Overview of recent cases before the European Court of Human Rights and the European Court of Justice (April-September 2009)

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In the period covered there have been two interesting decisions of the Court of Justice and the Court of Human Rights concerning the current boundaries of the scope of equality as it applies to social security issues. The Court of Human Rights addressed issues of discrimination against homosexual couples in *M.W.*, while the Court of Justice rejected a claim in relation to social security treatment while on parental leave in *Gomez-Limon*. Meanwhile, the concept of European citizenship continued to develop – if in a somewhat erratic manner. The Court of Justice, in *Rüffler*, ruled that national tax rules in relation to deductibility of health insurance contributions could not differentiate on the basis of the Member State in which the contributions were paid, and, in *Commission v Germany*, it upheld the Commission’s complaint against German tax legislation as it applied to aspects of the Riester pensions legislation. However, in *Von Chamier* the Court refused to extend its case law on free movement of services as regards health care to the citizenship provisions of the EU Treaty.

Finally, the ECHR gave some potentially important, if unconvincing, rulings on the scope of P1-1 and Article 6 as they apply to social security. In *Moskal*, the ECHR (unsuccessfully) grappled with issues concerning the power of social security authorities to review incorrect awards of benefit, while in *Mendel* it (equally unconvincingly) considered whether the termination of participation in an employment activity scheme constituted a civil right for the purposes of Article 6.

As readers may recall, in July 2009 the Council of Ministers and the European Parliament finally adopted the legislative package on social security coordination which will see Regulation 883/2004 replace Regulation 1408/71. The implementing regulation was published in September 2009 and will come into force on 1 May 2010. As part of this reform, the EESSI (Electronic Exchange of Social Security Information) network is being

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2 See also the *Zeibek* case on nationality discrimination.
3 Regulation 987/2009. Regulation 988/2009 amending and completing Regulation 883/2004 was also finalised.
established. This will enable institutions in different countries to exchange information using electronic means and will replace the current system of paper forms. However, to take account of the needs of certain Member States to adapt their systems, provision has been made for a transition period of two years for the electronic exchange of data. It is planned that by March 2012 all Member States should be using electronic exchange for all social security areas covered by the Regulation.

1. OVERVIEW OF RECENT CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE (APRIL-SEPTEMBER 2009)

1.1 Sexual orientation
The status of discrimination on the basis of sexual orientation (in the area of social security) has been somewhat unclear under the ECHR. One the one hand, the Court of Human Rights appeared to allow such discrimination, at least for the present. In Mata Estevez the applicant had lived with another man for more than 10 years in a joint household but was unable to marry under Spanish law. Following the death of his partner, the applicant claimed a social security allowance for a surviving spouse. However, the Spanish authorities refused to grant a survivor's pension on the grounds that he had not been married. The Court held that according to its established case law ‘long-term sexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8’. However, the Court went on to acknowledge that the applicant’s emotional and sexual relationship related to his private life within the meaning of Article 8 and accepted that the question might arise as to whether the decision to refuse a pension could amount to a discriminatory interference in breach of Articles 8 and 14 taken together. It did not have to decide this as, even supposing that the refusal did constitute an interference with respect for private life, the Court found that this interference was justified under Article 8.2. However, in the subsequent Karner case, the Court upheld a claim in relation to discrimination concerning the succession of a tenancy by the long-term homosexual partner of the deceased. Although the Court in Karner referred, without dissent, to Mata Estevez, the decision cast some doubt on the status of the former case.

4 Mata Estevez v Spain, 56501/00, 10 May 2001.
In *M.W. v United Kingdom* the Court again had to consider a similar issue and again rejected the claim, albeit on different grounds. M.W. lived with his male partner in a homosexual relationship for 23 years until his partner’s death in 2001. Civil partnerships did not exist in UK law at that time. M.W. enquired about claiming a bereavement payment but was advised that he would not qualify as he was not married. Civil partnership legislation, which came into force in 2005, now extends entitlement to this benefit to persons who have entered a civil partnership.

The Court relied on the approach set out by the grand chamber in *Burden.* Although that case involved a claim by siblings, the Court took the opportunity to lay down a broader approach, holding that persons in a civil partnership were comparable to those who were married, while persons living together but not in a civil partnership could not be so compared. On that basis, the Court ruled that M.W. and his partner could not be compared to a married couple at the time and so no discrimination arose. The Court rejected the view that *Burden* implied that, where no civil partnership laws existed, same-sex relationships should be equated to marital relationships. The Court pointed out that the statement that it was impossible to gain formal recognition of the relationship was, in effect, a criticism of the timing of the introduction of civil partnership legislation in the UK. However, the Court ruled that at the relevant time there was insufficient consensus amongst the Contracting Parties on recognition of same-sex relationships to find a breach of the Convention on the part of the UK. This approach, as noted before, provides a clear framework for the Court to assess such issues. However, it leaves open the case of ongoing discrimination in a country which has currently not introduced civil partnership type laws and raises the question as to the approach the Court would now take if such an issue came before it.

