Overview of Recent Cases Before the European Court of Human Rights and the European Court of Justice (October - December 2007)

Mel Cousins, Glasgow Caledonian University
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**European Court of Justice**

The Court of Justice considered a number of important issues in the period in question including the ongoing issue of the exportability of social security payments classified as ‘special non-contributory benefits’ under Regulation 1408/71. A significant issue in terms of the provision of social security benefits and one with implications for individuals in terms of how they will be paid their benefits was considered in a case involving the Irish social security authorities and their decision in the 1990s to award a contract for the payment of social security benefits to the Irish postal service without open competition.

Readers should also note the decision of the Grand Chamber of the Court of Justice in *Palacios de la Villa* concerning age discrimination and Directive 2000/78/EC (the general framework directive on equal treatment in employment). The Court ruled that national legislation allowing compulsory retirement clauses in collective agreements was not contrary to the Directive as it reflected a legitimate aim of social policy (the encouragement of employment) and was therefore objectively justified; and was proportionate in its application. This decision is not directly relevant to statutory social security schemes which are excluded from the scope of the Directive but may be of relevance to occupational pensions.

**Special non-contributory benefits and Regulation 1612/68**

In addition to the *Commission v Council* case on special non-contributory benefits (noted in the last issue of this journal), the ECJ also considered special non-contributory benefits (SNCBs) in the *Hendrix* case – this time in relation to Regulation 1612/68. Mr. Hendrix was Dutch. He had a slight mental disability and received a disability allowance (Wajong) which the Court found to be a ‘social advantage’ for the purposes of Regulation 1612/68. He was employed in specially adapted work, in the Netherlands and was paid for this work but continued to receive the Wajong benefit, reduced to take account of his wages. In 1999, Mr. Hendrix moved to Belgium while continuing to work in the Netherlands. The Netherlands authorities then decided to terminate the benefit under the Wajong on the basis that he had taken up residence outside the Netherlands. The Wajong benefit is specifically designated by the Netherlands as a special non-contributory benefit under Regulation 1408/71 and as such is not exportable. Article 10a of Regulation 1408/71 specifically provides that

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1. Case C-411/05, *Palacios de la Villa* [2007] ECR I-000. The rules allowed such clauses at age 65 where the person qualified for a contributory retirement pension. As the case is primarily of interest from an employment and equality perspective it is not discussed in more detail in this section.
2. Case C-287/05 *Hendrix* [2007] ECR I-000.
3. The referring court in *Hendrix* had asked whether the Wajong was, in fact, a special non contributory benefit but this issue had already been resolved in Case C-154/05 *Kersbergen-Lap* [2006] ECR I-6249. See the recent discussion in this journal and H. Verschueren ‘European (internal) migration law as an instrument for defining the boundaries of national solidarity systems’ 9 European journal of migration and law (2007), 307-346.
Notwithstanding the provisions of Article 10 and Title III, persons to whom this regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) *exclusively in the territory of the Member State in which they reside* (my emphasis), in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. …

The defendant as well as the Netherlands and UK governments argued that Regulation 1408/71 was the more specific provision in comparison to Regulation 1612/68, and that, therefore, it applied to the exclusion of Regulation 1612/68 within its scope of application. They argued in particular that Regulation 1612/68 could not result in a situation that benefits whose export is excluded under Article 10a of Regulation 1408/71 might, after all, be payable. The Court, however, predictably rejected this argument in principle.

As to its application in practice, the Court pointed out that it had previously held that a Member State may not make payment of a social advantage within the meaning of Article 7 of Regulation 1612/68 dependent on the condition that recipients are resident in the national territory of that Member State unless that condition is objectively justified and proportionate to the objective pursued. This remained the case even though the Wajong benefit is a special non-contributory benefit. Following Advocate General Kokott, the Court stated that Article 7(2) of Regulation No 1612/68 is the particular expression, in the specific area of the granting of social advantages, of the principle of equal treatment enshrined in Article 39(2) EC, and as such it must be accorded the same interpretation as Article 39(2) EC. The Court accepted that the Wajong benefit is closely linked to the socio-economic situation of the Member State concerned, since it is based on the minimum wage and standard of living in the Netherlands. It also had regard to the fact that it is a special non-contributory benefit under Regulation 1408/71, which is to be received exclusively within the territory of the Member State of residence. On this basis, the Court ruled that the condition of residence was, in general, objectively justified.

