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Overview of recent cases before the European Court of Human Rights and the European Court of Justice (January-April 2010)

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OVERVIEW OF RECENT CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE (JANUARY-APRIL 2010)

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In this review, we look at five recent decisions of the European Court of Justice and the European Court of Human Rights. The ECJ decided two interesting cases in the period, giving its first ruling on the IORP (Institutions for Occupational Retirement Provision) Directive (Directive 2003/41/EC) and a judgement on the interpretation of Regulation 881/2002 which gives effect to Resolution 1390 (2002) of the UN Security Council setting out measures against persons and entities associated with Osama bin Laden, Al-Qaeda and the Taliban. In Carson, the Grand Chamber of the Court of Human Rights reviewed the decision of the Chamber – discussed in volume 10 (3) of this Journal – and upheld the decision of the Chamber but on somewhat different grounds. In addition, the Court – in the Zubczewski admissibility decision – considered the interesting issue of a reduction in social security entitlements on marriage. The case is interesting not so much for the decision itself – which lacks any serious engagement with the issue – but rather as an indication of the inadequate level of jurisprudence – and, by implication, respect for human rights – which is all too often seen in the Court’s rulings. These two decisions are rather worrying as in Carson the Grand Chamber appears to call into question the need to take into account the facts of individual cases in assessing proportionality, while Zubczewski is a case in which the Court simply ignores any assessment of proportionality. Finally in Aizpurua Ortiz the Court of Human Rights adopted its usual relaxed approach to national reforms which affect social security entitlements as possessions under P1-1.

1. Comparison v justification – sidestepping proportionality

The Carson case involves the fact that the UK pays the contributory State (old age) pension to persons living outside the UK but – unlike UK residents and residents of countries with which the UK has agreed social security conventions – these benefits are not uprated.1 The compatibility of these rules with the Convention (specifically Article 14) has been challenged

1 Carson v. United Kingdom, 42184/05, 16 March 2010.
by persons living in countries where uprating does not apply, but this challenge had been rejected by courts at all levels (albeit with sole dissentents in the UK House of Lords and in the Chamber decision of the Court of Human Rights). The Grand Chamber decided to refer the case to itself under Article 43 of the Convention – a somewhat surprising decision given the unanimity below and the fact that academic commentators generally supported the outcome. Having taken responsibility for the case, the Grand Chamber clarified issues which did not really need clarification and created further uncertainty where certainty was required.

In short (though, in fact, at great and unnecessary length), the majority of the Grand Chamber ruled that it did

‘not consider that the applicants, who live outside the United Kingdom in countries which are not party to reciprocal social security agreements with the United Kingdom providing for pension up-rating, are in a relevantly similar position to residents of the United Kingdom or of countries which are party to such agreements.’

Therefore, there was no need to make a comparison with UK or convention-country residents and no breach of the Convention.

**Place of residence as ‘status’**

The Grand Chamber confirmed that only differences in treatment based on an identifiable characteristic, or ‘status’ could involve discrimination within the meaning of Article 14. It further confirmed that place of residence constituted an aspect of status for the purposes of Article 14. It turned then to consider whether the applicants were in a ‘relevantly similar position’ to pensioners whose pensions were uprated.

**Comparison with UK residents**

The Court rejected the argument that the applicants were in a comparable position to UK residents, arguing that payment of national insurance contributions was not, in itself, sufficient to establish comparability. It pointed out that national insurance contributions had

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4 At para 61 and see para 70.

5 At para 71.
no exclusive link to pensions but formed part of the revenue which funded the overall social security system. Where necessary they were topped up by funding from taxation. Given that the UK pension system was primarily designed to serve the needs of UK residents, the Court felt that it was hard to make any genuine comparison between such residents and pensioners resident elsewhere because of the range of economic and social variables which varied between countries.

**Comparison with convention-country residents**

Nor did the Court consider that the applicants could compare themselves with residents of countries with which the UK has agreed social security conventions (who did receive up-ratings). The Court argued that States had the right under international law to conclude bilateral social security conventions which were entered into on the basis of judgements as to the respective interests of the parties.