### 1.2 Parental leave

Although there were a significant number of initial claims under Directive 79/7/EEC on equal treatment for men and women in social security, there have been rather few claims in recent years. *Gomez-Limon* involved a claim that calculating the applicant’s pension on the basis of the (reduced) contributions actually paid while on parental leave rather than on full

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6 11313/02, 23 June 2009 following the decision (of the same chamber) in *Courten v United Kingdom*, 4479/06, 4 November 2008 (which concerned tax treatment).

7 *Burden v United Kingdom*, 13378/05, 29 April 2008. See EJSS 10 (2).

8 The Court did not refer specifically to Article 8 or to *Mata Estevez*,
contributions was a breach of the parental leave agreement\(^9\) and/or the equality directive. Unsurprisingly the Court rejected these claims.

There is rather little in the parental leave agreement itself upon which to found such a claim. The recitals do ask Member States (where appropriate) to consider the maintenance of entitlements to relevant social security benefits while on such leave. Clause 2 of the agreement states (in the relevant part) that

6. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.

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8. All matters relating to social security in relation to this agreement are for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.

The Court ruled that clause 2(6) was both unconditional and sufficiently precise, and therefore could be relied upon by individuals as against the Member State.\(^{10}\) However, it also held that Clause 2(6) applied to entitlements derived from an employment relationship, acquired or being acquired, which the employee already has when she starts parental leave and not those acquired *during* parental leave.\(^{11}\) As regards clause 2(8), the Court unsurprisingly ruled that, given its wording, the extent to which an employee will be able to continue to acquire social security entitlements while on part-time parental leave must be determined by the Member States.\(^{12}\) It held further that Clause 2(8) does not impose obligations on the Member States, apart from that of considering and determining social security questions related to that framework agreement in accordance with national

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\(^9\) Directive 96/34/EC framework agreement on parental leave.  
\(^{10}\) Paras. 32-7.  
\(^{11}\) Paras. 39-40. Advocate General Sharpston also pointed out that clause 2(6) clearly did not apply to social security entitlements: Opinion, paras. 28-9.  
\(^{12}\) Para. 41.
legislation and, therefore, it could not be relied on by individuals before a national court against public authorities.

As regards directive 79/7, the Court adopted a ‘belt and braces’ (and another belt) approach in rejecting the claim. It argued that

1. An employee benefiting from parental leave (under Directive 96/34) who worked only part-time was in a specific situation which could not be compared to that of a man or woman who worked on a full-time basis.\(^\text{13}\)

2. Article 7(1)(b) of the directive allows Member States to exclude from its scope the acquisition of entitlements to social security benefits under statutory schemes following periods of interruption of employment due to the bringing up of children. Therefore, the acquisition of entitlement to social security benefits following periods of interruption of employment due to the bringing up of children is still a matter for the Member States to regulate.\(^\text{14}\)

3. Finally, it pointed out that the case law of the Court (e.g. allowing a retirement pension to be calculated \textit{pro rata temporis} in the case of part-time employment) was inconsistent with Ms. Gomez-Limon’s claim that the contributions during parental leave should be calculated on the basis of full-time work.\(^\text{15}\)

Although the outcome is clearly correct, the Court did not give any reason as to why persons on parental leave are not comparable to full-time workers.\(^\text{16}\) Secondly, article 7(1) does allow the exclusion of a number of areas from the scope of equal treatment. However, article 7(2) requires Member states periodically to examine matters excluded under paragraph 1 in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining the exclusions concerned. Article 7(1) does not refer to parental leave which did not exist in EU law at that time. Indeed, the purpose of Article 7(1)(b) was clearly to exclude existing advantages to persons caring for children (mainly women) so that

\(^{13}\) Para. 57.

\(^{14}\) Paras 60-1.


\(^{16}\) The Court relied on its decision in Case C-333/97 \textit{Lewen} [1999] ECR I-7243, but that case also does not provide any rationale for this approach.
such persons would not lose out through the introduction of equality legislation, and it is rather a leap by the Court to interpret the provision as entirely excluding the issue of rights (to be) acquired during parental leave.\textsuperscript{17}

The correct answer is clearly the final one that the Court’s consistent case law does not support the argument made by Ms. Gomez-Limon. As Advocate General, Sharpston pointed out, an attractive argument could be made for not reducing entitlement to benefits during parental leave so as to support substantive equality, but one could not read the existing state of EU law as imposing such a requirement.\textsuperscript{18}

1.3 Nationality discrimination

Zeïbek is the latest in a series of cases considered by the European Court of Human Rights concerning nationality discrimination which, however, have told us rather little about the principles underlying the Court’s approach to this issue.\textsuperscript{19} Ms. Zeïbek was a Greek citizen of Muslim religion. Upon the birth of her fourth child in 1982, she became the ‘mother of a large family’ for the purposes of Greek law, which entitled her to various social security benefits. Subsequently her husband and later again the entire family were deprived of Greek nationality. The Court, while setting out the rather lengthy circumstances, did not specifically address the compatibility of these decisions with the Convention but their compliance with any concept of natural justice would seem open to serious question. Greek nationality was later restored to Ms Zeïbek and three of her four children.