However, it went on to consider whether the application of the residence condition was *proportionate*, i.e. whether it entailed an infringement of the rights which Mr. Hendrix derived from the freedom of movement for workers which went beyond what was required to achieve the legitimate objective pursued by the national legislation. The Court observed that the national legislation itself expressly provided that the residence condition might be waived if it led to an ‘unacceptable degree of unfairness’. The Court pointed out that it is the responsibility of national courts to interpret, so far as possible, national law in conformity with the requirements of Community law. The Court held that the national court must be satisfied, in the circumstances of this particular case, that the residence condition did not lead to such unfairness, taking into account the fact that Mr. Hendrix has exercised his right of freedom of movement as a worker and that he has maintained economic and social links to the Netherlands. In conclusion, the Court ruled that Article 39 EC and Article 7 of Regulation 1612/68 did not preclude national legislation that provided that a special non-contributory benefit may be granted only to persons who are resident in the national territory as long as this did not involve an infringement of the

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5 Though, as in Case C-413/99 *Baumbast* [2002] ECR I-7091, this would surely have been the case whether or not the national legislation contained a specific “hardship” clause.
rights of the claimant person which goes beyond what is required to achieve the legitimate objective pursued by the national legislation. In what may be interpreted as a strong hint, the Court reiterated that the national court should in particular take account of the fact that Mr. Hendrix had maintained all of his economic and social links to the Member State of origin.

**Competition law and payment of social security benefits**

An interesting case considered the extent to which EU competition law may affect the payment of social security benefits. The Irish social security authorities had a long-standing arrangement with the Irish postal service (formalised by contract in 1992) whereby most social security benefits are paid through the post office system. In May 1997 and again in May 1999 this contract was extended without any tendering process. Prompted by a complaint, the EC Commission began an exchange of correspondence with the Irish authorities which ultimately led to infringement proceedings. That the issue is not confined to Ireland is suggested by the fact that four Member States intervened to support the Irish position.

Payment of social security benefits was considered to fall within the definition of ‘non-priority services’ under Directive 92/50/EEC on the co-ordination of procedures for the award of public service contracts. That directive aims to ensure that there is no discrimination between service providers (Article 3(2)) but does not require a prior tendering process in the case of the award of a contract for such non-priority services. However, the Commission argued that the Irish approach was contrary to the Treaty provisions, in particular Article 43 EC and 49 EC. The Commission argued that the fact that the contract fell within the scope of Directive 92/50 did not preclude the application of the obligations developed in the Court’s case law in relation to the fundamental freedoms laid down in the Treaty.

The Court set out a number of important points in relation to such contracts. Firstly, regardless of its categorisation in Directive 92/50, the award of public contracts remained subject to the fundamental rules of Community law and, in particular, the principles laid down in the Treaty on the right of establishment and freedom to provide services. Thus insofar as a contract of services was of a certain cross-border interest, its award in the absence of any transparency to an undertaking in the home Member State would amount to a difference in treatment to the detriment of undertakings in other Member States. Unless justified by objective circumstances, such a difference would amount to indirect discrimination on the basis of nationality prohibited by Article 43 and 49. One might have thought that the award of such a large contract would be of obvious interest to businesses in other Member States. However, the Court ruled that the onus was on the Commission to establish this, that it could not rely on any presumption in this regard, and that it had failed to provide appropriate evidence to show a cross-border interest. Accordingly it rejected the complaint. Thus the Court clarified the general principles which should apply to the award of such contracts. However, the important point is to know what these principles require in practice in the absence of detailed legislation. It is quite an

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6 Case C-507/03, Commission v Ireland, [2007] ECR I-000.
7 This categorisation does not appear to have been disputed in the proceedings: see judgement, para 21.
8 At paras 26-31 of the judgement.
9 At paras 32-4.
achievement that the Commission and the Grand Chamber of the Court have managed to leave this issue almost as unclear as it was a decade ago.10

**European Court of Human Rights**

The Court of Human Rights continues to give judgment in a growing number of social security cases. Issues considered by the Court in the relevant period include the right of access to social insurance for prisoners and non-nationals, and non-implementation of the order of a national Human Rights Chamber in relation to rights under the International Covenant on Economic, Social and Cultural Rights.

**Social insurance for prisoners**

In *Strummer v Austria*11 the Court found admissible a complaint by Mr. Stummer in relation to the non-insurability of his work in prison for the purposes of Austrian old age pensions. Mr. Stummer had spent lengthy periods of his life in prison (28 years in total). He complained under Article 4 of the Convention – which provides that ‘No one shall be required to perform forced or compulsory labour’ – and Article 14 (non-discrimination) that he was not insured under the old-age pension system for work performed as a prisoner (although prisoners are now insured for unemployment insurance purposes) and that as a result he had been refused an old-age pension. He submitted that the distinction between work performed during detention and work while at liberty was not objectively justified. The Government argued that there were important differences between work performed in the context of regular employment situations and work performed by prisoners including, firstly, the fact that persons living in freedom entered freely into an employment contract, while prisoners performed work on the basis of a statutory obligation. Secondly, persons in regular employment situations usually aimed primarily at earning their livelihood while prisoners’ livelihood was provided by the prison authorities and their work served the purpose of keeping them usefully occupied and of facilitating their re-integration. Having regard to these factual differences, it argued that the decision not to insure prisoners was not discriminatory and was within the legislature’s margin of discretion.