**Discussion**

The decision of the Court is almost certainly correct as to the substance. However, the fact that it (purportedly) decided the case on the basis of non-comparability rather than justification sets a somewhat worrying precedent for future case law. Baker, in a very interesting article, has highlighted the problems arising from deciding cases on the basis of non-comparability. In particular, it means that – unlike the situation where the Court assesses a difference in treatment between two comparable groups – there is no (or no explicit) assessment of proportionality.

Obviously, given that Article 14 is a non-discrimination provision, it is necessary for applicants to compare themselves with some other group. In fact, the Court of Human Rights often does not consider this issue in any great detail (perhaps on the basis that the comparable group is obvious). However, in this case it is much more difficult to decide whether the two groups are comparable (and how decisions as to comparability are to be assessed). From the perspective of the applicants, they are comparable in that they satisfy all the conditions for

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6 At paras 84–86.
7 At paras 88-9.
8 Baker, A (2006) ‘Comparison tainted by justification: against a “compendious question” in Art. 14 discrimination’ Public Law, 476. The article considers the House of Lords’ judgement in the case but the principles are highly relevant to the ECHR approach.
9 And others such as Burden v United Kingdom, 13378/05, 29 April 2008.
uprating of benefits except their place of residence. However, the Court appears to have focussed rather on the purpose of the UK pension scheme, holding that it was to provide pensions to UK residents. On this basis one might accept that non-residents are in a non-comparable position with UK residents.

However, the comparison between non-UK residents living in convention-countries and those in countries with which no convention has been signed is rather more suspect. The Court is obviously correct that countries are entitled to conclude bilateral conventions in accordance with their interests. However, this is an argument as to justification and not comparability. The Chamber had provided rather better arguments for a finding of non-comparability, taking the view that differences in social security provision, taxation, rates of inflation, interest and currency exchange make it difficult to compare the respective positions of such residents. At the very least, the Grand Chamber should – like the Chamber – have also considered the case from a justification perspective where, I would argue, the difference in treatment is clearly justified given the State’s margin of discretion.

The dissent, in contrast, held that the applicants were in a comparable position to both UK residents and residents of convention-countries. It accepted the applicants’ argument that they were in a comparable position because they had contributed to the national insurance system and were awarded pensions under UK law. The dissent pointed out that the failure to compensate for the loss of purchasing power led to a depreciation in pension value which could be quite significant. It felt that ‘no relevant differences (sic.) can be found to justify such a radical and unfavourable difference in their treatment’ and that the Government had failed to provide any such justification. The dissent’s approach is, however, no more satisfactory than that of the majority since it also failed to engage with the issue as to how

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10 Though presumably they could not do so in a manner which discriminated on grounds of, for example, race.
11 Though it is, again, arguable that these points go to justification as much as comparability.
12 Dissent at paras. 3-7.
13 At para 9. Implicitly this might suggest that the failure to uprate is a breach of P1-1 itself but the Chamber had ruled that this issue was inadmissible and the Grand Chamber held that this was a final decision and was not before it (at para 57).
14 The dissent felt that ‘in a world of computers’ the ‘alleged complexity’ of providing some formula for up-rating pensions could not be regarded as a justification.
one should decide who is and is not comparable, confused comparison and justification,\textsuperscript{15} and did not adequately engage with the justification which was advanced by the United Kingdom.\textsuperscript{16}

It is unfortunate that the Grand Chamber did not at least consider the issue of justification. However, one comment of the Court might suggest that this was a deliberate approach. In setting out its general approach, and after outlining the standard requirement that there should be a ‘reasonable relationship of proportionality’ between the means employed and the aim to be realised, the Court stated that it was concerned with

‘the compatibility with Article 14 of the [welfare or pensions] system, not with the individual facts or circumstances of the particular applicants or of others who are or might be affected by the legislation.’\textsuperscript{17} Much is made in the applicants' submissions, and in those of the third party intervener, of the extreme financial hardship which may result from the policy not to up-rate pensions and of the effect that this might have on the ability of certain persons to join their families abroad. However, the Court is not in a position to make an assessment of the effects, if any, on the many thousands in the same position as the applicants and nor should it try to do so. Any welfare system, to be workable, may have to use broad categorisations to distinguish between different groups in need.\textsuperscript{18} As in the cases cited above, the Court's role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation.\textsuperscript{19}

While one would, of course, accept that welfare systems must make broad categorisations, it is rather unclear how the proportionality of any provision is to be challenged in the abstract and without reference to ‘the individual facts or circumstances of the particular applicants’. If

\textsuperscript{15} The sentence quoted above would appear to import justification into comparison or adopt a ‘compendious’ approach to comparison and justification but whether or not this was the intention is entirely unclear.

