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Overview of recent cases before the European Court of Human Rights and the European Court of Justice (January-March 2012)

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OVERVIEW OF RECENT CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE (JANUARY-MARCH 2012)

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Unusually, there were only a small number of significant rulings by either the Court of Justice or the Court of Human Rights in the period January-March 2012. In *Markin v Russia* the Court of Human Rights showed its positive side, ruling that the exclusion of servicemen from entitlement to parental leave, while servicewomen are entitled to such leave, was in violation of Article 14 taken in conjunction with Article 8.¹ However, the other important case considered by the Court – *B. v United Kingdom* – unfortunately makes no contribution whatsoever to the protection of human rights.² The Court of Human Rights also continued its advocacy of palm tree justice³ in cases concerning social security as a property right.

The only social security case to be considered by the Court of Justice was *Salemink*, in which the Court held that Regulation 1408/71 precluded national law from treating an employee, working on a fixed installation on the continental shelf adjacent to a Member State (though outside territorial waters), as not being compulsorily insured under national statutory employee insurance in that Member State solely on the ground that he was not resident there, but in another Member State.⁴

Meanwhile, the proposed Directive on equal treatment outside employment remains smothered in the loving embraces of the Working Party on Social Questions and the Social Affairs Council.

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¹ *Markin v Russia*, 30078/06, 22 March 2012.

² 36571/06, 14 February 2011. See also *Raviv v Austria*, 26266/05, 13 March 2012, in which the Court narrowly rejected a challenge under Article 14 to the provisions of very specific Austrian legislation creating additional possibilities of obtaining pension entitlements for persons who had been prevented from accumulating insurance periods by their arrest, punishment, detention, unemployment, denaturalisation or emigration, as a result of National Socialist persecution.

³ A pragmatic approach to justice that is entirely discretionary and transcends legal rights or precedent, enabling the court to make such order as it thinks fair and just in the circumstances of the case.

⁴ Case C-347/10, *Salemink* [2012] ECR I-000. This is an interesting decision, but more from the point of view of labour law and the international law of the sea.

PROPERTY RIGHTS UNDER THE PALM TREES

In the last issue of this Journal, we discussed a number of cases in which the Fourth Section of the Court of Human Rights appeared to be taking a more stringent approach to the protection of property rights in the social security field (albeit one based on principles which were difficult to elucidate, assuming they exist).⁵ In the *Arras*, *Torri* and *Gallez* rulings, the Second Section adopted a more traditional approach to this issue.⁶

Torri v Italy

In the *Torri* case the applicants were public servants (employed by an agency called AGENSUD) who had contributed to pensions administered by the INPS (*Istituto Nazionale della Previdenza Sociale*). In 1992, AGENSUD was dissolved and they were eventually re-employed in the civil service on lower salaries and became insured with a different body: INPDAP (*Istituto Nazionale di Previdenza per I Dipendenti dell'Amministrazione Pubblica*). It eventually emerged that the applicants lost out as a result of this move in that any future pensions would be lower, and secondly, that a part of the contributions already paid did not add anything to their pension entitlement.⁷

The applicants complained that they had suffered a violation of their property rights under P1-1, both because they had been forced to take up lower salaries, and because, as a consequence of legislative interference (contrary to Article 6 of the Convention) with contributory benefits already acquired by them, they had lost a substantial amount of contributions that they had paid. They further invoked Article 14, in conjunction with P1-1, claiming that they suffered discriminatory treatment *vis-à-vis*: (i) AGENSUD employees who had their contributions from INPDAP returned voluntarily/received back their contributions from the INPDAP voluntarily; (ii) AGENSUD employees who maintained their previous welfare

⁵ *Lakićević v Montenegro and Serbia*, 27458/06, 37205/06, 37207/06 and 33604/07, 13 December 2011 and, to a lesser extent, *Valkov v Bulgaria*, 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, 25 October 2011.

⁶ *Arras v Italy*, 17972/07, 14 February 2012; *Torri v Italy*, 11838/07 and 12302/07, 24 January 2012; *Gallez v Belgium*, 51391/00, 14 February 2012.

⁷ The facts and national law as set out by the Court (at paras. 3-22) appear very convoluted, and are only summarised here insofar as is necessary to understand the proceedings. Despite the complexity, the Court noted that 'no appropriate numerical details' had been furnished as to the alleged loss.

status; and (iii) other employees in general who allegedly received more favourable treatment.