The Court considered that the complaint raised serious issues of fact and law under the Convention, the determination of which required an examination of the merits and concluded therefore that the complaint was not manifestly ill-founded. The fact that the Court did not reject the complaint at this stage is perhaps somewhat surprising. The Commission on Human Rights had found that a comparison of prisoners with non-prisoners, in relation to suspension of benefits while in prison, was a comparison of two different factual situations and as such disclosed no discrimination under Article 14.12 The US courts have also upheld similar non-insurability under

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10 Interestingly the Advocate General did not make any reference to a failure to show a cross-border interest. Although also somewhat critical of the Commission’s presentation of the case (at paras 70-6), Advocate General Stix-Hackl considered that the principle of transparency would normally involve a call for tenders and that as the case did not reveal any circumstances which would have allowed the service to be awarded without any advertising, Ireland was in breach of its obligations.

11 37452/02, 11 October 2007.

12 *Scrabjer and Clarke v United Kingdom*, 27004/95 and 27011/95, 23 October 1997 followed in *Carlin v United Kingdom*, 27537/95, 3 December 1997, (1998) 25 EHRR CD 75. The applicant is also complained of discrimination in relation to the type of pension received in that the occupational pensions were not suspended but the Commission also considered this raised two different factual situations. Although see the decision of the Constitutional Court of
the US social security scheme as not in breach of the equal protection guarantee derived from the US Constitution as it was rationally related to the objective of the social security scheme, i.e. to replace loss of support for workers and their dependents. Finally, the UN Human Rights Committee considering a claim that the denial of adequate remuneration for work performed during incarceration was in breach of Article 26 of the International Covenant on Civil and Political rights, held that the complaint was inadmissible. Nonetheless, the Court’s decision to consider the case on its merits should be welcomed. The Court – albeit for understandable reasons – has perhaps been too ready in the past to dismiss cases as manifestly ill-founded when they were ‘manifestly’ not. Despite the administrative difficulties involved in dealing with extra cases it would be preferable if such issues were considered (and if necessary rejected) on substantive grounds.

Nationality and other discrimination

In *Luczak v Poland* the Court again considered direct nationality discrimination. The applicant in this case had been refused admission to the Polish farmers’ social security scheme on the grounds of his nationality. Unsurprisingly, the Court found that the rule in question was in breach of Article 14 of the Convention. This case is reported in full below.

*Soukupová v Czech Republic* concerned alleged gender and age discrimination in the granting of a survivor’s pension. Ms. Soukupová was already in receipt of an old age pension when her spouse died. She would have been entitled to a survivor’s pension but her old age pension exceeded the total amount allowed under a cumulation provision in Czech law. She argued that this involved discrimination when compared with women who spouses died before pension age and compared with men who could receive the survivor’s pension, contrary to Article 14 of the Convention. The Court ruled that, as she was not entitled to a widow’s pension under national law, she had no possession within the scope of P1-1 and, therefore, Article 14 was not applicable. This would appear to be clearly incorrect on the basis of the Court’s only jurisprudence as the applicant would have been entitled to a pension but for the alleged discrimination. The Court did not consider the discrimination issue and it is not clear whether there was justification particularly for the alleged gender discrimination.

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13 *Radosevic v Germany*, Communication No. 1292/2004, 22 July 2005. Albeit that the decision is rather unconvincing rejecting the claim on the basis, inter alia, that the author of the complaint had not provided adequate information as to the type of work carried out to show that he was a victim of discrimination (at para 7.2).

14 Following which, of course, further cases on the same point could indeed be dismissed as ill-founded.


16 25460/02, 13 November 2007.

17 She also invoked Article 2 of the International Covenant on Economic, Social and Cultural Rights and Article 7 of the Universal Declaration of Human Rights but the Court pointed out that, under Article 19 of the Convention, it was not competent to consider other legal instruments in themselves.
Delay in rectifying a breach of the International Covenant on Economic, Social and Cultural Rights

Finally, in a case which considered the non-implementation of a court decision under Article 6 of the Convention, the Court ruled in Karanović v. Bosnia and Herzegovina that a failure to implement a decision of the Human Right Chamber was a breach of Article 6. The original case concerned the non-payment of a pension by the Bosnian pension fund to the applicants arising from the fact that they had been displaced to what is now the Republika Srpska even after their return to their original home in Bosnia and Herzegovina.\(^{18}\) The Human Right Chamber had held that the applicants had been discriminated against in the enjoyment of the right to social security as guaranteed by Article 9 of the International Covenant on Economic, Social and Cultural Rights.\(^{19}\) The Chamber had ordered the Federation of Bosnia and Herzegovina to take all necessary legislative and administrative actions by 10 July 2003 to ensure that the applicants were no longer discriminated against in their enjoyment of pension rights and to compensate each applicant for the short-fall in the pension received. Although some compensation was paid, the Chamber’s order had not otherwise been implemented.