In 2001, Ms Zeïbek claimed a pension on the basis of her status as a mother of a large family. This was refused on the basis that only three of the requisite four children had Greek nationality. Despite the fact that – according to the position set out by the Court – this was clearly incorrect as a matter of Greek law,\textsuperscript{20} the Council of State upheld the refusal.\textsuperscript{21} Given the Court’s view that this decision was inconsistent with Greek law, it unsurprisingly held that Ms Zeïbek had suffered different treatment which was not based on any objective and

\textsuperscript{17} As Advocate General Sharpston pointed out, the provision is permissive not mandatory.

\textsuperscript{18} Opinion, paras. 54-5.

\textsuperscript{19} Zeïbek v Greece, 46368/06, 9 July 2009. See most recently Weller v Hungary, 44399/05, 31 March 2009 and Andreva v Latvia, 55707/00, 18 February 2009, both discussed in this journal: See EJSS 11(3), 291-99. At the time of writing (January 2010) the case is only available in French.

\textsuperscript{20} Judgment, paras. 21-28.

\textsuperscript{21} See Judgment, para 19.
reasonable justification and which was in breach of P1-1 of the Convention taken with Article 14 – without going into detail as to the precise basis for this finding.\textsuperscript{22}

One interesting point is that the Court rejected the applicant’s claim that the issue fell within the scope of Article 8 (right of respect for family life). Although the measure was clearly connected with national demographic, and in a broad sense, family policy, the Court ruled that the refusal of the pension for mothers of large families was not aimed at breaking up their family lives, nor did it have such an effect.\textsuperscript{23} The Court also pointed out that Ms Zeibek could not invoke the existence of a family relationship with her fourth daughter, who was married and had set up her own household, and where there were no supplementary elements bringing the issue within the scope of the concept of ‘family life’. This view would appear to be a sensible delimitation of the scope of Article 8. However, while the case can be distinguished on its facts from Moskal, the Court clearly adopted a more expansive reading of Article 8 in that case (see below).

1.4 Freedom of movement and social security

In Rüffler, a German national who had lived and worked in Germany took up residence in Poland in 2005. His income included an occupational pension from his former employer which, under a double taxation agreement, was subject to tax in Poland, but also to 14.3 percent health contributions deducted in Germany. Mr. Rüffler was entitled to health care in Poland under Regulation 1408/74 at the expense of the German authorities. He argued that the amount of tax he paid should be reduced by the amount of health contributions paid in Germany. This was refused, as the Polish authorities argued that only health contributions paid under the Polish health care law were deductible. At the hearing, however, the Polish authorities changed their position and argued that, on a correct reading of the law, Mr. Rüffler’s contributions should be deductible.

Unsurprisingly, given this background, the Court found that Article 18 EC precluded legislation which made the right to a reduction in income tax in respect of health contributions paid conditional upon the payment of those contributions in the taxing Member State. However, the Court’s reasoning is less than clear. As readers will recall, the Court has tended to drop its earlier ‘discrimination’ analysis in cases involving free movement of

\textsuperscript{22} Judgement, para. 51.
\textsuperscript{23} Para 32.
citizens and has moved to a simpler ‘barrier to free movement’ approach. The Court now looks to see whether the measure complained of constitutes a barrier to free movement and, if so, whether it is justified. In Rüffler, however, the Court reverted to the old discrimination analysis. However, albeit without explaining why it took two roads to the same goal (or that it was doing so), the Court also adopted the ‘barrier analysis.’ It found that the measure complained of would disadvantage citizens who had exercised free movement. No justification had been put forward by Poland, and the Court dismissed the suggestion that the fact that non-contribution of foreign taxpayers, who pay contributions to systems other than Poland, to the Polish health care system could constitute a justification.

A second case considered the implications of EU free movement law as it concerns tax measures and the German pension system. The Commission argued that German tax law concerning certain incentives for supplementary pensions was in breach of EU law. Specifically, the complaint concerned three aspects of the Riester pension legislation – (i) it denied cross-border workers and their spouses the right to a savings-pension bonus, unless they were fully liable to tax in that Member State; (ii) it did not permit the subsidised capital to be used for an owner-occupied dwelling, unless that dwelling was in Germany, and (iii) it required the repayment of the subsidy on termination of full liability to tax. The Court agreed with the Commission on all points and found the provisions to be in breach of Article 39 EC and article 7(2) of Regulation 1612/68. The Court ruled that the savings-bonus was a ‘social advantage’ within the means of article 7(2).

