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Overview of recent cases before the European Court of Human Rights and the European Court of Justice (September-December 2011)

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In the period, there was an interesting case before the European Court of Justice concerning the equal treatment Directive (79/7), while the European Court of Human Rights has given some important judgements in a number of cases on social security as a property right.\(^1\) Finally, the Court of Human Rights has again addressed the position as to when and why an oral hearing is required in social security cases but without greatly clarifying anything.

1. INDIRECT DISCRIMINATION

The Brachner case concerned the disproportionate impact of Austrian rules concerning the uprating of pensions.\(^2\) Ms Brachner was in receipt of a small old age pension. She was not entitled to receive an additional ‘compensatory supplement’ because her spouse received a monthly pension which brought the combined household income to above the relevant amount. She argued that the rules were indirectly discriminatory in so far as pensions of an amount lower than the standard rate were increased by only 1.7%, whereas higher pensions (of between €747 and €2160) were increased by a greater amount.\(^3\) The evidence indicated that women made up slightly over half (54%) of total pensioners. However, almost three quarters (73%) of those who received a pension equal to or lower than €750 per month were women. Thus women were much more likely to receive the lower pension increase.

The Court of Justice, which largely followed the approach of Advocate General Trstenjak, unsurprisingly ruled that an annual pension adjustment scheme came within the scope of Directive 79/7 on equal treatment for men and women in social security. Second, and again unsurprisingly given the statistical data, the Court ruled that the Directive precluded a

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\(^1\) In Paillet v France, 16264/07, 11 October 2011, the Court followed the decision of the Grand Chamber in Stummer v Austria, 37452/02, 7 July 2011 (discussed in the last issue of this Journal) in ruling that the exclusion of prisoners from detriment insurance was not in breach of Article 14.

\(^2\) Case C-123/10 Brachner [2011] ECR I-000.

\(^3\) The rationale for this approach is not clear from the judgement.
pension adjustment which benefited a significantly higher percentage of male pensioners (unless it was objectively justified).

The key question, as usual in the case of indirect discrimination, was whether the difference in treatment could be justified. The Austrian authorities claimed that the unequal treatment was objectively justified for the following reasons: first, because women contributed for a shorter period of time than men since they retired earlier; second, because women received their pension for longer than men because of their longer life expectancy; and, finally, because of the increase in the compensatory supplement standard rate of €21 per month for pensioners living alone and approximately €29 per month for pensioners living with another person.

The referring court took the view, first, that the justification relating to the shorter period of contributions by women must be rejected since the annual adjustment aimed to maintain the purchasing power of pension holders by indexing the pension to consumer prices, and that that adjustment was not, therefore, linked to the amount of the contributions or to the duration thereof. Second, it found that the fact that, on average, women receive their pension for a longer period because of their longer life expectancy also could not justify the difference in treatment in question, since that is a factor directly based on sex which, in the light of the case-law of the Court of Justice, cannot, by its nature, be taken into account. Finally, with regard to the justification based on the payment of the compensatory supplement standard rate, the referring court noted that a significantly larger number of women than men did not receive any compensatory supplement and could not, therefore, benefit from the increase applicable to that supplement.

The Austrian court noted that taking into account of the spouse’s income in determining entitlement to a benefit could be justified in the case of a minimum subsistence payment. However, it did not follow that spousal income could also be taken into account in the context of an annual pension adjustment measure where the essential purpose was to maintain the purchasing power of the pension. In order to clarify the issues, the court asked:

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4 Judgement, para. 68.
5 Para 31 et seq.
‘May a disadvantage for female pensioners arising from the annual increase in their pensions be justified by the earlier age at which they become entitled to a pension and/or the longer period during which they receive a pension and/or by the fact that the standard rate for a minimum income, provided for under social law (compensatory supplement standard rate), was disproportionately increased, where the provisions concerning the payment of the minimum income provided for under social law (compensatory supplement) require account to be taken of the pensioner’s other income and the income of a spouse living in the common household, whereas in the case of other pensioners the pension increase takes place without account being taken of the pensioner’s other income or the income of the pensioner’s spouse?’