The Court quickly dismissed the argument that the applicants had been forced to take up lower salaries (and the implications thereof for their pensions) pointing out that ‘the applicants were not forced to take up a new job, but they willingly chose to take up the offer made by the State...’⁸ In addition, they ‘were fully aware of the legal significance of the employment contract they were signing up for and in particular the repercussions it would have had on their pensions.’ As to the ‘loss’ of paid up pension contributions, the Court noted that the legislative change predated legal proceedings, and that there had not been any legislative interference in the form of an enactment of laws in the period 2000-2006 during which the applicants were pursuing proceedings. It followed that their complaint of legislative interference was misconceived. The applicants also complained of inconsistent national jurisprudence but the Court explained that, unlike a case involving divergent approaches by the national supreme court which could create jurisprudential uncertainty depriving the applicants of the benefits arising from the law,⁹ the present case involved a reversal of previous court decisions by the supreme administrative court (*Consiglio di Stato*).¹⁰ The Court reiterated that it is primarily for the domestic courts to interpret and apply domestic legislation. Even a ‘reversal of jurisprudence’ fell within the discretionary powers of domestic courts, ‘notably in countries having a system of written law (as in Italy) that are not bound by precedent.’¹¹

The Court went on to consider the complaint relating to the fact that the change of jurisprudence constituted a disproportionate interference with the applicants’ possessions. It considered that the contributions that the applicants had paid could not, in themselves, now be regarded as their possessions. However, the rights stemming from the payment of those contributions to social insurance systems were pecuniary rights for the purposes of P1-1. Indeed, the Court has previously recognised that the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected

⁸ At para. 37.

⁹ Citing *Beian v. Romania* (No. 1), 30658/05, ECHR 2007-XIII.

¹⁰ In fact, the Court’s presentation of the facts indicates that the *Consiglio di Stato* changed its view on the interpretation of the legislation over time (para. 18).

¹¹ At para. 42.

by the manner in which the fund is distributed.¹² However, even assuming that the applicants had a property right in the present case, the interference was in itself a lawful one, as the Court had already found that the decision in the applicants' case was not arbitrary (i.e. on the basis that the national court was entitled to reverse its own jurisprudence). The Court concluded that

‘... the applicants’ right to derive benefits from the social insurance scheme has not been infringed in a manner resulting in the impairment of the essence of that pension right.¹³ Unlike in the case of *Kjartan Ásmundsson*, the applicants did not suffer a total deprivation of their entitlements and will still receive a pension on retirement. Neither has it been claimed that the applicants have lost substantial amounts of their pension, and in any event no appropriate numerical details have been submitted showing to what extent their pensions have been reduced. Against this background, bearing in mind the State’s wide margin of appreciation in regulating the pension system¹⁴ and the legitimate aim invoked by the Government, namely the principle of solidarity, the Court considers that the applicants were not made to bear an individual and excessive burden.’¹⁵

With regard to the Article 14 complaint, the Court noted that it was not necessary to determine whether Article 14 was applicable in the present case, since the various complaints were, in any event, inadmissible. As regards other AGENSUD employees who had received a return of contributions, the Court concluded that more favourable treatment was based on voluntary action or different judicial interpretations (which it had already ruled did not breach the Convention).¹⁶ Comparison with other AGENSUD workers who had retired did not involve an analogous grouping, since the decision of whether or not to retire was freely chosen.¹⁷ More general complaints with other employees had not been supported in evidence.

¹² At para. 43 citing *Skorkiewicz v. Poland*, 39860/98, 1 June 1999.

¹³ See *Domalewski v. Poland*, 34610/97, ECHR 1999-V and *Kjartan Ásmundsson v. Iceland*, 60669/00, ECHR 2004-IX.

¹⁴ See *Maggio v. Italy*, 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011.

¹⁵ At para 45.

¹⁶ Para. 53.

¹⁷ Para. 55.

Arras v Italy

Arras also involved reform of ‘generous’ pension schemes for Italian public servants (or persons who were, at one point, in the public sector). The applicants were former employees of the Banco Di Napoli (a banking group which was originally a public entity and was later privatised). Before its privatisation, the Banco di Napoli had a special welfare system and its employees benefited from a more favourable equalisation mechanism than that available to persons registered with the general insurance scheme. In 1990 the Amato reform provided for the privatisation of public banks such as the Banco di Napoli. It suppressed their special pension regimes, replacing them with integrated ones. Banco di Napoli employees were enrolled in a new welfare management system that was part of the general obligatory insurance managed by the INPS.