Reflecting the fact that Regulation 1612/68 specifically refers to nationality discrimination, the Court approached the issue from this perspective and was satisfied that the measure involved indirect nationality discrimination which was not justified by the arguments advanced by the German authorities. The Court adopted a similar approach to the other two issues. The case is interesting in illustrating the scope that free movement rules now have and the extent to which general rules, such as those

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24 See, for example, Case C-192/05 Tas Hagen and Tas [2006] ECR I-10451.
25 Paras. 59 and 64-70. The Court’s reliance on the pre-citizenship Case C-107/94 Asscher [1996] ECR I-3089 was also arguably unnecessary.
26 Paras. 71-87.
27 Paras. 72-3.
28 Paras. 77-80. As the Court pointed out, Mr. Rüffler’s health costs were, in any case, met by Germany.
29 Case C-269/07, Commission v Germany, [2009] ECR I-000.
30 Judgment, paras. 39-43.
31 Para. 52 et seq.
set out in Article 39 EC and Regulation 1612/68, apply even in areas where specific
Community legislation is limited or absent.

1.5 Cross-border access to health care and article 18EC

In von Chamier-Glisczinski, the claimant sought the reimbursement of care costs incurred in
Austria, although Germany was the competent state. Regulation 1408/71 states that benefits
in kind are to be provided on behalf of the competent institution by the institution of the place
of residence ‘in accordance with the provisions of the legislation administered by that
institution’. However, Austrian law does not provide a benefit-in-kind in these particular
circumstances. The German authorities therefore refused reimbursement of care costs
incurred in Austria. In this case the European Court of Justice was faced with the question as
to whether its case law on cross-border health care (under the free movement of services
provisions of the Treaty) should be extended to the citizenship provisions. Advocate General
Mengozzi took the view that it should and that national legislation which did not allow
reimbursement of institutional care costs in another Member State in any circumstances was
incompatible with Article 18EC. However, the Court did not follow this approach and
refused to extend its ‘free movement of consumers’ case law to all citizens.

The Court first clarified that the benefit in question was a ‘benefit-in-kind’ rather than a cash
benefit for the purposes of Regulation 1408/71 and that articles 19 or 22 of that regulation
did not require benefits to be provided outside the Competent State. Following its consistent
case law in the area of health care, the Court ruled that this did not mean that the person’s
access to health care was ‘governed exclusively by the legislation of the Member State of
residence’, so that, where the legislation of that Member State did not provide for the grant of
benefits in kind, Regulation 1408/71 did not prevent the competent institution from granting
such benefits in kind. The Court, therefore, turned to the key question of whether the non-
reimbursement of care costs was compatible with the Treaty provisions. On the facts (which
were, again, less clear than might be desired), the Court held that Articles 39EC and 49EC

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33 Judgment, paras. 48-9.
34 It did not find it necessary to decide which applied.
35 Para 55.
were not applicable. Therefore, it turned to the citizenship provisions and, in particular, Article 18EC.

Based on the Court’s recent case law, it is clear that a measure – such as non reimbursement of health care costs in another Member State – which can form a barrier to the exercise of the right to free movement of citizens must be justified on objective considerations proportionate to the legitimate aim of the national provisions. Both the Advocate General and the Court (up to a point) adopted this approach. Advocate General Mengozzi relied on the Court’s Article 49EC approach in *Smits and Peerbooms*, where the Court ruled that a requirement of prior authorisation (in order to assume responsibility for hospital costs in another Member State) may be justified by the double objective of maintaining a balanced medical and hospital service open to all and the efficient management of financial resources which may be made available for health care. He took the view that ‘[a]nalogue considerations apply with regard also to benefits for persons reliant on care provided in the framework of specialised centres’. A requirement of prior authorisation for the purpose of obtaining reimbursement of care costs would not, therefore, be contrary to Article 18EC, provided that the conditions governing the granting of authorisation were justified in relation to such objectives, were based on objective criteria, were non-discriminatory and predetermined, and were in keeping with the requirement of proportionality. However, in the present case, the claim was rejected solely on the basis of Regulation 1408/71. He argued that Regulation 1408/71 did not exclude the right to reimbursement of expenses, within the limits of the cover provided for by such a scheme, by virtue of Article 18EC and that the rejection of Ms Von Chamier-Gliszckinski’s claim could not, therefore, on any view be regarded as legitimate.