With regard to the first justification (earlier age of retirement) the Court agreed that the adjustment scheme was designed to maintain the purchasing power of the pension and did not represent consideration for the contributions paid. It could not, therefore, justify the difference in treatment.\(^8\) The Court also ruled that there was no link between the fact that women receive their pensions for a longer period by reason of their longer life expectancy and the difference in treatment provided for by the adjustment scheme.\(^9\) Turning to the third possible justification, the Court accepted that supplements to a minimum income benefit, even if they principally benefit men due to the rules requiring the taking into account of the spouse’s income, were in principle justifiable under Directive 79/7. Likewise, the exclusion from entitlement to the compensatory supplement resulting from the aggregation of spouses’ income, even if mainly affects female pensioners, might be justifiable in the light of the objective of ensuring that the pension does not fall below the social minimum. However, the Court ruled that:

\[\text{‘in so far as the exceptional increase in the compensatory supplement standard rate is relied on as a justification for the exclusion of the holders of minimum pensions from the exceptional increase provided for by the adjustment scheme at issue in the case in the main proceedings, on the ground that that first-mentioned increase is intended to compensate for the effects of that exclusion, such an}\]

\(^8\) Judgement, para 79.
\(^9\) Para 83.
income aggregation rule must also be justifiable in the light of the particular objective of the adjustment scheme.\textsuperscript{10}

This was not the case where there was no relationship between the aggregation of income and the specific objective of that adjustment scheme, which, as already noted, sought to maintain the purchasing power of the pensions. The Court also noted that, for a very large majority of women in receipt of a minimum pension, the increase in the compensatory supplement standard rate was not such as to cancel out the effects of the differential increases.\textsuperscript{11}

Accordingly the Court ruled that article 4(1) of Directive 79/7 must be interpreted as meaning that if the referring court should conclude that a significantly higher percentage of female pensioners have suffered a disadvantage because of the exclusion of minimum pensions from the exceptional increase provided for by the adjustment scheme, that disadvantage could not be justified by the fact that women who have worked become entitled to a pension at an earlier age or that they receive their pension over a longer period, or because the compensatory supplement standard rate was also subject to an exceptional increase. Thus the Court did not accept any of the justifications advanced. It will be interesting to note the final outcome of this case given that very few indirect discrimination cases have been successful under Directive 79/7.\textsuperscript{12}

2. PROPERTY RIGHTS AND HUMAN RIGHTS

The Court of Human Rights has considered the role of P1-1 in the context of limitations imposed on benefit rights either by amendment of the legislation or through the imposing of pension ‘caps’. At least some members of the Court appear to be prepared to impose more rigorous standards on contracting States requiring that where such limitations are imposed they should, in order to be proportionate, be phased and partial. However, it is by no means clear that the Court as a whole has a consistent view of how the general principles of P1-1 should be applied in this area.

\textsuperscript{10} At para 94.
\textsuperscript{11} At 101.
\textsuperscript{12} The Austrian constitutional court (Verfassungsgerichtshof) has rejected challenges to the rules under the Austrian constitution; see opinion, para. 3.
In Lakićević, the applicants were lawyers who, after retirement, were entitled to old age and disability pension.\(^{13}\) All recommenced to work part time but, in the light of new legislation, their rights to pensions were suspended from 2004 until such time as they ceased professional activity.\(^{14}\) The Pension and Disability Insurance Act 2003 provided that a person’s pension shall be suspended should he or she resume working or establish a private practice, for as long as this activity continues.

The Court accepted that the pensions fell within the scope of P1-1 which provides (in relevant part) that

> ‘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.’

In order to be justified, any interference by a public authority with the peaceful enjoyment of possessions (or deprivation of such possessions) must be lawful, must pursue a legitimate aim, and be proportionate. The Court expressed some doubts as to whether the reduction in pensions had been in accordance with the law\(^{15}\) but, assuming that it was in accordance with the law, it considered whether the interference pursued a legitimate aim and if there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court may accept that the aims pursued were social justice and the State’s economic well-being, both of which are legitimate.

As regard the issue of proportionality, the Court pointed out that to be proportionate

> ‘a “fair balance” must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s

\(^{13}\) Lakićević v Montenegro and Serbia, 27458/06, 37205/06, 37207/06 and 33604/07, 13 December 2011.