The facts of the case were again complicated, but, arising from these reforms, the applicants made legal claims against the state. Subsequently, Law no. 243/04 provided that retired employees of the Banco di Napoli could no longer benefit from the more favourable equalisation mechanism, and made this effective retroactively, with effect from 1992. The applicants submitted that the retroactive legislation constituted a retroactive expropriation of their possessions, i.e. acquired rights which had matured thirteen years earlier. Assuming that the provision did involve an interference with (or deprivation of) possessions,¹⁸ it must be: (a) lawful; (b) serve a legitimate public (or general) interest; and (c) be reasonably proportionate to the aim sought to be realised. The requisite fair balance will not be struck where the person concerned bears an individual and excessive burden.

The Court had previously acknowledged that laws with retrospective effect that were found to constitute legislative interference could still conform with the lawfulness requirement of P1-1.¹⁹ It found ‘no reason to deem otherwise in the present case.’²⁰ Because of their direct knowledge of their society and its needs, the national authorities are, in principle, better placed than the international judge to decide what is ‘in the public interest’. Therefore, the

¹⁸ The Court (at para. 80) did not consider it necessary to decide whether the applicants had a possession within the meaning of P1-1. It is not clear why the Court made such reservations given that it is blindingly obvious that the pension was a possession within the meaning of P1-1.

¹⁹ Citing *Maggio and Others v. Italy*, 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011.

²⁰ Para. 81.

Court accepted that the enactment of Law no. 243/04 pursued the public interest (i.e. harmonising the pension system by treating all pensioners equally). In considering whether the interference imposed an excessive individual burden on the applicants, the Court stated that it must have regard to the particular context in which the issue arises, i.e. that of a social security scheme which is an expression of a society's solidarity with its vulnerable members.²¹ The Court noted that Law no. 243/04 did not affect the applicants' basic pension, and that their pension would still be augmented over the years. Accordingly, the applicants only lost the more favourable augmentation. Thus, the Court considered that the applicants were obliged to endure a reasonable and commensurate reduction, rather than the total deprivation of their entitlements. Therefore, the measure at issue did not result in the impairment of the essence of the applicants' pension rights. Moreover, this reduction only had the effect of equalising pensions and avoiding unjustified advantages for the applicants and other persons in their position. Against this background, bearing in mind the state's wide margin of appreciation in regulating the pension system and the fact that the applicants endured commensurate reductions, the Court considered that the applicants were not made to bear an individual and excessive burden. Thus, there was no breach of P1-1.

However, unlike *Torri*, the applicants had a stronger argument under Article 6 of the Convention, which provides that:

'In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal...'

The applicants complained that Law no. 243/04, as interpreted by the Court of Cassation on 23 October 2006, constituted a legislative interference with pending proceedings that was in breach of their fair trial rights under Article 6 of the Convention. The Court has repeatedly ruled that the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude, except for compelling public interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute.

Although the Italian state was not formally involved in the proceedings, the Court took the view that:

²¹ Para. 82.

‘the State’s responsibility is engaged both in its legislative capacity, if it vitiates the trial or affects the judicial outcome of the dispute, and in its capacity as a judicial authority where the right to a fair trial is violated, including in private law cases between private individuals...’²²

Unsurprisingly, the Court took the view that Law no. 243/04 involved legislative interference in breach of Article 6.

The applicants complained that the legislative changes were discriminatory, contrary to Article 14. The Court rejected this argument on the basis that the different treatment of persons still employed was objectively justified;²³ other pensioners who had been working for other former public banks were not in an analogous situation,²⁴ while a comparison with other pensioners whose domestic proceedings had terminated involved the choice of a cut-off date when transforming social security regimes which must be considered as falling within the wide margin of appreciation afforded to a state when reforming its social strategy policy.²⁵

Gallez v Belgium

In this case, the applicants had been in receipt of various sickness and occupational injury benefits. When they qualified for pension, the former benefits were reduced based on anti-cumulation rules. Arising from proceedings taken by Mr. Gallez, the relevant rule (Royal order of 13 January 1983) was set aside by the cour de cassation for procedural reasons in 2006. Subsequent legislation, however, restored the rule with retrospective effect and a challenge to the law was rejected by the Court constitutionnelle. The Court distinguished the *Maggio* case on the basis that the Gallez applicants had not been deprived of rights which they already enjoyed. It held that their claim was not protected by Article 6. It also rejected a P1-1 claim holding that the applicants did not have a legitimate expectation within the meaning of P1-1. The Court was clearly unsympathetic to the applicants’ claims. Its rejection of the P1-1 claim is unsurprising although one might have assumed that it would be based on

²² Para. 44.

²³ Para. 58.

²⁴ Para. 63.

