Private and family life, gender equality and social security under the European Convention on Human Rights - Di Trizio v Switzerland

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This note examines the recent Di Trizio ruling by the European Court of Human Rights. The case, first, involves the scope of Article 8 of the Convention as it concerns social security schemes. The Court by a narrow majority held that the claim fell within the scope of Article 8 but, it is submitted that the approach of the dissenting judges was a better reading of the Convention. However, a panel of the Grand Chamber has rejected a State request to refer the matter to the Grand Chamber.

Second, the case involves a rather complicated gender equality claim concerning rules for the assessment of disability which mainly affected women.

The facts

In short, the case involved a claim by Ms. Di Trizio that Swiss rules concerning entitlement to disability benefits discriminated against her on grounds of gender. The facts and the rules for assessment of disability benefit are rather convoluted and we will focus here on the key points. Ms. Di Trizio had worked part-time as a saleswoman. She ceased work in June 2002 due to back pain and subsequently in October 2003 claimed disability benefit (rente d’invalidité). She gave birth to twins in February 2004. The Swiss authorities awarded disability benefit from June 2003 to August 2004 but decided that she was not entitled to benefit from August 2004. Following various unsuccessful national appeals against this decision, Ms. Di Trizio referred her case to the European Court of Human Rights in 2009.

In general, the level of disability (invalidité) was calculated by comparing what the person could earn if she was not suffering from disability with what she could reasonably be expected to earn with the disability. However, there were a number of exceptions to this including where a person worked part-time or could not reasonably be expected to work. Of particular relevance to this case was what was known as the ‘mixed method’ (la méthode mixte). The applied to persons who, in addition to a part-time job also exercised another unpaid activity (such as looking after the home). As one might expect, the evidence showed that the mixed method applied overwhelmingly to women (97-98% of those to whom the mixed method applied were women). In addition, the national courts had found that the mixed method often led to a lower assessment of disability than did the other methods.

Whether the issue fell within the scope of the Convention

The main issue was whether the application of the mixed method and the resultant denial of disability benefit was in breach of Article 14 of the Convention. This provides

The enjoyment of the rights and freedoms set forth in this European Convention on Human Rights shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

As is well known, Article 14 is not stand-alone and it is necessary to show that the issue falls within the scope of one of the other substantive provisions of the Convention. Normally, the disability benefit at issue would have fallen within the scope of Article 1 of Protocol 1 (P1-1) of the

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17186/09, 2 February 2016. The decision is only available in French at the time of writing.
4 July 2016.
Article 16 of la loi fédérale du 6 octobre 2000 sur la partie générale du droit des assurances sociales.
Article 28.
At [39] and [88].
Cited at [35] of the judgement. See also [45].
Convention as a ‘possession’. However, Switzerland had not ratified Protocol 1 and it was, therefore, necessary for Ms. Di Trizio to argue that the issue fell within the scope of Article 8 which concerns respect for private and family life.

The majority of the Court held that the disability pension fell within the scope of Article 8 as it concerned issues linked to the organisation of family life. The Court recalled that the concept of family life was not confined only to social, moral or cultural issues but also included material interests. The Court referred to previous rulings in which it had ruled that measures allowing a parent to remain in the home to care for children (such as parental leave and benefit) fell within the scope of Article 8. It argued that the current case also raised issues concerning the organisation of family life, albeit (as the Court admitted) in another way. The Court concluded that the application of the mixed method could influence a couple in the manner in which they shared family tasks and, thereby, have an influence on their family and work life. This was sufficient for the Court to conclude that the issue fell within the family aspect of Article 8. The majority also held that the claim fell within the scope of the protection of ‘private life’ as issues of personal development and personal autonomy were involved.

The dissent (Judges Keller, Sano and Kjolbro) argued that such a broad interpretation of Article 8 was inappropriate and would result in almost all social security benefits falling within the scope of Article 8. It argued that the implications of the majority’s approach are that almost any impact of a benefit on the family or private life of an applicant would be sufficient to bring that benefit within the scope of Article 8, thereby giving rise to a situation where almost any grant or refusal of a benefit would automatically fall under Article 8. It was argued that this was inconsistent with the Court’s jurisprudence whereby the Convention should be construed as a whole insofar as it would render P1-1 largely unnecessary if issues concerning possessions are to be considered under Article 8. The dissent argued that the majority had misread those cases in which the Court had found that social security benefits fell within the scope of Article 8 and that these rulings involved a much stricter link between the benefit in question and family life, in particular where the aim of the benefit in question was to facilitate family life. Applying this approach the dissent concluded that disability benefit was not within the scope of Article 8 as it did not have as an objective the organisation of family life. Nor were they convinced by majority’s argument that the benefit related to private life or clear as to how the application of the mixed method affected personal development or personal autonomy.

While one might think that the dissent had the better of the argument, a requested reference of the case to the Grand Chamber has recently been rejected. This means that de Trizio stands as a precedent for a very broad approach to the issues which fall within the scope of Article 8.

Did the mixed method give rise to discrimination?