\(^{14}\) However, a separate provision allowed persons who obtained pension rights in accordance with the relevant legislation in force before this Act entered into force to retain these rights afterwards at the same level.

\(^{15}\) At para. 66.
fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden.\textsuperscript{16}

The Court noted that, when the applicants’ pensions were suspended in 2004 and 2005, this was not due to any changes in their own circumstances, but to changes in the law. This, the Court said,

‘particularly affected the applicants, as it entirely suspended the payment of the pensions they had been receiving for a number of years, taking no account of the amount of revenue generated by their part-time work.’\textsuperscript{17}

The Court set out a number of reasons why it felt that the applicants had been disproportionately burdened. First, and though it had no information on the issue, the Court considered that the pension constituted a considerable part of their gross monthly income. Second, the Court noted that the change in the law affected not only the applicants’ right to receive their pension in the future but partly also the payments already received.\textsuperscript{18}

Given these facts, the Court found that, as individuals, the applicants were made to bear ‘an excessive and disproportionate burden’. Even having regard to the wide margin of appreciation enjoyed by the State in the area of social legislation, the impact of the measure on the applicants’ rights, even assuming its lawfulness, could not be justified by the legitimate public interest relied on by the Government. The Court suggested that it could have been otherwise had the applicants been obliged to endure ‘a reasonable and commensurate reduction’ rather than the total suspension of their entitlements or if the legislature had afforded them a transitional period within which to adjust themselves to the new scheme.\textsuperscript{19} Therefore, the Court found a breach of P1-1.

\textsuperscript{16}At para. 62.
\textsuperscript{17}At para. 69. It appears that the Court is suggesting that any withdrawal of pension should be proportionate to the amount of income received from work.
\textsuperscript{18}At paras. 70-71.
\textsuperscript{19}At para. 72.
prior to the change was legitimately entitled to such a pension). In the current case, leaving aside the correct interpretation of national law, it is difficult to see why a national government should not be able to decide that a person cannot receive a pension while in employment. This may or may not be good policy but it is surely a question that national governments are best placed to decide. However, Lakićević is a reminder to national governments that at least some members of the Court are prepared to set aside such decisions and to replace them with their own view of what is proportionate, even in the absence of any suggestion of discrimination, and to require that any such changes be phased or partial.

In Valkov, although the applicant was unsuccessful, the same section of the Court (including a number of the same judges) had subjected a pension cap to a much more searching examination than in previous cases. Here Bulgarian pensioners whose maximum pension amount had been capped complained that this limitation was in breach of P1-1. The Court accepted that the pension fell within the scope of P1-1 but did not consider that the cap amounted to a ‘deprivation of possessions’. Rather it was to be regarded as an interference with the applicants’ right to the peaceful enjoyment of their possessions. Unlike the Montenegrin case there was no question as to the lawfulness of the limitation. As to its justification, the Bulgarian constitutional court had ruled that the limitation was ‘consistent with the requirements of social justice’. The Court agreed, holding that it did ‘not consider that it was illegitimate for the Bulgarian legislature to have regard to social considerations, or that its judgment in that respect was manifestly without reasonable foundation.’

20 Kjartan Ásmundsson v. Iceland, 60669/00, ECHR 2004-IX.
21 Though it is surely unfortunate that a critical aspect of the case should be decided on the basis of assumptions as to what the law was.
22 The issue of retrospective effect could, of course, have been addressed separately had the Court wished to do so.
24 At para. 88.
26 At para. 92.
Finally, the Court considered proportionality and highlighted five issues. The applicants’ main argument against the cap was that, unlike modern-day workers, they were bound to pay contributions on the full amount of their salaries and, therefore, should be entitled to pensions based on those contributions. The Court rejected this view, pointing out that until 1996, contributions were payable solely by employers. More importantly, the argument misconceived the relationship between social security contributions and first-tier pensions in Bulgaria. Unlike the second- and the third-tier schemes, where contributions are directly linked to the expected benefit returns, first-tier contributions did not and do not have an exclusive link to retirement pensions. This is due to the unfunded, pay-as-you-go character of the first pillar of the Bulgarian pension system. So the Court found that it was impossible to regard the payment of higher social security contributions as a sufficient ground for entitlement to matching pension benefits.