²⁵ Para. 67-68.

the justification of the anti-cumulation rules. Instead the Court ruled that there was no possession (or even a legitimate expectation of a possession) although it appears that the applicants may have been entitled to the benefits at issue as a result of the cour de cassation judgement (the legal position is not very clear from the brief judgment). The Article 6 ruling is more surprising as, while the state was perfectly entitled to restore the *status quo ante* as far as the general regime was concerned, the legislation would seem to have interfered in the proceedings as regards the applicants contrary to Article 6 (and the Court did not consider whether it still might have been justified by compelling reasons of public interest).

Discussion

Unlike the Fourth Section in *Lakićević*, the Second Section applied a low level of scrutiny to the laws at issue in these cases.²⁶ Arguably, for the reasons set out in *Arras*, this was the correct approach to apply in the absence of discrimination under Article 14. But it is not consistent with the approach of the Fourth Section. The recent decisions, of course, make no reference to *Lakićević*, and refer, rather, to the (Second Section's) decision in *Maggio*. The Fourth Section in *Lakićević* made no reference to *Maggio*.²⁷ The Court's outcome-focussed jurisprudence, which focuses little attention on using precedent in any meaningful way,²⁸ and its apparent general disregard for any consistency of approach inevitably advances palm tree justice more than human rights.²⁹ The Court has stated that:

‘[w]hile the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases ...’³⁰

Unfortunately, this approach is rarely followed in practice.

²⁶ Indeed, in *Torri* the Court only gave cursory consideration to an alleged breach of P1-1 in itself.

²⁷ At least the Second Section aims for consistency with itself.

²⁸ A minor example of the Court's sloppiness is the recent citation (by the Fourth Section) to the *Chamber* judgment in *Carson v. United Kingdom*, 42184/05, 4 November 2008, a case upheld, but on somewhat different grounds, by the Grand Chamber: *B v United Kingdom*, 36571/06, 14 February 2012 at para. 50. Those readers who guessed that this was a Fourth Section case were, of course, correct.

²⁹ On the use of precedent in the ECHR, see Gerards (2008), who suggests that ‘the Court's discourse shows problematic ambiguities that entail considerable risks for its position as an influential and authoritative supranational court.’

³⁰ *Scoppola v. Italy (No. 2)*, 10249/03, 17 September 2009,

THE ECHR AND EQUAL TREATMENT

1. *Markin v Russia*

Markin is a good example of the positive role which the Court does play in upholding human rights in Europe.³¹ The Grand Chamber, upholding the Chamber judgment,³² ruled that the exclusion of servicemen from entitlement to parental leave, while servicewomen are entitled to such leave, was in violation of Article 14, taken in conjunction with Article 8. A parental leave allowance was payable during part of the leave, although the case focussed on the issue of the parental leave itself.

The Court ruled that:

‘...Article 8 does not include a right to parental leave or impose any positive obligation on States to provide parental leave allowances. At the same time, by enabling one of the parents to stay at home to look after the children, parental leave and related allowances promote family life and necessarily affect the way in which it is organised. Parental leave and parental allowances therefore come within the scope of Article 8 of the Convention.’³³

The Court found that, in so far as parental leave and parental leave allowances are concerned, and unlike the situation concerning maternity leave, men are in an analogous situation to women.³⁴ Although the Court acknowledged that a wide margin of appreciation is afforded to the states in matters relating to national security in general, and the armed forces in particular, the Court did not accept any of the (rather weak) arguments advanced by Russia for objective justification, and concluded that the difference in treatment was in breach of Article 14.³⁵

³¹ *Markin v Russia*, 30078/06, 22 March 2012. Much of the judgment concerned preliminary objections and consideration of Article 34 (concerning an alleged hindrance to the exercise of the right of individual petition). These issues are not considered here.

³² 7 October 2010.

³³ Para. 130. See the opinion of Judge Pinto de Albuquerque (concurring in part, dissenting in part) regarding the nature of the right to parental leave.

³⁴ Para. 132.

³⁵ Paras. 138 *et seq.* These included the ‘traditions prevailing in a certain country’ (at 142).

2. *B v United Kingdom*

The case of *B v United Kingdom* (a case decided a mere five and a half years after the application was originally submitted to the Court) is unfortunately a not-unrepresentative example of how the ECHR approaches equal treatment issues, and shows a number of the weaknesses adopted (by at least some Sections of the Court) in approaching such cases.³⁶ These include:

1. Ignoring relevant cases;
2. Confusing comparison and justification;
3. Not bothering to decide the ‘status’ involved in different treatment; and
4. Applying the wrong standard in assessing justification.