\textsuperscript{16} The dissent appears to take the view (at paras. 5 and 10) that because ‘place of residence’ is a status for the purposes of Article 14, differences in treatment cannot be justified on that ground. But, of course, the fact that something is a status does not prevent the State justifying differences in treatment arising from actual differences flowing from that status.

\textsuperscript{17} \textit{Stec v United Kingdom}, 65731/01, 12 April 2006, paras 50-67; \textit{Burden}, 13378/05, 29 April 2008, paras 58-66; \textit{Andrejeva v. Latvia} 55707/00, 18 February 2009, paras 74-92. Note the ‘blunderbuss’ style of citation to up to 20 paragraphs of the judgements.

\textsuperscript{18} \textit{Runkee and White v. the United Kingdom}, 42949/98 and 53134/99, 10 May 2007, para 39.

\textsuperscript{19} At para 62.
the Court is to ignore the actual impact of legislation on individuals this is a very worrying
trend in Convention jurisprudence. As is common with the Court’s use of ‘precedent’, none of
the cases cited in the paragraph quoted above provide any support for ignoring the
individual facts of the cases before the Court. In Andrejeva, for example, the Court gave very
detailed consideration to the individual facts of the case, while Burden was a case of non-
comparability rather than justification.

2. Never mind the (e)quality, feel the width

Given the broad range of social security benefits falling with the scope of P1-1, the Court
now reviews a very wide range of issues concerning social security. However, the breadth of
its remit is unfortunately not matched by the depth of its analysis. In Zubczewski the Court
‘considered’ the interesting issue – common in many social security systems – of a reduction
in social security benefits on marriage.\textsuperscript{20} Mr. Zubczewski was retired and in receipt of a
Swedish pension. He subsequently married at age 63 and part of his pension was – in
accordance with Swedish law – reduced by about €50 per month. The Swedish government
argued that a difference in pension levels for married and unmarried pensioners was a
fundamental principle in Swedish legislation since the introduction of the Swedish social
security system in the early twentieth century.\textsuperscript{21} The Government explained that the rationale
for this approach was that married couples who lived together generally had lower costs of
living per capita than single, unmarried persons. Therefore, the principle constituted a
general measure of social and economic strategy for which the State enjoyed a wide margin
of appreciation. In this case, Mr. Zubczewski argued that his wife had no income and was
economically dependent on him.\textsuperscript{22} Therefore, he now had to support two persons on a lower
income.

The Court accepted that the pension fell within the scope of P1-1 and, therefore, Article 14
was applicable. However, noting the rationale outlined by the government and that States
enjoy a broad margin of appreciation in implementing social policy, the Court ruled that

‘Notwithstanding the applicant’s alleged exception to the general principle on which
the legislation is based ... the enactment of the said legislation and the impugned

\textsuperscript{20} Zubczewski v. Sweden, 16149/08, 12 January 2010.
\textsuperscript{21} Zubczewski at para. 15.
\textsuperscript{22} At paras 6 and 21.
decision which was based thereon falls squarely within the State's margin of appreciation.

There was, therefore, no breach of the Convention. The Court’s decision may well be correct as to its outcome. However, this important issue has not been clearly addressed in previous jurisprudence. Therefore, some substantive discussion of the issues was required from the Court.

As the Court noted

‘discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. “No objective and reasonable justification” means that the distinction in issue does not pursue a “legitimate aim” or that there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”.