Second, the Court noted that the pensions cap was put in place and maintained at a time when the Bulgarian pension system was undergoing a comprehensive reform, as part of the country’s transition from a State-owned and centrally planned economy to a market economy. In that context, the cap, as well as its extensions, could be seen as a transitional measure accompanying the overall transformation of the pension system. The Court has consistently recognised that Contracting States have a wide margin of appreciation when passing laws in the context of a change of political and economic regime.27

Third, the Court emphasised that, unlike the subsequent Lakićević case, the cap involved a ‘reasonable and commensurate reduction’ rather than a total loss of pension entitlements.28 The cap, while sometimes resulting in considerable reductions of the amount of their monthly pensions, did not totally divest the applicants of their only means of subsistence. The Court found that applicants were the top earners among the more than two million persons in Bulgaria who are currently in receipt of a retirement pension. They could hardly, therefore, be regarded as being made to bear an excessive and disproportionate burden, or as having suffered an impairment of the essence of their pension rights. Fourthly, the Court pointed out that public pension schemes are based on the principle of solidarity between contributors and beneficiaries. They are an expression of a society’s solidarity with its vulnerable members.

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27 At para. 96.
28 At para. 97.
and could not be likened to private insurance schemes. Finally, the Court noted that the amount of the cap and the manner in which it is calculated had evolved, being gradually increased throughout the years, with the result that, as a general trend, considerably fewer pensioners are affected by it.29 Accordingly the Court (Judge Panova dissenting) found that the limitation was proportionate and rejected the challenge.

The applicants had also argued that they were being discriminated against contrary to Article 14 of the Convention. They compared themselves, firstly, to those pensioners whose pensions fell below the cap and who thus remained unaffected by it and, secondly, to high-ranking officials whose pensions were exempted from the cap. The Court rejected the first comparison on the same basis that it had rejected the claim under P1-1, i.e. assuming it fell within the scope of Article 14, any difference in treatment was justified. The Court was prepared to accept that holding, or otherwise, of high office could be regarded as ‘other status’ for the purposes of Article 14. However, the Court was not prepared to hold that the applicants were ‘in a relevantly similar situation to’ those in high office, arguing that this was a policy judgment reserved for the national authorities (although arguably this was more in the nature of justification rather than comparison).

In contrast, a different section of the Court had adopted a more restrained approach in Šulcs.30 Latvian law on parental benefit had provided that a benefit was payable even if the parent did not use the parental leave and continued working. In 2009, the Parliament repealed this provision. The law provided for a transitional period so that from 1 July 2009 to 2 May 2010 parents already in receipt of benefit had their parental benefit reduced by 50%. The applicants (some of whom were already in receipt of parental benefit and some whose children were born shortly after the change) brought a constitutional complaint to the Latvian constitutional court arguing that the legislative changes infringed on their legitimate expectations to receive the parental benefit in the full amount until the child reached the age of one. The applicants whose children were born after June 2009 argued that they had the same legitimate expectations arising from the law in force at the time when they planned their family.

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29 Though why this is relevant is unspecified.
30 Šulcs v Latvia, 42923/10, 6 December 2011. For other recent examples see Aizpurua Ortiz v Spain, 42430/05, 2 February 2010 in which the Court upheld a revision of a collective agreement effectively terminating the applicants’ rights to pension payments; and Poulain v France, 52273/08, 8 February 2011, in which the Court held that a modification of the rules concerning the calculation of pension did not involve a breach of P1-1 as it pursued a legitimate aim and was not disproportionate.
The constitutional court (by a majority) found that the contested provisions were constitutional. Firstly, it concluded that the employed and unemployed parents were not in a comparable situation, therefore differentiated benefit rates did not lead to unequal treatment. Secondly, the court recognised that even if the parents had had a legitimate expectation to receive the parental benefit in full amount, the contested measure in the particular economic situation in Latvia had a legitimate aim and it did strike a fair balance between the general interests and the applicants’ rights. Finally, the court recognised that the reduced amount of the benefit for employed parents in the transitional period was a proportional measure.