It also highlights the Court’s consistent failure to clarify what falls within the scope of P1-1.³⁷ The case involved UK law concerning the recovery of overpaid social security payments. This law provides that an overpayment of benefits is recoverable where, whether fraudulently or otherwise, a person has misrepresented, or failed to disclose, any material fact, and in consequence an overpayment has arisen. Ms. B, who had a severe learning disability, was in receipt of state benefits, including payments for her children. They were subsequently taken into care and, as a result, she should no longer have been entitled to benefits in respect of the children. It was accepted that she was aware of the (material) fact that the children had been taken into care, but that she did not appreciate that she was required to disclose this fact (and she did not so disclose). When they became aware of the relevant facts, the UK authorities ruled that an overpayment had been made to her. The UK courts ruled that the statutory meaning of ‘failed to disclose’ admitted of no qualification in favour of claimants who did not appreciate that they had an obligation to disclose something once they were aware of it.³⁸

Ms. B complained that persons unable to report facts because they were unaware of them were treated differently from those who were unable to report facts for some other reason (e.g. because they did not appreciate the significance of the facts), contrary to Article 14 of

³⁶ 36571/06, 14 February 2011. The Fourth Section panel included Nicolas Bratza, President of the Court.

³⁷ As we have seen, the Second Section in both *Arras* and *Torri* was unclear as to whether pension contributions and pensions rights fall within the scope of P1-1 (although it is clear in both cases that they do).

³⁸ *B v Secretary of State for Work & Pensions* [2005] EWCA Civ 929 at para. 44.

the Convention. Alternatively, she complained that the law treated identically persons who were capable, and persons who were incapable of understanding that there was something that they were required to report. As discussed in more detail below, having rejected the first comparison on the basis that the two groups were not analogous, the Court also rejected the second argument on the basis that the failure to treat the groups differently was objectively justified.

Scope of P1-1

The Court had first to decide if the issue fell within the scope of P1-1. The Court has ruled that, where an individual has an assertable right under domestic law to a welfare benefit, P1-1 is applicable.³⁹ Therefore, the reduction or discontinuation of a benefit may constitute an interference with possessions, which requires to be justified in the general interest.⁴⁰ In this case, Ms. B complained that the overpaid benefit was itself a ‘possession’ because, under UK law, she remained entitled to the increased award until the Secretary of State formally decided to supersede it, relying on *Moskal*. However, the Court distinguished that case on the basis that the relevant mistake was that of the Polish Social Security Board, whereas in the present case the payment of benefit to which the applicant was not entitled was the result of her own failure to report the fact that her children had been taken into care.

Where a benefit system relies on recipients to report any change in their circumstances, the Court considers that it would be perverse if they could acquire an assertable right to overpaid benefit where they have failed to report such a change. To hold otherwise would enable recipients of benefits to profit from their own omissions and, in some cases, fraud.⁴¹ Therefore, the Court concluded that the applicant did not have an assertable right to the overpaid benefit, and that it did not amount to a possession for the purposes of P1-1. However, the Court went on to accept that the issue fell within the scope of P1-1 because the authorities intended to recover the overpayment from the future payments of her benefits (which it accepted involved her possessions).

³⁹ *Stec v. United Kingdom*, 65731/01 and 65900/01, ECHR 2005-X.

⁴⁰ *Kjartan Ásmundsson v. Iceland*, 12 October 2004, ECHR 2004-IX; and *Moskal v. Poland*, 10373/05, 15 September 2009.

⁴¹ Para. 39. Of course, the finding begs the question of whether Ms. B was responsible in some way for her failure to notify the authorities.

Now if the Court is to take this approach, not much turns on the distinction, since overpayments will always have to be recovered from some ‘possession’ and, therefore, P1-1 will be engaged. However, the Court’s approach is arguably not very logical. Assuming the Court was correct that the overpayment is not a possession, how can recovering something that is not your possession engage your possessions? But arguably it was not correct. As it was aware, under UK law the applicant remained entitled to the benefit until a decision was made suppressing the earlier decision to award the benefit. So Ms B did have an assertable claim to the benefit, and P1-1 was engaged on the facts. While the Section distinguished its earlier (dubious) decision in *Moskal*, it significantly did not refer to its decision in *Wieczorek*.⁴² In that case, the Court upheld a decision to terminate disability benefits to which the applicant was no longer entitled. The Court found that P1-1 was engaged without any great discussion of the issue. The only distinction between the two cases would seem to be that *Wieczorek* involved a change in the claimant’s disability status, whereas *B* involved the claimant’s family or dependency status.