The Court, however, did not seek objective justification in national policy. Rather it referred to Article 42 EC which provides only for ‘the coordination, not the harmonisation, of the legislation of the Member States’. The Court ruled that ‘substantive and procedural

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36 Paras. 72-3 and 74-7. The Court obviously left open the question as to what the outcome would have been had Article 49 EC applied.
37 Such as Case C-406/04 *De Cuyper* [2006] ECR I-06947 29; and Case C-192/05 *Tas Hagen and Tas* [2006] ECR I-10451.
38 Opinion paras. 71-8; Judgment paras. 78-83.
40 Opinion, para 76.
41 Opinion, para. 77.
42 Para. 78.
differences between the social security systems of individual Member States, and hence in the rights of persons who are insured persons there, are unaffected by that provision’. 43 ‘In these circumstances’ the Court held that Article 18(1)EC could not ‘guarantee to an insured person that a move to another Member State will be neutral as regards social security’. Further, ‘in view of the disparities existing between the schemes and legislation of the Member States in this field, such a move may, depending on the case, be more or less advantageous or disadvantageous for the person concerned, according to the combination of national rules applicable pursuant to Regulation 1408/71’. 44 Thus, the Court argued, the non-reimbursement arose from the combined application of German and Austrian legislation in accordance with Regulation 1408/71. 45 Since the Member States ‘may freely choose the mode of organisation of their sickness insurance schemes, one of those schemes cannot be considered to be the cause of a discrimination or a disadvantage for the sole reason that it has unfavourable consequences when it is applied, in accordance with the coordination mechanisms laid down in application of Article 42EC, in combination with the scheme of another Member State’.

Thus the Court, in effect, read Article 18EC subject to Article 42EC. This is certainly a plausible approach to Article 18EC. However, it is not one which has been adopted by the Court in a series of social security cases. Not only is the Court’s approach not consistent with these cases, it is positively inconsistent in that the rationale adopted in von Chamier might have led to quite different outcomes in cases such as Tas Hagen and Petersen. 46 The Court’s approach is also internally inconsistent in that it had already held that Article 42 EC and Regulation 1408/71 did not prohibit a Member State from granting broader social protection cover than that arising from the application of that Regulation. 47 Therefore, it is rather difficult to see how one could justify a restrictive interpretation of Article 18EC on the basis of Article 42EC, when such a restriction is not only not stated in that Article, but would ‘exceed [its] purpose and scope’. 48

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43 Judgment, para. 84.
44 Para. 85.
45 Though one might ask how this statement can be consistent with the Court’s earlier position that articles 19 and 22 of Regulation 1408/71 did not prevent the competent institution from granting such benefits in kind.
46 Case C-192/05 Tas Hagen and Tas [2006] ECR I-10451; Case C-228/07 Petersen [2008] ECR I-000.
47 Para. 56.
48 Ibid.
From the individual’s point of view, the patient-centred approach which has featured in the Court’s Article 49 EC case law on cross-border access is obviously attractive. However, there may be much to be said – from the point of view of having an EU-wide system of social security co-ordination which actually functions effectively – in giving more weight to Community legislation (adopted by the Community legislature).\footnote{Although the same argument could have been made as to the Article 49EC case law on cross-border health care.}

The problem with this decision, however, is that it is not consistent with the approach taken in a number of earlier decisions and it does not seek to explain why a different approach has been adopted. It also means that rights under Article 18 EC in this area are more limited than those under Article 49 EC, whereas in previous cases the Court had granted more extensive rights under Article 18 EC than it had under the earlier free movement provisions (again without explanation).\footnote{As, for example, in Tas Hagen. Of course, Article 49EC has a different role to Article 18EC and there is no reason why different consequences should not flow from the exercise of different freedoms. The point is that both consistency as to outcomes and some rationale for such differences would be desirable.}

The case highlights a number of issues concerning the Court’s case law, particularly in the area of social security:

1. Regulation 1408/71 is sometimes found to be exclusively binding and sometimes not (as in Bosmann)\footnote{Discussed in a number of the articles in the special edition of this Journal, EJSS 11(1&2). See also Oxana Golynker, ‘Co-ordination of social security schemes in the European Union: The Rashomon effect in Bosmann’, (2009) 16.2 Journal of Social Security Law 61.} without any clear rationale as to why the Court chooses different approaches (or even, in some cases, an acknowledgement that it is so doing).

2. The Court is increasingly choosing to uphold Community legislation (as in Vatsouras)\footnote{Case C-28/08, Vatsouras [2009] ECR I-000.} but to challenge national legislation on the basis of Treaty provisions (see para 66 of the Von Chamier judgement). This may be an elegant legal solution which allows the Court to uphold principles of EU law without directly challenging the Community legislature. However, it can also lead to total confusion in practice and to an almost unworkable administrative situation.\footnote{As, for example, the fact that we now seem to be doomed to have two parallel legal systems of cross-border health care (again discussed in the special issue of this Journal). See EJSS 11(1&2).}
3. Finally, while a degree of inconsistency is inevitable in any legal system, it is hardly acceptable for the Court to adopt a different approach to Article 18 EC – contrary to the opinion of the Advocate General – without making any effort to explain why it is so doing.

1.6 Reviewing incorrect decisions to award benefits

In the Moskal case, the European Court of Human Rights came to a somewhat surprising ruling, holding, by a narrow majority, that the decision of the Polish authorities to terminate payment of an early retirement pension, to which it was accepted the person was not entitled, had been in breach of Article 1 of Protocol 1 (P1-1) concerning the peaceful enjoyment of possessions. The judgement may, at best, be confined to the specific facts of the case (which are discussed below). However, it is probably more correct to say that the majority judgement is simply incorrect.