The Court of Human Rights pointed out that the Human Rights Chamber had ordered that “legislative and administrative actions” be taken. Given the current legislative and administrative arrangements (notably, the absence of harmonised legislation between the Entities and the lack of State-level legislation regulating pensions), the Court was satisfied that the only conceivable interpretation of that order was that it required the applicant’s transfer from the Republika Srpska Fund to the Bosnian Fund. The Court also held that the amount paid to the applicant did not constitute full compensation. As more than four years had passed since the impugned decision of the Human Rights Chamber became final and the applicant has not yet been transferred to the Bosnian Fund and has not yet received full compensation, the Court held that the essence of the applicant’s right of access to court, as protected by Article 6 of the Convention, was impaired and there had been a breach of that Article.

\(^{18}\) CH/02/8923, CH/02/8924 and CH/02/9364 Kličković, Pašalić and Karanović v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska, 20 January 2003. The applicants were in receipt of a pension from the Republika Srpska but this was payable at a lower rate than the Bosnian pension.

\(^{19}\) Interestingly the Chamber held that there was no breach of the European Convention of Human Rights, an approach also adopted by the Court of Human Rights in a case involving similar facts: Čekić v Croatia, 15085/02, 9 October 2003.
THE LUCZAK V POLAND JUDGMENT

This case concerns a national provision which prevented non-Polish nationals from obtaining access to a State subsidized scheme of social insurance for farmers. The Court of Human Rights held, following its previous case law, that such nationality discrimination was in breach of Article 14 of the Convention on Human Rights.

Judgment

European Court of Human Rights (Fourth section), 27 November 2007, Application no. 77782/00


...THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

1. The applicant, who is a French national of Polish origin, was born in 1950 and lived in Brzeg.

2. The applicant moved to Poland in about 1984. He was in employment for a number of years and consequently was affiliated to the general social security scheme. The relevant law governing it did not exclude the participation of foreign nationals in the general social security scheme.

3. On 20 January 1997 the applicant and his wife, who is a Polish national, jointly bought a farm. They took possession of it on 20 November 1997. At about that time the applicant terminated his employment and decided to make his living from the farm.

4. On 2 December 1997 the applicant requested the Częstochowa branch of the Farmers' Social Security Fund (Kasa Rolniczego Ubezpieczenia Społecznego) to admit him to the farmers' social security scheme.

5. On 16 December 1997 his request was refused on the ground that he was not a Polish national, a condition stipulated in the Farmers' Social Security Act of 20 December 1990 (“the 1990 Act”; ustawa o ubezpieczeniu społecznym rolników). As a result, the applicant did not have social security cover in the event of sickness, occupational injury and invalidity. In addition, he could not pay contributions towards his old-age pension.

6. In a decision given on the same date, the applicant's wife was admitted to the farmers' scheme.

7. The applicant appealed against the decision given in his case. He submitted that as a self-employed farmer he was exposed to the risk of work-related accidents. Furthermore, he argued that since he had acquired the farm he had terminated his previous employment and that the farm was intended to provide for his livelihood. The applicant also submitted that when previously employed he had been covered by the general social security scheme despite his foreign
nationality. As a result of the refusal, he could not pay his social security contributions, so the relevant time would not be taken into account when calculating his future retirement pension.

8. He also submitted that he had been informed about an obligation to join the scheme by way of a clause in the notarial deed whereby he had acquired the farm. In addition, the applicant stated that he had been living in Poland for 18 years and that he had had a permanent residence permit for 15 years. He also referred to his Polish origin and his willingness to pay the relevant contributions to the scheme.

9. On 30 March 1998 the Częstochowa Regional Court dismissed the applicant's appeal, finding that the applicant could not be admitted to the farmers' social security scheme as he did not have Polish nationality. On the other hand, it observed that in the event of a serious occupational injury the applicant could be granted a one-off compensation payment as provided in section 10(1)(2) of the 1990 Act. As regards access to health services, the Regional Court noted that the applicant, as a foreign national permanently residing in Poland, would be provided with such access by a law which was to come into force on 1 January 1999.

10. The applicant appealed against that judgment. He submitted that the refusal to admit him to the social security scheme for farmers on the basis of his nationality was discriminatory. He alleged a breach of the principle of equality, relying on the Constitution and the International Covenant on Economic, Social and Cultural Rights (“the ICESC”).

11. On 22 December 1998 the Katowice Court of Appeal dismissed the applicant's appeal. It found that the applicant could not base his claim for admission to the farmers' social security scheme on the Constitution as the latter provided in Article 37 § 2 for statutory limitations on the rights of aliens. Similarly, the Court of Appeal held that the 1948 bilateral treaty concluded between France and Poland in matters of social security was applicable exclusively to employees. The applicant's claim based on the ICESC was also dismissed. The Court of Appeal noted that Article 9 of the ICESC included a provision on the right of everyone to social security. However, it held that the provisions of the Covenant were not self-executing and left States a margin of discretion as to the manner of their implementation in domestic law.