Ignore relevant cases

Turning to the issue of discrimination, the Court of Human Rights has recently passed a number of important judgments on disability (not involving social security issues). These include *Glor v Switzerland* (in the context of Article 14) and *Alajos Kiss v Hungary* (First and Second Sections, respectively).⁴³ In these cases, the Court referred to the United Nations Convention on the Rights of Persons with Disabilities, and in *Glor*, the Court recognised the concept of ‘reasonable accommodation’ for people with disabilities.⁴⁴ These judgments are not referenced in *B*, and, in fact, the Fourth Section appeared to be determined to ignore the fact that the case involved a claim of discrimination on the grounds of *disability*. The notion of ‘reasonable accommodation’ might have been particularly relevant in *B* (had the Court

⁴² *Wieczorek v Poland*, 18176/05, 8 December 2009.

⁴³ *Glor v Switzerland*, 13444/04, 30 April 2009; *Alajos Kiss v. Hungary*, 38832/06, 20 May 2010 (primarily an Article 3 case, though Article 14 was also argued). See also the Grand Chamber ruling in *Stanev v Bulgaria*, 36760/06, 17 January 2012, in which the Court stated that: ‘The State is therefore obliged to take measures providing effective protection of vulnerable persons...’ (at para. 120).

⁴⁴ Of course, the importance of the *Glor* decision might be easier to identify if (three years after it was handed down) an English language version of the judgment was available on the Court’s website. The Public Relations Unit of the Court helpfully (if less than entirely accurately) explained that ‘Chamber judgments are not translated’.

addressed the issues correctly). Not only is this reflected in the UN Convention,⁴⁵ but the Court in *Glor* (which concerned a military service obligation) specifically referred to

*‘... l’absence, dans la législation suisse, de formes de service adaptées aux personnes se trouvant dans la situation du requérant.’*⁴⁶

Confuse comparison and justification

As has been noted before in this Journal, the Court consistently confuses comparison with justification. Indeed, the Grand Chamber appears to have advocated doing so.⁴⁷ Baker, in a very interesting article, has highlighted the problems arising from deciding cases on the basis of non-comparability.⁴⁸ In particular, it means that – unlike the situation where the Court assesses a difference in treatment between two comparable groups – there is no (or no explicit) assessment of proportionality. In this case, the Court rejected the comparison between persons unable to report facts because they were unaware of them, and those who were unable to report facts for some other reason on the basis that they were not analogous.

The Court considered that:

*‘the proposition that you cannot report something that you do not know is a simple proposition of logic, whereas the proposition that you cannot report something you do not appreciate you have to report depends on difficult questions of cognitive capacity and moral sensitivity which vary from person to person.’*⁴⁹

This is perhaps a good justification for a difference in treatment, but not for a refusal to compare the two groups.

It is interesting to note that the Canadian Supreme Court – a Court which consistently aims to provide a motivation for its decisions – has recently adopted a more flexible approach to equality jurisprudence, holding that:

⁴⁵ ‘Reasonable accommodation’ is defined therein as ‘necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.’

⁴⁶ Para. 96.

⁴⁷ *Carson v. United Kingdom*, 42184/05, 16 March 2010.

⁴⁸ Baker (2006).

⁴⁹ At para. 57.

‘...a formal analysis based on comparison between the claimant group and a ‘similarly situated’ group, does not assure a result that captures the wrong to which s. 15(1) [the equal protection clause of the Canadian Charter of Rights] is directed — the elimination from the law of measures that impose or perpetuate substantial inequality. What is required is not formal comparison with a selected mirror comparator group, but an approach that looks at the full context, including the situation of the claimant group and whether the impact of the impugned law is to perpetuate disadvantage or negative stereotypes about that group.’⁵⁰

Don’t bother to decide the ‘status’ involved in different treatment

The Court has held that disability is a status for the purposes of Article 14.⁵¹ However, the UK argued that the distinction in the law was not based upon any ‘personal characteristic or status’. The Court made no explicit response to this argument. It repeated that:

‘...only differences in treatment based on an identifiable characteristic, or ‘status’, are capable of amounting to discrimination within the meaning of Article 14...’⁵²

However, the Court went on to consider Article 14 without specifying what difference in treatment it was considering,⁵³ or whether this was a ‘status’. Clearly (a lack of) mental capacity (i.e. disability) was the issue in this case; this does amount to a status for the purposes of Article 14; the Court should have identified this, and was remiss not to do so. One of the results of this was a failure to consider the appropriate standard of review.

Apply the wrong standard in assessing justification

In *Glor*, the Court ruled that it:

⁵⁰ *Withler v. Canada* (Attorney General), 2011 SCC 12, [2011] 1 S.C.R. 396, at para. 40.