Having concluded that the issue fell within the scope of Article 14, the majority then considered whether the application of the mixed method was discriminatory. It was clear that the mixed method

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7 At [60]-[62].
8 Citing Merger and Cros v. France, 68864/01, § 46, 22 December 2004
9 Citing Petrovic v. Austria, 27 March 1998; Konstantin Markin v. Russia 30078/06, 22 March 2012; and also cases concerning family benefits such as Weller v. Hungary, 4399/05, 31 March 2009, and Dhahbi v. Italy 17120/09, 8 April 2014.
10 At [63]-[64].
11 Dissent at [7].
13 At [10].
14 At [11].
15 4 July 2016.
16 Of course, the ECtHR is not known for its strict adherence to precedent.
applied overwhelmingly to women, specifically to women who wished to reduce the level of paid work after the birth of a child. The Government argued that the approach was justified by the objective of the disability insurance scheme which, it argued, was to protect against the risk of the loss of the possibility to exercise paid employment or routine tasks (des travaux habituels) due to disability.\textsuperscript{17}

The Court recalled that in a claim of indirect discrimination, the applicant must show that the measure at issue had a disproportionate impact on a specific group thus giving rise to a presumption of indirect discrimination. The State then had to refute this presumption by showing that the difference in treatment was justified by objective factors unrelated to the factor identified by the applicant (i.e. gender).\textsuperscript{18} In this case, it was clear that the mixed method applied predominately to women thus giving rise to a presumption of indirect discrimination.\textsuperscript{19} The Court accepted that the aim advanced by the Government was legitimate and, therefore, considered whether the impact on the applicant was reasonable and proportionate.

In relation to proportionality, the Court accepted that it was for the national authorities and national courts, in the first instance, to interpret the national provisions, although it argued that the State’s margin of appreciation was greatly reduced in a case such as this involving possible gender discrimination.\textsuperscript{20} However, it noted that, in this case, if Ms. Di Trizio had either engaged in paid work only or had looked after the home only she would have received a partial disability benefit. The Court also referred to criticisms of the detailed workings of the mixed method by the national courts.\textsuperscript{21} It concluded that there were clear indications of a growing awareness that the mixed method was no longer consistent with efforts to achieve gender equality in contemporary society, in which women legitimately sought to reconcile family life and employment. Moreover, alternative methods of calculation were possible which would take greater account of women’s choice to work part time following the birth of a child. This would make it possible to pursue the aim of greater gender equality without jeopardising the purpose of disability insurance. The Court also concluded that, in addition to these general considerations, the refusal to grant the applicant even a partial disability benefit had significant practical implications for her, even assuming that she could work part time.\textsuperscript{22} Overall, the Court concluded that it was not convinced that the treatment of the applicant was based on a reasonable justification.\textsuperscript{23}

### Discussion

It is unfortunate that the Court of Human Rights is inclined to adopt a strained interpretation of the Convention in order to bring a matter within the scope of the Convention, in this case because Switzerland had not ratified Protocol 1 concerning the protection of property. Of course, Article 8 is very broadly worded and the Court has generally been reluctant to adopt a clear definition of where its scope begins or ends. Nonetheless, the dissent is surely correct to argue that the approach adopted by the majority risks bringing almost any issue concerning a social security benefit within the scope of Article 8 and, thereby, undermining a coherent interpretation of the Convention vis-a-vis Protocol 1.

\textsuperscript{17}At [74].
\textsuperscript{18}At [84].
\textsuperscript{19}At [88]-[90].
\textsuperscript{20}At [96]-[97].
\textsuperscript{21}At [98]-[101].
\textsuperscript{22}Of course, these practical implications were the reason she was bringing the case and not a reason why the Court should uphold her claim.
\textsuperscript{23}At [103]. The dissent did not specifically discuss the issue of discrimination although it voted against the majority’s finding of a breach of Article 14.
A similarly broad approach in relation to Article 8 has recently been applied in *Aldeguer Tomás v. Spain*, again over the dissent of Judge Keller.24 However, that case at least involved a claim concerning payment of a pension to a same-sex couple where the Court had previously invoked Article 8 25 (and, in any case, the issue fell within P 1-1)

In relation to the finding of discrimination, it would perhaps be incorrect to read too much into this particular ruling. In this case, we find a specific rule which applied overwhelmingly to women and which apparently operated to reduce the level of disability which would have otherwise be assessed. In this context, the Court’s conclusion appears correct. However, where a disability insurance scheme is, in practice, confined to compensating for loss of income due to disability, it does not seem unreasonable that, in general, a loss of income for some other reason (such as a decision to work part-time) should lead to a loss of (or reduction in ) the disability benefit which would otherwise be payable. This would be so even if this affected more women than men. However, it was by no means clear that the Swiss scheme was so confined and, as the Court showed, the mixed method appeared to operate in a rather anomalous manner (for example, if Ms Di Trizio had worked full-time in the home the Court found that she would have qualified for a partial payment).

24 35214/09, 14 June 2016.
25 For example, in *Mata Estevez v Spain*, 56501/00, 10 May 2001.