Overview of recent cases before the European Court of Human Rights and the European Court of Justice (May-September 2008)

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NEWS AND CASES

OVERVIEW OF RECENT CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE (MAY-SEPTEMBER 2008)

1. Child support, civil rights and access to the courts

In the period in question, the European Court of Human Rights has considered a number of cases concerning the right of access to the courts set out in Article 6 of the Convention as it concerns social security, including the important Kehoe case.¹

In Kehoe, the Court considered whether the British Child Support Act 1991 breached Article 6 by excluding Mrs. Kehoe from bringing proceedings in her own right or even being involved in proceedings in relation to maintenance brought by the Child Support Agency established under the Act.²

In brief, the Child Support Act replaced (or supplemented) the existing law – under which enforcement of maintenance was largely an individual right and responsibility – with a public system whereby maintenance obligations were assessed and enforced by the Child Support Agency (CSA).³ The Act made no provision for the involvement of the spouse seeking maintenance (other than to initiate the process by contacting the CSA). In Mrs. Kehoe’s case there had been lengthy delays in obtaining redress. She had first contacted the CSA in December 1993 but it had not made any contact with her husband till May 1995. As set out in the judgement of the Court, there followed a long saga of arrears and broken agreements leading to a

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¹ See also S.H. v Finland, 28301/03, 29 July 2008 in whihe the Court followed its established approach and held that the failure to communicate two medical opinions to the applicant meant that she was not able to participate properly in the proceedings and thus deprived her of a fair hearing within the meaning of Article 6 of the Convention; and Kallio v Finland, 40199/02, 22 July 2008 in which the Court held that the failure to hold an oral hearing in relation to the imposition of a surcharge for alleged fraud concerning payment of tax and social security contributions was (in the circumstances of the case) a breach of Article 6.1 (distinguishing Jussila v Sweden, 73053/01, 23 November 2006).

² Kehoe v United Kingdom, 2010/06, 17 June 2008.

³ The UK judges in fact differed as to whether the Act replaced the existing law or simply provided a means of enforcing rights. For a detailed discussion of the issues as they were considered by the English courts see WIKELEY (2005) AND WIKELEY (2006).
situation where nearly £20,000 of child support was outstanding. Eventually Mrs. Kehoe brought proceedings under the UK Human Rights Act 1998 (which incorporates the ECHR into UK domestic law) claiming that the Child Support Act was incompatible with Article 6 as it denied her access to the court in connection with disputes as to whether the ‘absent’ parent had paid or ought to pay maintenance or as to the manner in which the obligations under a maintenance assessment (made by the CSA) should be enforced. The House of Lords held by a majority that Mrs. Kehoe has no ‘civil right’ within the meaning of Article 6.\footnote{R. v. Secretary of State for Work and Pensions, ex parte Kehoe [2005] UKHL 48.}

At the admissibility stage, the Court of Human Rights agreed with the UK courts that the Child Support Act gave Mrs. Kehoe no right to sue her husband for maintenance and that she had no arguable civil right in that regard.\footnote{Kehoe v United Kingdom, 2010/06, 26 June 2007} Nor was there such a civil right for her children. However, it left open the issue as to whether a civil right existed in relation to the delays in the enforcement of the maintenance awards. However, at judgement, the Court ‘did not find it necessary to resolve the dispute as to the existence of a civil right’ being satisfied that the opportunity to bring judicial review proceedings against the CSA concerning any failure properly to enforce payment of maintenance meant that the essence of her right of access to the court was not impaired.\footnote{At para. 46 et seq.}

Whatever the outcome, the Court’s approach is entirely unconvincing. Given that the issue had been extensively argued both before the national courts and the Court of Human Rights, it is surely unfortunate that the Court ducked making any decision as to whether or not a civil right existed.\footnote{There are ongoing disputes concerning other aspects of the Child Support Act before the English courts which would make it important to establish whether or not a civil right exists.} Moreover, its finding that the possibility of judicial review ensures effective access to justice in such a case is difficult to take seriously. A leading UK expert (in advance of the Court’s decision on this point) had said that ‘the proposition that judicial review is an adequate remedy will be greeted with at best some bemusement, and at worst hollow laughter, by those practitioners who have acted for parents with care in similar cases ...’ \footnote{Wikeley (2006), op. cit.} The Court’s deference (at para. 49) to the Government’s arguments as to the purpose and rationale of the child support system is understandable but has nothing to do with whether judicial review does or does not
provide an adequate remedy. It is noteworthy that the Court made no reference to its recent judgement in *Tsfayo v United Kingdom*, as to the limitations of judicial review as a guarantee of access to the courts where the initial tribunal was itself neither independent nor impartial.