12. The applicant lodged a cassation appeal against that judgment with the Supreme Court. On 8 February 2000 the Supreme Court dismissed his cassation appeal, relying principally on the same grounds as the Court of Appeal. Additionally, it observed that Article 67 of the Constitution provided that the right to social security was guaranteed only to Polish nationals.

13. In 1998 the applicant requested the President of the Farmers' Social Security Fund to admit him to the farmers' scheme as an exception to the existing rules. On 7 August 1998 the President of the Farmers' Social Security Fund refused and informed the applicant that the 1990 Act expressly excluded the admission of non-Polish nationals to the scheme. It was envisaged that the amendments would enter into force on 1 January 1999. The applicant was informed of this by the Ombudsman. However, the amendments were not enacted.
15. In 2002, in view of the prolonged uncertainty as to his social security cover, the applicant went to the Netherlands, where he obtained a job. From April 2004 to April 2006 the applicant was on sick leave and subsequently he has been in receipt of a sickness allowance.

16. On 2 April 2004 the 1990 Act was amended in connection with Poland's accession to the European Union (EU). The amendments provided, *inter alia*, that nationals of EU Member States and foreign nationals in possession of a residence permit could join the farmers' scheme.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The European Social Charter 1961

17. The European Social Charter 1961 (“the Social Charter”), which entered into force in respect of Poland on 25 July 1997, provides, as relevant:

“The governments signatory hereto, being members of the Council of Europe, ... Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin; ... Have agreed as follows: ...”

Part II

“The Contracting Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs. ...”

Article 12 – The right to social security

“With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake:

1. to establish or maintain a system of social security;

2. to maintain the social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security;

3. to endeavour to raise progressively the system of social security to a higher level;

4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

   a. equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties;

   b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.”
18. In accordance with Article 20 of the Social Charter, the Republic of Poland considered itself bound by a number of substantive provisions of the Charter, including Article 12.

B. Constitutional provisions

19. Article 37 of the Constitution reads:

“1. Any person within the jurisdiction of the Republic of Poland shall enjoy the freedoms and rights guaranteed by the Constitution.

2. Exemptions from this principle with respect to aliens shall be specified by statute.”

Article 67 § 1 of the Constitution provides:

“A citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidity as well as having attained retirement age. The scope and forms of social security shall be specified by statute.”

C. Social security scheme for farmers

20. The social security scheme for farmers is regulated by the Farmers' Social Security Act of 20 December 1990 (“the 1990 Act”; ustawa o ubezpieczeniu społecznym rolników). At the relevant time section 1(1) of the 1990 Act provided, in so far as relevant:

“The social security [scheme] for farmers shall cover farmers of Polish nationality and Polish members of their household working with them.”

21. The Social Security (Farmers and Members of their Families) Act of 14 December 1982, which predated the 1990 Act, did not lay down a nationality condition.

22. The scheme set out in the 1990 Act provides the following benefits: (1) sickness and maternity benefit, (2) benefit in respect of occupational injury and disease, and (3) old-age and invalidity pension. It is operated by the Farmers' Social Security Fund (Kasa Rolniczego Ubezpieczenia Społecznego), a specialised government agency which is subsidised by the State budget. Depending on the size of their farms, farmers are either required to join the scheme by law or may join at their own request. Each farmer admitted to the scheme is required to pay contributions to it, the amount of which does not depend on the size of the farm or the level of income from it. The precondition for admission to the scheme is to be an owner of a farm, regardless of whether farming is the main source of the farmer's livelihood.

23. On 2 April 2004 the 1990 Act was amended. The relevant amendment, which entered into force on 2 May 2004, broadened the range of farmers who could be admitted to the farmers' social security scheme by, inter alia, including nationals of the EU Member States and foreign nationals residing in Poland on the basis of a visa or a residence permit.

D. The general social security scheme for employees

24. At the relevant time the rules governing the operation of the general social security scheme for employees were laid down in the Social Security (Organisation and Financing) Act of 25 November 1986 (ustawa o organizacji i finansowaniu ubezpieczeń społecznych). The Act law did not provide for any restrictions on admission to the general social security scheme on the
basis of an employee's nationality, with the exception of those aliens who did not reside permanently in the country and were employed by foreign diplomatic missions. On 1 January 1999 the Act of 25 November 1986 was repealed and replaced by the Social Security System Act of 13 October 1998 (ustawa o systemie ubezpieczeń społecznych). However, the rule in respect of the admission of employees of foreign nationality to the general social security scheme remains the same.