⁵¹ *Glor* at para. 80. ‘...il n’est pas douteux que le champ d’application de [l’article 14] englobe l’interdiction de la discrimination fondée sur un handicap.’ Indeed, the national court was prepared to accept that ‘mental capacity’ constituted a status for the purposes of Article 14: *B v Secretary of State for Work & Pensions* [2005] EWCA Civ 929 at para 23.

⁵² At para. 54.

⁵³ Other than a difference in treatment between (i) ‘persons who could not reasonably be expected to report a material fact because they were not aware of the fact and those who could not reasonably be expected to report a fact because they were not aware of its materiality’ (at 57) and (ii) persons ‘who did not have the capacity to understand the obligation to report’ and those who did (at 58).

‘...estime également qu’il existe un consensus européen et universel sur la nécessité de mettre les personnes souffrant d’un handicap à l’abri de traitements discriminatoires (voir notamment la recommandation relative aux personnes handicapées, adoptée par l’Assemblée parlementaire du Conseil de l’Europe le 29 janvier 2003, ou la Convention des Nations Unies relative aux droits des personnes handicapées, entrée en vigueur le 3 mai 2008).’⁵⁴

The Court went on the refer to:

‘...la nécessité de lutter contre la discrimination envers les personnes handicapées et de promouvoir leur pleine participation et intégration dans la société. Partant, la marge d’appréciation des Etats parties dans l’établissement d’un traitement juridique différent pour les personnes handicapées s’en trouve fortement réduite.’⁵⁵

In *Kiss*, concerning restrictions on voting rights, the Court stated that:

‘if a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, such as the mentally disabled, then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question.’⁵⁶

Of course, in *B* the issue was not one of fundamental rights. However, Ms. B. – like Mr. Kiss – was a member of ‘a particularly vulnerable group in society’, and, arguably, was entitled to heightened protection in line with the ‘European and universal consensus’ and the reduced margin of appreciation identified in *Glor*.

The Court did consider that the argument that someone who did not have the capacity to understand the obligation to report should have been treated differently from someone who did was ‘somewhat more persuasive’ and it required the state to objectively and reasonably justify its failure to treat them differently.⁵⁷ However, the Court did not apply any rigorous

⁵⁴ At para. 53.

⁵⁵ Para. 84.

⁵⁶ *Kiss* at para. 42. In fact, the Court went on to say that, in that case, ‘the curtailment of their rights must be subject to strict scrutiny’ (although it is not clear whether the Court was applying any specific meaning to the term strict) (at para. 44).

⁵⁷ Para. 58.

standard in reviewing the failure to treat Ms. B differently. In fact, the approach adopted by the Court resembled the US courts' approach to 'rational basis' review under which an equal treatment claim will be rejected if there exists any conceivable basis for the law.

The Court accepted that:

'requiring decision-makers to assess levels of understanding or mental capacity before deciding whether or not overpaid benefits were recoverable would hinder their recovery and thereby reduce the resources available within the social security fund. It therefore considers that the decision not to treat the applicant differently from someone who had the capacity to understand the requirement to report pursued a legitimate aim, namely that of ensuring the smooth operation of the welfare system and the facilitation of the recovery of overpaid benefits.'⁵⁸

Turning to the question of proportionality, the Court pointed out that it has held that public authorities should not be prevented from correcting mistakes in the award of benefits, even those mistakes result from their own negligence.

Holding otherwise would be contrary to the doctrine of unjust enrichment, would be unfair to other individuals contributing to the social security fund, and would amount to sanctioning an inappropriate allocation of scarce public resources. However, the Court has observed that the above general principle cannot prevail in a situation where the individual concerned is required to bear an excessive burden as a result of a measure divesting him or her of a benefit.⁵⁹

However, in the instant case, the Court focussed not on the decision to rule that there had been an overpayment, but on a number of arguably irrelevant factors, including the fact that no interest was charged on the overpaid sums, that there was a statutory limit on the amount that could be deducted each month from her award of income support, that the amount to be repaid was reduced to reflect the fact that during the material time she was entitled to, but had not been in receipt of, a disability allowance, and that it was open to Ms. B to request that the Secretary of State to waive his right to recover the overpaid benefit if that recovery would be

⁵⁸ Para. 59.

⁵⁹ *Moskal v. Poland*, 10373/05, 15 September 2009.

detrimental to her health or welfare (although she did not do so).⁶⁰ On this basis the Court concluded that any failure to treat the applicant differently from persons who understood the reporting requirement was objectively and reasonably justified.