The circumstances of the case were that Ms. Moskal, who was in employment in Poland, had a child with various disabilities including asthma. She claimed an early retirement pension for persons raising children who require ‘constant care’ due to a serious health condition. She submitted a medical certificate from the health service institution specifying the child’s state of health and his need for constant care. In August 2001, the social security board granted the applicant’s claim but suspended it as she was still in employment. Two days later she resigned and the pension was put into payment. However, for reasons which are not fully clear from the judgement, the social security board re-examined the case and, in June 2002, issued a further decision revoking the pension from 1 July 2002. This was on the grounds that the condition with which the child had been diagnosed was not listed in the relevant regulation and did not justify the award of a pension on the basis of the need for constant care. It appears that similar reviews were carried out in a relatively large number of cases. The Polish authorities did not seek repayment of the pension already paid and Ms. Moskal was, in October 2005, awarded a pre-retirement benefit (payable at a lower rate and backdated to October 2002). The decision was upheld by the national courts.

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54 Moskal v Poland, 10373/05, 15 September 2009.
55 About 120 similar applications are before the ECtHR (para 28).
56 The maximum backdating allowed under Polish law. Again the reason for this delay to 2005 is not explained.
1.6.1 Was P1-1 engaged?

The Polish authorities argued that P1-1 did not extend to erroneously acquired rights to pensions and welfare benefits, rights which had never arisen under domestic law. The Court set out the general principles applicable and quoted *Stec* to the effect that

Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.\(^{57}\)

The Court went on to point out that the fact that a property right was subject to revocation in certain circumstances did not prevent it being a possession (at least until revoked).\(^{58}\) On the other hand, a conditional claim which lapsed as a result of the non-fulfilment of the condition did not amount to a possession for the purposes of P1-1.\(^{59}\)

Applying these principles to the facts of this case, the Court found that a property right was generated by ‘the favourable evaluation of the applicant's dossier attached to the pension application which had been lodged in good faith and by the Social Security Board's recognition of the right’.\(^{60}\) This broad interpretation of the scope of P1-1 might be welcomed by many welfare lawyers. However, it is not clear that it is consistent with some of the Court’s earlier case law. For example, in the *Ouzounis* case, the Court of Human Rights held that no property right within the meaning of P1-1 was in dispute.\(^{61}\) In that case, the applicants had claimed a readjustment of their retirement pensions. The claim had been upheld by the administrative court at first instance but had been subsequently overturned by the administrative court of appeal. The Greek government argued that P1-1 did not apply as the applicants did not have a ‘possession’ within the meaning of that provision. The Court of Human Rights, noting that the appeal court had ruled that the applicants did not have a right to readjustment of the pension, held that as a consequence they had never had a definitive

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\(^{57}\) Para 39. *Stec and Others v. the United Kingdom*, 65731/01 and 65900/01, July 2005, ECHR 2005-X, (2005) 41 EHRR SE 295. This is, in fact, a quote from *Stec* (para 51) although this is not very clearly acknowledged in the judgment. However, the argument surely was whether Ms. Moskal had an ‘assertable right under domestic law’ and the Polish courts had held that she did not.

\(^{58}\) Para 40 citing *Beyeler v. Italy*, 33202/96, § 105, ECHR 2000-I.

\(^{59}\) *Prince Hans-Adam II of Liechtenstein v. Germany*, 42527/98, §§ 82-83, ECHR 2001-VIII, and *Rasmussen v. Poland*, 38886/05, § 71, 28 April 2009 (in the latter case the loss of a pension based on a false declaration was found not to involve an interference with property rights under P1-1).

\(^{60}\) Para 45.

claim against the Greek state. In addition, the Court held that the applicants never had a legitimate expectation to acquire a property right and accordingly held that there was no violation of P1-1.

1.6.2 The termination of the benefit

Ms. Moskal argued that the termination of her pension was an unjustified deprivation of property and sought financial compensation equivalent to the pension which would have been payable up to 2015 when she qualified for a general retirement pension. It was agreed that the revocation of the pension amounted to an interference with the applicant’s rights under P1-1.62 The Court had, therefore, to decide if this was in accordance with law, based on a legitimate aim and proportionate to that aim. The Court decided that the decision to revoke the pension was in accordance with Polish law. It also agreed that the objective of correcting a mistake of the social security authorities which had resulted in the applicant ‘unjustly acquiring a right to the ... pension’ pursued a legitimate aim – i.e. to ensure that the public purse was not called upon to subsidise undeserving beneficiaries of the social welfare system without limitation in time.63 However, the Court ruled that the decision was not proportionate. It ruled that

... in the context of property rights, particular importance must be attached to the principle of good governance. It is desirable that public authorities act with the utmost scrupulousness, in particular when dealing with matters of vital importance to individuals, such as welfare benefits and other property rights. In the instant case, the Court considers that having discovered their mistake the authorities failed in their duty to act in good time and in an appropriate and consistent manner.64

The Court unsurprisingly conceded that ‘as a general principle, public authorities should not be prevented from correcting their mistakes, even those resulting from their own negligence’.65 However, the majority argued that this general principle could not ‘prevail in a

62 Para 53.
63 Para 62-3.
64 Para 72. Note that the ‘relatively long’ ‘delay’ (para 69) in this case ran from September 2001 to June 2002.
65 Para 73. The Court appears to have assumed (although without clarifying the basis for its assumption) that the error in this case resulted from the negligence of the authorities.
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’. It ruled that

If a mistake has been caused by the authorities themselves, without any fault of a third party, a different proportionality approach must be taken in determining whether the burden borne by an applicant was excessive.