One can readily accept that the rationale set out by the government pursues a legitimate aim of public policy (although the Court did not explicitly do so). However, the disappointing aspect of this decision is that there is no consideration of proportionality whatsoever. Assessment of proportionality is probably now the critical issue in many cases since a State should usually be able to show that its’ polices pursue some ‘legitimate aim’. However, it may be rather difficult to persuade national courts to apply a serious approach to the assessment of proportionality if the Court of Human Rights does not bother to provide any assessment at all. If the Grand Chamber in Carson sidestepped proportionality, in this case the Court simply ignored it altogether. Unfortunately this sloppy approach to the protection of human rights is by no means unusual in the Court’s decisions.

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23 Although the issue has arisen in a number of cases, the Court has never set out clear principles as to when a reduction in entitlements on the basis of marriage is consistent with the Convention (or whether such a restriction might ever be inconsistent). See, for example, Hess-Anger v Germany, 45835/99, 17 May 2001, ECHR 2001-VI.

24 At least on the basis of the quotation provided in the Court’s decision (at para 8).

25 At para 19.
3. Pension rights as possessions

The Aizpurua Ortiz case involved an interference with pension rights by way of a collective agreement but was held to be justified.\(^{26}\) The applicants took early retirement and were to be paid a supplementary pension (on the basis of a 1983 collective agreement) until they reached age 65. In 1994, the employer ceased to make these payments and in 2000 a new collective agreement replaced the pension with a once-off lump sum. The supreme court upheld the legality of the convention.\(^{27}\) The Court considered that the 2000 agreement constituted an interference with property rights and thus had to be objectively justified.\(^{28}\)

The Court referred to the importance of collective agreements in Spanish law, and the fact that the right to draw up collective agreements was protected by Article 11 of the Convention.\(^{29}\) On the other hand, it pointed out that States, in delegating employment legislation to independent bodies, could have a positive obligation to protect the rights of persons affected.\(^{30}\) In its consideration of the justification of the agreement, the Court in effect followed the reasoning of the national supreme court including the importance of the role of collective agreements in Spanish law, the fact that the pension entitlements had been replaced by a lump sum payment, and that there was no discrimination involved.\(^{31}\) The case shows the Court’s traditional reluctance to interfere in national rules concerning social security entitlements in the absence of evidence of discrimination or other exceptional circumstances. Judge Myler, dissenting, felt that retired persons constituted a vulnerable group and should be entitled to heightened protection as concerns their pension rights.

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\(^{26}\) Aizpurua Ortiz v Spain, 42430/05, 2 February 2010.
\(^{27}\) At para 20-21.
\(^{28}\) At para 48. The Court assumed, as a working hypothesis, that the pension fell within the scope of P1-1. Why Chambers consistently adopt this approach when it is blindingly obvious that the pension was a possession is unclear.
\(^{29}\) Demir and Baykara v Turkey, 34503/97, 12 November 2008.
\(^{30}\) At para 49.
\(^{31}\) At paras 51-55.
4. Payments of social security benefits to support terrorism?

In *M v Her Majesty’s Treasury*, the Court of Justice considered an interesting issue concerning whether payment of social security benefits to family members of ‘designated’ persons fell within the scope of Regulation 881/2002 which implemented UN Security Council Resolution 1390 (2002) concerning the measures which States must take to prevent, *inter alia*, the provision of funds to certain organisations (Al-Qaeda and the Taliban). The persons receiving the benefits were not themselves designated by the UN Sanctions Committee but were the spouses of such persons.

Resolution 1390 (2002) provides:

‘[The Security Council] [d]ecides that all States shall take the following measures with respect to Usama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them, ... :

(a) Freeze without delay the funds and other financial assets or economic resources of these individuals, groups, undertakings and entities, including funds derived from property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons’ benefit, by their nationals or by any persons within their territory;

…’

In implementation of this Resolution, Article 2(2) of EU Regulation 881/2002 provided that ‘No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee ... .’