E. The bilateral agreement between Poland and France

25. In 1948 Poland and France concluded the General Convention on Social Security (Konwencja Generalna pomiędzy Polską a Francją o zabezpieczeniu społecznym). However, the provisions of that Convention were applicable exclusively to employees and other workers in comparable positions, as opposed to self-employed persons.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL No. 1 TO THE CONVENTION

26. The applicant complained under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 that he had been refused admission to the farmers' social security scheme on the ground of his nationality and thus could not receive benefits from that scheme. Article 1 of Protocol No. 1 to the Convention reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Article 14 provides:

“The enjoyment of the rights and freedoms set forth in [the] Convention 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.”

27. In its admissibility decision of 27 March 2007 the Court held that the applicant's interests relating to the farmers' scheme and the ensuing right to derive social security benefits fell within the scope of Article 1 of Protocol No. 1, and that Article 14 of the Convention was therefore applicable. It must now consider whether there has been a breach of Article 14 taken in conjunction with Article 1 of Protocol No. 1.
A. The arguments of the parties

1. The applicant

28. The applicant claimed that by depriving him of the possibility of joining the farmers' scheme solely on account of his foreign nationality, despite the fact that he met the other statutory conditions, the authorities had violated the prohibition of discrimination. As a result he was effectively deprived of social security coverage in the event of sickness, occupational injury and invalidity. Furthermore, he could not continue making contributions towards his retirement pension, which he had paid for many years when affiliated to the general social security scheme. In this connection, the applicant had a reasonable expectation of being admitted to the farmers' scheme. That position was supported by the Ombudsman's opinion in his case.

29. The difference in treatment to which the applicant was subjected had no objective and reasonable justification. He submitted that the problem of providing social security cover to foreign nationals under the farmers' scheme was a marginal one. There were only a very limited number of cases of this kind which could not in any way affect the country's economy or its social security system.

30. Furthermore, the applicant emphasised that the relevant law had abolished the nationality criterion in 2004 in respect of certain foreign nationals. In the subsequent period the farmers' social security scheme had not collapsed and nor had the situation of farmers, referred to by the Government as “a socially vulnerable group”, changed considerably. In addition, when tabling the relevant bill in Parliament the Government had submitted that the amendments to the 1990 Act would not generate additional budget expenditure.\(^{20}\)

31. The applicant submitted that the farmers' scheme was also susceptible to abuse in that persons who should otherwise be making higher contributions to the general social security scheme could join the farmers' scheme, which provided them with comprehensive social security cover in exchange for smaller contributions. The authorities had ignored the potential for abuse.

32. The applicant had been prevented from pursuing work on his farm and obtaining income from it, despite having made investments with a view to creating a vineyard. The prolonged uncertainty as to his social security cover had forced him to abandon his work plans and to leave Poland at the age of 52 after having spent 18 years in the country.

2. The Government

33. The Government denied that domestic law gave rise to any discrimination contrary to Article 14. The legislation concerning admission to the farmers' scheme included objective criteria and applied to everyone without any arbitrary exceptions. The distinction between nationals and non-nationals had been introduced in pursuance of the general interest and did not contravene the principle of proportionality.

34. The Government averred that despite the fact that prior to 2004 it had not been possible for the applicant to join the farmers' scheme, he had nevertheless been entitled to certain social security benefits. They referred to a one-off compensation payment which could have been granted to the applicant in the event of serious occupational injury as provided under section 10(1)(2) of the 1990 Act and a similar one-off compensation payment which could be granted to the applicant's family in the event of his death as a result of a work-related accident (section 10(1)(4)). In their opinion, the applicant might also have been entitled to a dependant's pension

\(^{20}\) Bill on amendments to the 1990 Act and certain other laws, submitted to the Sejm on 26 March 2003 (no. 1489).
(**renta rodzinna** in the event of his wife's death (section 29 of the 1990 Act). The Government further pointed out that the applicant had been entitled, as a foreign national with permanent residence status, to a family allowance (**zasilek rodzinny**) and a nursing allowance (**zasilek pielęgnacyjny**), subject to certain statutory conditions, and access to health insurance services as from 1 January 1999.

35. Having regard to the social vulnerability of farmers, as well as the tradition of State support for Polish farmers, the Government found no persuasive grounds to believe that they had been bound under the Convention to provide support to foreign nationals by admitting them to the farmers' scheme prior to 1 May 2004. They argued that the limitation of the applicant's right of access to the farmers' scheme had been only temporary as it had been removed on the latter date. However, they underlined that after 1 May 2004 the applicant had not applied to join the farmers' scheme and had simply pursued his application before the Court. On that account, the Government expressed their reservations about the applicant's victim status.