The Court went on to refer to a number of factors including (i) the total loss of her pension which constituted her sole source of income; (ii) the potential risk, in view of her age and ‘economic reality’ in the underdeveloped region where she lived that she would have considerable difficulty in securing new employment, and (iii) the long delay in determining her entitlement to an alternative early retirement pension. The relevance of factors (ii) and (iii) is somewhat unclear especially as the Court appears to have had no evidence as to the reasons for the delay in granting the new pension. As to the state of the labour market, would the decision have been proportionate if the local labour market had been booming?

In view of these considerations, the Court found that ‘a fair balance has not been struck between the demands of the general interest of the public and the requirements of the protection of the individual’s fundamental rights and that the burden placed on the applicant was excessive’. Not only that but the majority awarded €15,000 – roughly equivalent to an award of pension until 2015 (or at least until her son attained the age of majority in 2012).

The Court did not find it necessary to give separate examination to the applicant’s argument that the reopening of her social security decision was in breach of Article 6.1 of the ECHR. Surprisingly, the majority indicated that it considered that ‘the principle of legal certainty’ (derived from Article 6.1) applied to a ‘final legal situation, irrespective of whether it was brought about by a judicial act or an administrative or, as in this case, a social security decision’. This application of Article 6 to the initial decision making process is entirely inconsistent with the Court’s normal approach. The Court also considered the applicant’s claim under Article 8 and held that as the benefit concerned aimed to allow parents to stop working to look after their sick children and constituted the basis of the family budget,

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66 Para. 73.
67 Para. 76.
68 Para 82.
‘divesting the applicant of the ... pension must constitute an interference with her right to respect for her family life, given that the measure in question entails severe consequences for the quality and enjoyment of the applicant’s family life and necessarily affects the way in which the latter is organised’. 69 This is a very expansive reading of the scope of respect for family life and one which, if generally applied, would bring many social security issues within the scope of Article 8. Again, however, given its decision on P1-1, the Court did not give separate consideration to this issue. Finally, the Court also considered the applicant’s argument that she had been discriminated against on the basis of her place of residence (in that, she argued, the reviews had been carried out only in her region of residence). The Court was prepared to assume that place of residence was a ground falling within Article 14 but found no evidence of discrimination on the facts.70

The minority (led by Judge Bratza, president of the chamber) disagreed with the majority that the revocation of pension was not proportionate. They accepted that the applicant had acted in good faith, had resigned her job following the award of pension and had suffered serious financial consequences as a result of the decision to revoke the pension. The minority was also satisfied that the blame for what had occurred lay exclusively with the social security authorities.71 The minority accepted that it would have been disproportionate had the authorities sought to recover the pension erroneously paid. However, they argued that it would

… upset any fair balance if, once having discovered their mistake, the authorities were precluded from ever redressing its effects and were required to perpetuate the error by continuing to pay the pension which had been wrongly granted. This would, as the judgment expressly recognises, not only lead to the unjust enrichment of the recipient but would have an unfair impact on other individuals contributing to the Social Security fund, in particular those who were denied benefits because they failed to meet the statutory requirements; it would also amount to sanctioning an improper allocation of scarce public resources.72

69 Para. 93
70 Para 100.
71 Para 3 of the minority opinion. Unfortunately the exact circumstances are not explained.
72 Para 4.
The decision is a potentially important one in terms of the powers of social security authorities in reviewing awards of pension – something which is, of course, very common in practice. The arguments in this case did not focus on procedural issues – as in the famous American case of *Goldberg v Kelly*\(^73\) – but rather on the substantive property rights of the applicant. Even assuming that the Court was correct to hold that the claim fell within the scope of P1-1,\(^74\) the decision that the revocation of a pension, to which it was accepted the applicant was not entitled, was in breach of P1-1 is surprising. Clearly, the applicant had been put in a very difficult situation and, it appears, the reason was some failure in the procedures of the social security authorities. In this particular situation, the applicant had clearly resigned from her job on the basis of the decision to award the pension. Nonetheless, the implications of the Court’s decision are that where a social security authority, incorrectly and through its own error, awards a pension to a person in the difficult circumstances that the applicant was in, it cannot revoke the pension *at all*. This is clearly unacceptable and, as the minority points out, does not represent a ‘fair balance’ between the public interest and individual rights. On the (limited) basis of what is set out in the judgement, while the social security authorities were (apparently) responsible for the original erroneous award, it is not clear the authorities breached the principles of ‘good governance’ in revoking the pension. Clearly, the applicant should have been awarded the alternative pension to which she would have been entitled from the date of the revocation. However, this aspect of the case was not investigated by the Court and the reasons for the delay in awarding this pension are not clear.\(^75\) Thus it is argued that the analysis of the minority is correct and that this case should not form the basis for a general approach by the courts to the review of incorrect awards of social security. It is, however, interesting to note that the Court unanimously would have prevented any attempt to recover benefits incorrectly paid and this may have implications in jurisdictions which allow recovery of overpayments even in the absence of any fault on the part of the claimant.