In their complaint to the Court of Human Rights, the applicants complained that the legislature had failed to provide a sufficient transition period for the amendments to the amount of parental benefit. The Court considered that the amendment involved interference with the peaceful enjoyment of the applicants’ possessions and, therefore, required justification. Clearly it was lawful. The Court accepted the analysis of the constitutional court which described the situation in the State budget of the Republic of Latvia in early 2009 as requiring a speedy and radical decrease of public spending. Therefore, the Court found that the aim pursued by the contested measure, of re-establishing balance in the State social budget, was legitimate. As to proportionality, the Court found that as the applicants had the possibility of either taking parental leave and receiving full parental benefit or continuing to work and receiving a reduced parental benefit they were not ‘were deprived in the very essence of their right to a parental benefit’. Therefore, the Court shortly ruled that the measure was proportional.

Although the factual circumstances are different, it is somewhat difficult to reconcile the approach in this case with that adopted in Lakićević. Perhaps the critical difference was that the benefits for those already in receipt were reduced by 50% rather than being eliminated entirely. However, in the case of those applicants whose children were born shortly after the change in law, they did lose the full benefits and, obviously, had no real alternative option. The Šulcs court unfortunately did not specifically address this issue nor, despite the fact that the applicants explicitly raised it, the issue of the length of the transition period.

31 15 March 2010. The reasoning of the court is set out at para. 7 of the judgement.
32 At para. 31.
3. ORAL HEARINGS

Article 6 of the Convention provides potentially important procedural rights for social security claimants. These include the right to have an oral hearing of their claim in certain circumstances. However, the Court has been very reluctant to set out clearly where such a hearing is required and its case law on the issue has been somewhat inconsistent. Initially the Court appeared to indicate that oral hearings would rarely be required in social security appeals but, in 2002, the Court held in a number of cases involving medical issues that an oral hearing was required to comply with the requirements of the Convention. In the subsequent Miller case, the Court (by the narrowest of majorities) held that an oral hearing was required in that case. However, the Court repeated that:

‘The exceptional character of the circumstances that may justify dispensing with an oral hearing essentially comes down to the nature of the issues to be decided by the competent national court, not to the frequency of such situations. It does not mean that refusing to hold an oral hearing may be justified only in rare cases. For example, the Court has recognized that disputes concerning benefits under social-security schemes are generally rather technical, often involving numerous figures, and their outcome usually depends on the written opinions given by medical doctors. Many such disputes may accordingly be better dealt with in writing than in oral argument. Moreover, it is understandable that in this sphere the national authorities should have regard to the demands of efficiency and economy. Systematically holding hearings could be an obstacle to the particular diligence required in social-security cases.’

In Miller, the Court found that an oral hearing was necessary as it had been requested, the

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See also Naydenova v Bulgaria, 948/05, 11 October 2011, where the applicant’s degree of disability had been assessed by the Regional and National Expert Medical Commission. She disagreed with their assessment and appealed to the Bulgarian courts. She complained under Article 6.1 of the Convention that she had been denied effective access to a Court because the courts had not commissioned a new medical assessment of her disability status, as a result of which the merits of her claim remained unexamined. The Court found the case to be manifestly ill-founded. However, the legal and factual position is so unclear that the case is of little value.


Miller v. Sweden, 55853/00, 8 Feb. 2005 at para. 29. The Court there found a breach of Art. 6.1 by a 4–3 majority with one of the four doing so ‘grudgingly’. See also Andersson v Sweden, 17202/04, 7 December 2010, where an oral hearing was also required.
evidence as to the appellant’s degree of disability and consequent extra costs was not straightforward, and oral evidence might have helped to clarify this situation.\textsuperscript{36}

In the recent \textit{Fexler} case, the Court, while repeating much of the language of \textit{Miller}, came to the opposite conclusion on the facts.\textsuperscript{37} The case concerned the additional need for assistance and additional costs arising from Ms Fexler’s disability. The case was considered at three levels of the Swedish administrative courts and an oral hearing was requested (and denied) only at the appellate level. Ms. Fexler complained that the lack of an oral hearing in her case before the appellate courts, despite her explicit requests, constituted a violation of Article 6.1 of the Convention. The Court reiterated the view that exceptional (in this context) does not mean rare or unusual. It went on to state that