36. The Government asserted that the distinction at issue pursued the legitimate aim of protecting a vulnerable group by allowing its members to have access to and benefit from the scheme on payment of a modest contribution. They observed that the creation of the farmers' scheme was a reflection of the State's policy to support an underdeveloped and economically inefficient sector of the economy. In this connection, the condition of Polish nationality prior to 2004 had played a vital role in directing State support to those in particular need, namely Polish farmers, who had always been financially disadvantaged in comparison to other sectors of society. The Government emphasised that the farmers' scheme was 95% financed from the budget. That constituted a heavy burden on taxpayers and the economy alike. The Government submitted that contributions made by farmers to the scheme constituted only a small fraction of the contributions paid by persons covered under the general social security scheme. It would be unjustified to claim that such an expensive social security scheme should have been opened up to anyone willing to be covered by it.

37. Furthermore, the Government maintained that the Polish State could not be held responsible for attempting to reconcile its budgetary considerations with the social and financial difficulties encountered by the agricultural sector. They submitted that currently about 16% of the population in Poland were classified as being employed in agriculture, whereas their contribution to the country's GDP did not exceed 3%. It was thus obvious that the State budget and taxpayers were contributing heavily to the farmers' scheme. Moreover, there were sound reasons to believe that expanding the scheme to include foreign nationals would be contrary to the long-term aim of reducing its costs and would unjustifiably favour foreign nationals.

38. In view of the above, the Government argued that the distinction at issue did not go beyond the margin of appreciation enjoyed by the authorities in the sphere of social policy. They claimed that there was a reasonable relationship of proportionality between the conditions of admission to the farmers' scheme and the aim of State support for a socially and economically vulnerable sector of society. Furthermore, the difference in treatment had been of a temporary nature and had been based on important budgetary and social policy considerations. In the Government's submission, there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1 to the Convention.
B. The Court's assessment

1. General principles

39. The applicant complained of a difference in treatment on the basis of nationality, which falls within the non-exhaustive list of prohibited grounds of discrimination in Article 14.

40. For the purposes of Article 14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification – in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (Van Raalte v. the Netherlands, judgment of 21 February 1997, Reports of Judgments and Decisions 1997-I, § 39; Larkos v. Cyprus [GC], no. 29515/95, § 29, ECHR 1999-I; and Stec and Others v. the United Kingdom [GC], no. 65731/01, § 51, ECHR 2006-...).

41. The scope of this margin will vary according to the circumstances, the subject matter and the background (see Petrovic v. Austria, judgment of 27 March 1998, Reports 1998-II, § 38). As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention (see Gaygusuz v. Austria, judgment of 16 September 1996, Reports 1996-IV, p. 1142, § 42, and Koua Poirrez v. France, no. 40892/98, § 46, ECHR 2003-X). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for example, James and Others v. the United Kingdom, judgment of 21 February 1986, Series A no. 98, § 46, and National and Provincial Building Society and Others v. the United Kingdom, judgment of 23 October 1997, Reports 1997-VII, § 80). Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is “manifestly without reasonable foundation” (ibid.).

2. Application of these principles to the present case

42. The Court notes that the 1990 Act established a difference in treatment in respect of admission to the farmers' scheme on the basis of the nationality condition. It considers that the applicant could claim to be in a relevantly similar position to other persons who were Polish nationals and applied for admission to the farmers' scheme. In this connection, the Court attaches importance to the fact that the applicant was permanently resident in Poland, had previously been affiliated to the general social security scheme and had contributed as a taxpayer to the funding of the farmers' scheme.

43. The Court notes the Government's argument that even prior to 1 May 2004 the applicant had been entitled to certain social security benefits, such as a one-off compensation payment in the event of a serious occupational injury, a dependant's pension, a family allowance and a nursing allowance. However, it observes that the domestic courts found that the applicant had been entitled to only one of those benefits as provided under the farmers' social security scheme (see paragraph 16 above). The Court does not find it necessary to determine whether the applicant was in fact entitled to all or some of the benefits referred to by the Government as, in any event, the applicant was undoubtedly deprived of core elements of social security cover...
regarding provision for sickness (zasiłek chorobowy) and invalidity (renta inwalidzka). Furthermore, he could not continue making his contributions towards his retirement pension.

44. The Court observes that the respondent Government have sought to justify the difference in treatment between Polish nationals and foreign nationals by pointing to their policies in the agricultural sector, a sector which they considered underdeveloped and economically inefficient. They claimed that the creation of the farmers' scheme and the particular rules governing it served to protect Polish farmers, being a vulnerable group. Furthermore, the farmers' scheme was heavily subsidised from the budget, reflecting the State's policy to support Polish farmers financially.

45. The Court reiterates that very weighty reasons would have to be put forward by the respondent Government in order to justify a difference of treatment based, as in the present case, exclusively on the ground of nationality. It considers that the creation of a particular social security scheme for farmers that is heavily subsidised from the public purse and provides cover to those admitted to it on more favourable terms than a general social security scheme could be regarded as pursuing an economic or social strategy falling within the State's margin of appreciation. On the other hand, legislation regulating access to such a scheme must be compatible with Article 14 of the Convention. Where it is shown that there are reasonable and objective grounds for excluding an individual from the scheme, the principle of proportionality will then come into play. In particular, even where weighty reasons have been advanced for excluding an individual from the scheme, such exclusion must not leave him in a situation in which he is denied any social insurance cover, whether under a general or a specific scheme, thus posing a threat to his livelihood. Indeed, to leave an employed or self-employed person bereft of any social security cover would be incompatible with current trends in social security legislation in Europe.