At first glance, it might seem rather surprising that social security benefits might be thought to fall within the scope of the Resolution and Regulation. However, the UK government

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decided that such benefit payments fell within the scope of Article 2(2) of Regulation 881/2002 and imposed rather draconian limitations on the use of social security benefits by the persons concerned involving the issuing of ‘licences’ by the Treasury.\textsuperscript{33} This decision was upheld by the lower courts but the House of Lords (now the Supreme Court) disagreed and decided to refer the case to the ECJ while stating its own clear view that such benefits were not caught by the provisions. The House of Lords argued, first, that the supervisory regime imposed by the Treasury was not required to give effect to the purpose of Resolution 1390 (2002), which is to stop funds being used for terrorist ends. The referring court felt that it was hard to see how spending on current domestic expenses, such as the purchase of food, from which a designated person derives a benefit in kind, could create any risk that funds might be diverted to such ends, given that the amounts of the social benefits were calculated so as not to exceed the needs of the recipients.

Second, it suggested that a broad interpretation of the words ‘for the benefit of’ in Article 2(2) of Regulation 881/2002 would be inconsistent with Article 2(3) of that Regulation, which prohibits making economic resources available to a designated person only when that enables such a person ‘to obtain funds, goods or services’.

Third, the court believed that it was more likely, having regard to the objective pursued by that Regulation, that the drafters intended the wording of Article 2(2) to mean funds made available to or used for the benefit of a designated person that the latter could use for the purposes of terrorism.

Finally, it argued that the Treasury’s construction would produce a disproportionate and oppressive result and would mean that any person paying money to the spouse of a designated person, such as her employer or her bank, would have to seek a licence simply because the spouse lives with a designated person and some part of her expenditure may be used for his benefit. Furthermore, the terms of the licence are such that she would be unable to spend her own money, however large her income, without accounting to the Treasury for every item of her expenditure. That, it suggested, constituted an extraordinary invasion of the privacy of a person who is not themselves designated.

\textsuperscript{33} The details of the restrictions are outlined at para 30 of the judgement.
The House of Lords asked whether Article 2(2) of Regulation 881/2002 applied
‘to the provision by the State of social security or social assistance benefits to the
spouse of a designated [person] … on the ground only that the spouse lives with
the designated person and will or may use some of the money to pay for goods
and services which the latter will consume or from which he will benefit?’

The Court of Justice noted that the different language versions of the Regulation would
support different meanings and, therefore, ‘the provision in question must be interpreted by
reference to the purpose and general scheme of the rules of which it forms a part’.

In addition, reference must also be made to the wording and purpose of Resolution 1390 (2002)
which the Regulation was intended to implement.

The Court turned to the purpose of the Resolution and Regulation. It pointed out that it had
previously held that the purpose of Regulation 881/2002 was to ‘impede the financing of
terrorist activities’. Therefore ‘the measure freezing economic resources applies only to
those assets that can be turned into funds, goods or services capable of being used to support
terrorist activities’. It pointed out that the interpretation advanced by the Treasury (and
supported by the EU Commission) was not based on ‘any danger whatsoever’ that the funds
in question might be diverted to support terrorist activities. Therefore, the benefit in kind
which a designated person might indirectly derive from social security benefits paid to his
spouse could not bring those benefits within the scope of Article Regulation 881/2002.

The Court further noted that secondary EU legislation must be interpreted in line with general
principles of EU law and the principle of legal certainty. It took the view that the
interpretation advanced by the Treasury would run the risk of engendering legal uncertainty.

The Court’s decision is welcome both in applying a purposive interpretation of the provisions
and in signalling – in line with a number of other ECJ decisions concerning the restrictions
regime – that secondary legislation must be consistent with general principles of EU law.

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34 At para 44.
35 At para 45.
36 At paras 52-54.
37 At para 56.
38 At para 58.
39 At paras 64-67.
5. ‘Empty-shell’ implementation of EU law

Finally, in Commission v Czech Republic the Court of Justice gave its first judgement concerning the IORP Directive.\(^{40}\) At first glance the case looks like just another proceeding involving failure to transpose a directive but, in fact, the issues are rather more complex.