Discussion

This is a very weak decision. Given that the question of disability discrimination was at issue, the Court entirely failed to address the appropriate standard to apply to the case (or indeed to recognise that disability *was* at issue). Its acceptance of ‘the smooth operation of the welfare system’ as a legitimate aim would justify almost anything, while its application of proportionality was equally weak. The Court focussed not on the proportionality of the assessment of the overpayment (the decision at issue), but, rather, on the means by which the overpayment was to be assessed and recovered. The decision is difficult to reconcile with *Wieczorek*, in which the Court, while upholding a decision to terminate benefits to a person who was no longer qualified for them, felt it necessary to note that the applicant was not required to repay any amount in concluding that a fair balance had been struck and that there was no violation of P1-1.⁶¹

ACCESS TO MEDICAL OPINIONS

Eternit v France concerned the (frequently litigated) issue of access to medical opinions in social security cases but, in this case, from the perspective of an employer involved in a dispute as to whether its employee suffered from an occupational illness.⁶² The case concerned the complexities of the French adjudication system. The *caisse primaire d’assurance maladie* (CPAM) decided that the employee was suffering from an occupational illness on the basis of an opinion of its *médecin-conseil* (medical consultant). The employer complained that it was not allowed access to the medical records on which the decision was based. The Court accepted that, in principle, Article 6 required any evidence which might

⁶⁰ At para. 60-1. ‘As she did not make any such request, the Court cannot accept that the recovery would have had such a detrimental impact.’ The national courts of appeal had rejected the relevance of this as an aid to the construction of the law stating that ‘it is not acceptable to determine law by falling back upon executive discretion.’ (*B v Secretary of State for Work & Pensions* [2005] EWCA Civ 929 at para 33).

⁶¹ *Wieczorek v Poland*, 18176/05, 8 December 2009. Of course, as I suggest above, this comment starts from the mistaken assumption that Sections care whether their cases can be reconciled.

⁶² 20041/10, 27 March 2012.

influence the court (or tribunal) should be available to the parties. However, this was not an absolute right and the Court referred to several reasons in this case justifying the lack of access, in particular the medical confidentiality of the employee's medical reports.⁶³ The Court also took the view that the employer could appeal to the domestic courts (including the tribunal des affaires de sécurité sociale) which could order a medical examination (expertise médicale) and that this would protect the employer's rights under Article 6 (although the Court noted that such an examination need not be carried out in all cases). The Court is clearly correct to acknowledge the issue of the confidentiality of medical records and, in the absence of detailed knowledge of the French system, it is difficult to judge how fairly it operates. However, the procedure upheld by the Court would appear to impose very considerable restrictions on an employer's right to a fair hearing while it would seem possible to find ways to protect medical confidentiality in a less restrictive manner.

PROPOSED EQUAL TREATMENT DIRECTIVE

Meanwhile, on the legislative front, the proposal for an EU Directive aiming to extend the protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation to areas outside employment moves forward at a glacial pace. The proposal has been examined in the Council for more than three years now. The most recent 'progress' report highlighted the work carried out under the Polish presidency.⁶⁴ However, it also stated that further discussion was needed on a number of outstanding issues, including:

- the division of competences, the overall scope and subsidiarity;
- the disability provisions, including accessibility and reasonable accommodation for persons with disabilities;
- the implementation calendar;
- legal certainty in the Directive as a whole; and

⁶³ At para 36-37. The Court distinguished the case of *Augusto v. France*, 71665/01, 11 January 2007 which had involved access to the person's own reports. Just to make the point concerning the rather confused (and confusing) translation practices of the Court, this Chamber judgement is translated into English but only partially so (the Court's discussion as to the merits are only available in French although a concurring opinion is translated in full).

⁶⁴ 16525/11, 15 November 2011.

- ‘other issues’.⁶⁵

The December Council of Social Affairs Ministers simply noted the report without any clear proposals for action. On the positive side, the Council decided that ‘optimism must prevail in the EU’ (although not providing a clear rationale for this conclusion).⁶⁶

REFERENCES

Baker, A. (2006) ‘Comparison tainted by Justification: Against a ‘compendious question’ in Art. 14 discrimination’, *Public Law*, 3, 476-497.

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⁶⁵ For a detailed summary of the issues raised by Member States, see the Report of the Working Party on Social Questions, 12447/11, 3 August 2011. In the principle of EU transparency, Member States responsible for specific proposals are, of course, redacted.

⁶⁶ 17943/1/11 REV 1, Meeting of 1 and 2 December 2012.