The House of Lords ruling that no civil right existed has been criticised by leading commentators. However, it is arguable that their Lordships correctly identified the fact that the parent is excluded from procedures not as a procedural issue but to support the fact that the legislation (which does not make any reference to a 'right’ to maintenance) clearly intended not to create any such right so that a person could be excluded from the procedures that were to be left entirely to the CSA.

Assuming that the House of Lords was correct to hold that no civil right to maintenance (or to the enforcement of a maintenance award) exists, does this mean that a person has no remedy for maladministration under the ECHR other than the rather dubious benefits of judicial review? It would, from a human rights viewpoint, appear to be acceptable that a State can decide to abolish a civil right to a maintenance payment so as to attempt to introduce a new system that would, in fact, produce a more effective and efficient system of child support (the fact that this did not succeed in practice is a separate issue). However, it would not seem acceptable that a State can abolish such a right – with the concomitant right of access to the court under Article 6 – leaving a person with no effective remedy under the ECHR.

Arguably the Court of Human Rights should have ruled that, in implementing the legislation, the CSA was subject to Article 13 of the Convention which requires that a person should have an effective remedy before a national authority and should have held further that judicial review in

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9 60860/00, 14 November 2006.
10 The Court appears to have left open the question as to whether judicial review might in other circumstances be sufficient to satisfy Article 6 as it carefully distinguished the House of Lords decision in *Runa Begum v London Borough of Tower Hamlets* [2003] UKHL 5 in which their Lordships had held that judicial review was sufficient to satisfy Article 6 (in the context of a decision as to whether accommodation offered to the individual was appropriate to her needs).
itself did not meet the requirements of that Article. The precise form the remedy could take should be left to the State but could, for example, involve suing the CSA for damages.

2. **Personal health data**

The Court of Human Rights also considered the extent to which public health systems must protect patient records as part of a State’s obligations under Article 8 of the Convention. The applicant, who was a nurse, had been diagnosed as HIV-positive and was being treated in part of the hospital in which she worked. She began to suspect that her colleagues were aware of her illness. At that time hospital staff had free access to the patient register which contained information on patients’ diagnoses. She subsequently complained to the County Administrative Board requesting it to examine who had accessed her confidential patient record. However, it was not possible to find out who, if anyone, had accessed her patient record as the data system revealed only the five most recent consultations and even this information was deleted once the file was returned to the archives. On this basis the County Administrative Board was unable to decide whether information contained in the patient’s records has been accessed inappropriately. However it did hold that the system should record any consultation of patient files in order to safeguard privacy and to ensure that responsibility for possible leaks of information can be individualised. Subsequently, the hospital’s register was amended and it became possible to identify any person who had accessed a patient’s records.

Having been unsuccessful before the national courts, the applicant brought her case to the Court of Human Rights and complained that the district health authority had failed in its duties to establish a register from which her confidential patient information could not be disclosed in breach of Article 8 of the Convention which guarantees the right to respect for private life.

The Court held that the hospital was a public hospital for whose acts the State is responsible for the purposes of the Convention and that the processing of information relating to an individual’s private life comes within the scope of Article 8.1. The Court noted that it had not been argued.

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12 The Court gave no explicit consideration to the role of Article 13 simply stating that no violation of Article 13 was disclosed (at para 50).

that there was any deliberate unauthorised disclosure of the applicant’s medical data such as to constitute an interference with her right to respect for her private life. Nor had she challenged the compilation and storage of her medical data. Her complaint concerned only the failure on the part of the hospital to guarantee the security of her data against unauthorised access, or, in Convention terms, a breach of the State’s positive obligation to secure respect for her private life by means of a system of data protection rules and safeguards.

The Court pointed out that the protection of personal data, in particular medical data, is of fundamental importance to a person’s enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general.14

This was especially the case as regards protection of the confidentiality of information about a person’s HIV infection, given the sensitivities surrounding this disease. Accordingly, domestic law must afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention.

However, as the national court had established, the system did not reveal a full list of those who has access to the file. The Court also noted that, at the time, the hospital allowed the records to be read by staff not directly involved in the applicant’s treatment. Most importantly, the Court pointed out that the records system in place in the hospital was clearly not in accordance with the legal requirements contained in the Finnish Personal Files Act. It therefore held that the applicant’s medical data were not adequately secured against unauthorised access at the material time. The mere fact that the domestic legislation provided the applicant with an opportunity to claim compensation for damages caused by an unlawful disclosure of personal data was not sufficient to protect her private life and the Court ruled that the State had failed in its positive obligation under Article 8.1 of the Convention to ensure respect for the applicant’s private life.