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‘provided a public hearing has been held at first instance, a less strict standard applies to the appellate level, at which the absence of such a hearing may be justified by the special features of the proceedings at issue.’\textsuperscript{38}
\end{quote}

The Court also took the view that ‘this less strict standard should also apply if an oral hearing has been waived at first instance and requested only on appeal.’\textsuperscript{39}

Turning to the rejected request for a hearing at the appellate court, the Court held that ‘the outcome depended on an assessment of which needs and costs could be considered as deriving from the applicant’s disability and on an estimation of the total amount of the various items ...’\textsuperscript{40} In requesting an oral hearing, Ms Fexler had stated that she wished ‘to clarify certain unclear points of the case’. However, the Court (rather speculatively) concluded that an oral hearing would not have provided any new information of relevance to the determination of the case. It also considered that the issues raised were ‘technical’ in nature. Having regard to the circumstances, and to the fact that an oral hearing had not been requested for at first instance and requested only on appeal, the Court found that the refusal to hold an oral hearing did not therefore amount to a violation of Article 6.1 of the Convention.

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\textsuperscript{36} At para. 34.  \\
\textsuperscript{37} \textit{Fexler v Sweden}, 36801/06, 13 October 2011.  \\
\textsuperscript{38} Para. 58.  \\
\textsuperscript{39} Para. 59. The Court has consistently failed to consider whether a failure to request a hearing (which may be caused by lack of information) can properly be described as a ‘waiver’.  \\
\textsuperscript{40} Para. 65.
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It is rather difficult to see why an issue concerning whether a disability is work-related is ‘not only technical’\textsuperscript{41} while the issues raised in \textit{Fexler} are only technical. About the only lesson to be drawn from the Court’s case law is that an oral hearing should be requested at first instance. But, while this is in itself very reasonable, the Court’s willingness to categorise complex social and medical issues as ‘technical’ and its consistent assumption that a failure to request a hearing constitutes a waiver suggests that the Court is more concerned with administrative convenience than administrative fairness.

4. FREE MOVEMENT AND EU LAW

The Court of Justice also considered a number of other cases involving principles of free movement and the interpretation of Regulation 1408/71, although no new issues of principle appear to be involved. In \textit{Commission v Portugal} the Court ruled that, with the exception of care that requires the use of major and costly equipment, Member States must make it possible to obtain reimbursement, in accordance with their own scales, for non-hospital medical care provided in another Member State without prior authorisation.\textsuperscript{42} In a second enforcement case involving Portugal, the Court ruled that by reserving the benefit of the corporation tax exemption to pension funds resident in Portuguese territory alone, the Portuguese Republic failed to fulfil its obligations under Article 63 TFEU and Article 40 of the Agreement on the European Economic Area of 2 May 1992.\textsuperscript{43}

In \textit{Bergström} the Court ruled that as Sweden was the competent state (under Article 13(2)(f) of Regulation No 1408/71, on the basis of residence), the Swedish authorities must take into account periods of employment completed in their entirety in the Swiss Confederation.\textsuperscript{44} In \textit{Perez Garcia}, the Court ruled (again under Regulation 1408/71) that recipients of old age and/or invalidity pensions, or the orphan of a deceased worker, to whom the legislation of several Member States applied, but whose pension or orphan’s rights are based on the legislation of the former Member State of employment alone, are entitled to claim from that State the full amount of the family allowances provided under that legislation for handicapped children, even though they have not, in the Member State of residence, applied

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\textsuperscript{41} See \textit{Andersson v Sweden}, 17202/04, 7 December 2010.
\textsuperscript{42} Case C-255/09 \textit{Commission v Portugal} [2011] ECR I-000.
\textsuperscript{43} Case C-493/09 \textit{Commission v Portugal} [2011] ECR I-000.
\textsuperscript{44} Case C-257/10, \textit{Bergström} [2011] ECR I-000.
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for comparable, higher, allowances under the legislation of that latter State, because they
opted to be granted another benefit for handicapped persons which is incompatible with
those, since the right to family allowances in the former Member State of employment was
acquired by reason of the legislation of that State alone.\textsuperscript{45}

\textsuperscript{45} C-225/10, Perez Garcia [2011] ECR I-000.