### 1.7 Employment activity scheme as a civil right

*Mendel* raised the important question of the scope of Article 6 of the Convention which provides the right of access to a court concerning disputes as to civil *rights* and obligations. Ms. Mendel had been participating in a Swedish employment activity scheme. Her

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\(^74\) One might in principle welcome this approach so as to provide a review of decisions to revoke a pension. However, the Court’s judgment is lacking in a clear rationale as to why a ‘possession’ to which a person is not actually entitled in national law should be considered as a possession.

\(^75\) The minority speculate that it may have been due to the legal proceeding brought by the applicant.
involvement was terminated by the Swedish employment service on the basis that she had not been acting in a proper manner in relation to the demands placed on her. She appealed this decision to the National Labour Market Board (which it appears was not an independent and impartial tribunal for the purposes of Article 6) which rejected her appeal. Swedish law specifically provided that no further appeal was possible.

The Swedish courts had ruled that the right of access to a court under Article 6 of the ECHR overruled such national provisions and the Court accepted that a right to appeal against decisions by national authorities that concerned a person's 'civil rights and obligations' under Article 6 could be found in the Swedish case law, irrespective of any statutory prohibitions against appeals. Nonetheless, it pointed out that the National Labour Market Board had expressly told Ms. Mendel, who was not legally represented, that no appeal was possible. In the circumstances, the ECHR ruled that the theoretical right of access did not provide ‘a practical, effective right of access to court’.76 The Swedish Administrative Procedure Act of 1986 had subsequently been amended to provide that appeal to a court is always allowed if required by the ECHR, overruling any inconsistent provisions of national law.

The Swedish authorities argued that access to the activity guarantee scheme was discretionary under Swedish law and, therefore, Article 6 was not engaged. The Court accepted that ‘a “right” to be assigned to the activity guarantee scheme could not, on arguable grounds, be said to be recognised under national law’.77 However, it went on to consider whether a person who had already been assigned to the activity guarantee scheme could be considered to have gained, on at least arguable grounds, a right not to have their assignment to the scheme arbitrarily revoked. The Court noted that the national law laid down tangible criteria, the existence of which could be examined without particular difficulties by the competent authorities and, subject to appeal, the national courts.78 The Court also considered that the relevant provision did not leave the domestic authorities unfettered discretion or even a wide margin of discretion. It further noted that an unemployed benefit claimant could be forced to participate in the activity guarantee scheme. When that person entered the activity guarantee scheme, he or she would no longer be entitled to unemployment benefits. A revocation of the assignment to the activity guarantee scheme would therefore have serious economic

76 Judgment, par 81.
77 Para 46.
78 Para 50.
consequences for the individual involved. It concluded the applicant's claim not to have her assignment to the activity guarantee scheme arbitrarily revoked did concern a ‘right’ which could arguably be said to be recognised under Swedish law.

It is to be welcomed that persons involved in employment activity schemes, which are of growing importance in Europe, should have a right to an ‘independent and impartial’ review of at least some decisions concerning scheme participation. However, the Court’s approach may be subject to some criticism. The Court’s decision that a ‘right’ was involved appears to have focussed solely on the fact that the decision to terminate her participation was based on ‘tangible criteria’ and led to ‘serious economic consequences’. With respect, neither factor speaks directly to whether this issue involves a civil right. Although the Court accepted that whether a right can be said to exist ‘must be answered solely with reference to domestic law’, the decision contains little, if any, analysis of the status of decisions to terminate such participation in Swedish law.

The Court’s overall approach in this area and its failure to develop the content of Article 13 means that there are significant areas of social security law – such as the UK child support legislation and (apparently) access to the Swedish employment activity programme – for which no right to an independent and impartial review is available, while in areas such as that considered in this case, the Court is forced to rely on somewhat dubious reasoning to bring the issue within the scope of Article 6.83

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79 Paras 51-2.
80 Para 54.
81 Para 42. See, in contrast, Kehoe v United Kingdom, 2010/06, 17 June 2008 concerning the UK Child Support Act where the Court relied heavily on the analysis by the national court.
82 See 84
83 A less impartial observer might suggest that force is rarely required.