14 At para. 38.
The case is interesting for the importance attached by the Court to the protection of personal health data although, given that, as the Court pointed out, the rules challenged did not comply with national law, the outcome of the case is unsurprising.

3. **Export of benefits and EU citizenship**

We have seen a number of recent decisions in which the Court has overruled residency requirements in relation to social security benefits on the basis of the Treaty provisions concerning EU citizenship.\(^{15}\) To date, however, these have mainly involved the very atypical benefits for victims of war.\(^{16}\) In the *Petersen* case, the Court has, for the first time, extended this approach to an unemployment benefit.\(^{17}\) It is noteworthy that the case was decided under Article 39 EC (on freedom of movement for workers) and that the Court – unlike the Advocate General – does not even mention citizenship. However, this is arguably yet another example of the manner in which the Court continues to rely on Article 39 EC, read in the light of the citizenship provisions (and their development by the Court).\(^{18}\) Indeed Advocate General Ruiz-Jarabo Colomer’s interesting and erudite opinion discusses in some detail the relationship between the citizenship provisions and those concerning other aspects of free movement.

The benefit in question formed part of the Austrian unemployment insurance law but was payable as an advance where a person had submitted a claim for an incapacity pension pending the outcome of that claim. Accordingly the person was not subject to the normal requirements of being capable, willing and ready to work. The benefit was subject to a residence requirement and Mr. Petersen, who wished to change his country of residence, challenged this before the national courts. The court asked the Court of Justice whether the benefit in question was an invalidity or

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\(^{15}\) Case C-192/05 *Tas Hagen* [2006] ECR I-10451 (noted in COUSINS (2007a) and MARTIN (2007) and Case C-499/06 *Nerkowska* [2008] ECR I-000 noted in the last edition of this JOURNAL.

\(^{16}\) The Court has also allowed exportability in relation to financial assistance for students- Case C-11/06 and C-12/06 *Morgan and Bucher* [2006] ECR I-9161 (noted by DOUGAN (2008) – and, in very specific circumstances, a special non-contributory benefit for disabled persons – Case C-287/05 *Hendrix* [2007] ECR I-6909 noted in this JOURNAL Vol. 9 (2007) no. 4 at 367-369.

\(^{17}\) Case C-228/07 *Petersen* [2008] ECR I-000.

\(^{18}\) See SPAVENTA (2008) and COUSINS (2007b).
unemployment benefit and, if the latter, whether the residence requirement was consistent with Article 39 EC.\footnote{19}

The Court, following its previous case law, looked at the ‘purpose and object’ of the benefit and held that it was an unemployment benefit.\footnote{20} Accordingly it had to decide whether Article 39 EC precluded a residence requirement in the case of such a benefit. The Court ruled that a national law that was intrinsically liable to affect migrant workers more than national workers must be regarded as indirectly discriminatory unless it was objectively justified.\footnote{21} In fact the Austrian government did not seek to explain the objective of the residence requirement and the Court unsurprisingly ruled that, in the absence of such justification, the residence requirement was in breach of Article 39 EC. The outcome in this case is somewhat difficult to distinguish from that in De Cuyper (in which the Court held that a residence requirement for an unemployment benefit – where many of the normal conditions were also waived – was not inconsistent with EU law).\footnote{22} There are, however, a number of differences between the two benefits including the fact that the Austrian benefit was – according to the national authorities – normally payable only for 3-4 months.\footnote{23} But obviously the failure by the Austrian authorities to advance any rationale for the residence requirement contributed largely to the outcome.

The Court’s failure to respond to the Advocate General’s interesting arguments concerning the relationship between Article 39 EC and the Citizenship provisions leaves open this issue for further case law.\footnote{24}

\textbf{REFERENCES}

\footnote{19} Had the benefit been classified as invalidity it would have been exportable under EU law but Mr. Petersen did not satisfy the much more restrictive requirements for the export of unemployment benefit set out in Article 69 of Regulation 1408/71.

\footnote{20} At para 21-36.

\footnote{21} At para 54. Note that the Court here returns to the notion of indirect discrimination rather than the approach adopted in a number of recent cases such as Case C-192/05 Tas Hagen [2006] ECR I-10451 whereby it is the restriction on movement itself which must be justified.

\footnote{22} Case C- 406/04 De Cuyper [2006] ECR I-6947.

\footnote{23} At para 58.

\footnote{24} While the Court followed the Advocate General as to the outcome, unlike the Advocate General it found only a breach of Article 39 EC.


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