46. The Court notes that in Stec and Others v. the United Kingdom (cited above) it examined the alleged inequality arising out of entitlement to a social security benefit (the reduced earnings allowance) which was linked to the age of eligibility to the State pension. In that case the Court (Grand Chamber) held that the policy adopted by the legislature in deferring equalisation of the pension age for men and women until 2020 fell within the State's margin of appreciation and that, consequently, there had been no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

47. The present case, in contrast to the Stec and Others judgment which concerned a difference in treatment on the grounds of sex, involves discrimination on the grounds of nationality. However, the Court considers that there are a number of arguments in the present case which enable it to reach an opposite conclusion to that reached in Stec and Others.

48. Firstly, the Court notes that in the instant case, the applicant was refused admission to the farmers' scheme solely on the ground of his nationality, whereas for all practical purposes he was in a comparable position to Polish nationals who, having previously been affiliated to the general social security scheme, applied for admission. It underlines that the applicant, when in employment, supported the farmers' scheme through the payment of taxes, as did any Polish national.

49. Secondly, the Minister of Agriculture recognised the problem of discrimination underlying the present case, but failed to remedy it by January 1999 as proposed. In this connection, the Court observes that the 1982 Act which predated the 1990 Act did not lay down a nationality condition in respect of social security cover for farmers.
50. Thirdly, the Court notes that the Government argued that the difference in treatment at issue was justified by the social and economic policies pursued prior to 2004, when Poland was obliged to change the relevant law following its accession to the European Union. The Government have not, however, explained why their public policy goals in respect of the farmers' scheme suddenly lost their relevance after 2004.

51. Fourthly, in contrast to its finding in the Stec and Others judgment, the Court does not find it established that the continuation of the distinction at issue in the present case was justified because of the allegedly far-reaching and serious implications for the State's economy if that distinction were to be discontinued. In this connection, the Court observes that according to the Government's own estimate, the amendments to the 1990 Act providing for the admission to the farmers' scheme of, *inter alia*, nationals of EU Member States would not generate additional budget expenditure (see paragraph 37 above).

52. Having regard to the foregoing, while the Court accepts that a measure which has the effect of treating differently persons in a relevantly similar situation may be justified on public-interest grounds, it considers that in the instant case the Government have not provided any convincing explanation of how the general interest was served by refusing the applicant's admission to the farmers' scheme during the period in question (see, mutatis mutandis, Larkos, cited above, § 31). In conclusion, the Court finds that the Government have not adduced any reasonable and objective justification for the distinction such as to meet the requirements of Article 14 of the Convention, even having regard to their margin of appreciation in the area of social security.

53. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

...
consider whether the aim are advanced by the state was legitimate or whether it was simply the precise means chosen to advance that aim which fell foul of the Convention although the assumption might be that the Court did not consider that confining social security to nationals was a legitimate aim.

4. In *Luczak* the Court did give this issue more detailed consideration. It accepted that the creation of a special (heavily subsidised) social security scheme for farmers ‘could be regarded as pursuing an economic or social strategy falling within the State’s margin of appreciation’ (at para 20). However, such a scheme still had to be Article 14 compliant and even if it could be shown that there were reasonable and objective grounds for excluding a person from the scheme, the principle of proportionality would require that such a person should not be left in a situation where he was denied any social insurance cover (whether under a general or special scheme). In an interesting aside, the Court stated that to leave a person bereft of any social security cover would be incompatible with current trends in social security legislation in Europe.

5. As the applicant had been refused admission to the scheme solely on the basis of nationality (the Court having found that he was in a relevantly similar position to Polish farmers who were admitted) and being unconvinced by the government’s arguments that the discrimination was justified by social and economic policies, the Court found a breach of Article 14.

6. The case indicates that the Court is unlikely to find that discrimination solely on grounds of nationality is justified. Its comments in relation to the proportionality aspect may be interesting in relation to issues of indirect nationality discrimination which have yet to be analysed in detail by the Court and might, for example, suggest that a person should not be totally excluded from access to social insurance on the basis of a residence requirement. Such an approach might also have implications for other persons excluded from insurability such as (mainly female) part-time workers where the European Court of Justice has ruled that such exclusion is not in breach of Directive 79/7/EEC. On the other hand, however, it may not be wise to read too much into the Court’s comments in this case given the much loser approach to proportionality applied in a number of recent gender discrimination cases such as *Stec* and *Runkee and White*.25

MEL COUSINS
School of Law and Social Sciences
Glasgow Caledonian University

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