The case concerned the refusal by the Czech Republic to transpose in full the IORP Directive (2003/41). Directive 2003/41 seeks to facilitate the carrying on by institutions for occupational retirement provision of their activities in other Member States. It included, inter alia, rules requiring Member States to provide for registration or authorisation of IORPs located in their territory. The Directive was adopted prior to the accession of the Czech Republic (and other central European states) to the EU in 2004. As such it does not reflect conditions in many of these countries which, in terms of pensions, are quite different to the ‘old’ Member States. In particular, the Czech Republic does not have second-tier pensions (to which IORPs largely belong) and has made a deliberate policy choice to rely on first tier (State) and third tier (private) pensions to the exclusion of second-tier (occupational) pensions.\(^{41}\) As such it objected to having to implement aspects of the IORP Directive as it argued that doing so would require it to change the fundamental principles of its national social security system by introducing an occupational retirement scheme, contrary to Article 137(4) EC.\(^{42}\) Under current Czech law, an IORP is not legally allowed to set up in the Czech Republic.

There was no dispute that the Directive had not been fully implemented and, as the Advocate General noted, the provisions in question were mandatory and no permanent derogation was allowed in the Directive.\(^{43}\)

The Court ruled that its settled case law indicated that the fact that no IORP existed in the Czech Republic did not release that State from the obligation to transpose the Directive.\(^{44}\)

\(^{40}\) Case C-343/08, Commission v Czech Republic [2010] ECR I-000.
\(^{41}\) The terms are, of course, rather an over-simplification of an often complex position.
\(^{42}\) At para 30 of the judgement. Article 137(4)
\(^{43}\) Advocate General’s opinion, paras 47-8.
\(^{44}\) Judgement, para 39.
Only where transposition would be pointless for geographic reasons is it not mandatory. Therefore, even if no IORP could legally establish itself in the Czech Republic at present, it was still obliged to transpose the provisions of the Directive.

The Court further ruled that the obligation to transpose did not, contrary to the Czech arguments, affect its competence to organise its national pensions system. The Court expressed the view that transposition would not result in the introduction of a second tier pillar in the Czech Republic, which would require national legislation. Thus the rule requiring registration of any IORP operating in a State’s territory did not, by implication, require Member States to allow such an institution to operate – in effect, as the Advocate General suggested, the legal framework may remain an ‘empty shell’.

Discussion
While the Commission won the formal legal case in that the Czech Republic was required to implement the Directive, it would appear to be a rather hollow victory as the (at least initial) impact would appear to be minimal. However, as Koch’s interesting note points out, the case raises as many questions as it answers.

First, while pointing out that the Directive did not require a Member State to allow IORPs, the case does not determine whether this may be required under other provisions of EU law. The Advocate General opined that it was conceivable ‘for a Member State, without undermining Community law, to base its retirement system exclusively on the first and third pillars and thus to decide that institutions for occupational retirement provision should not play any role in that system’. However, the Court was careful to note that

‘such a prohibition [of IORPs] in national law must comply with the rules on free movement laid down in the EC Treaty, in particular, the provisions on freedom of establishment which include the prohibition, in principle, of restrictions on the exercise of that freedom, unless they can be justified on the grounds set out in the Treaty or by overriding reasons in the public interest, which include, in particular,

45 Para 42.
46 Judgement, para 58; opinion para 70.
48 Opinion, para 57.
the risk of seriously undermining the financial equilibrium of the social security system ...

Second, as Koch discusses, the Court did not seem to have considered the issue of an IORP established in the Czech Republic for operation in other Member States (an ‘export-only’ IORP). Conversely, the Czech Republic accepted that an IORP established in another Member State could carry out cross-border provision of services into the Czech Republic (though to what purpose is rather unclear).

It is indeed understandable that the Commission and the Court wish to see uniform transposition of Directives – even where there may be little practical effect. Accepting a Member State’s arguments as to the irrelevance of specific provisions to their factual situation could create an unmanageable situation and call into doubt principles of legal certainty. On the other hand, the case also raises the issue that certain EU laws drafted before the accession of the ‘new’ Member States sometimes do not reflect their specific needs well and the effective inability of the EU legislature to do anything concrete about this.

49 Judgement, para 63, references omitted.
50 Judgement, para 20.
51 The Court’s offered rationale that it is important that the Czech Republic should have such rules in existence in case it ever decided to introduce second tier pensions seems rather unnecessary (if not pointless) (at paras 50-51).
52 The application of gender equality provisions to third pillar pensions is another area where there is some legal uncertainty in some new Member States and Koch op. cit. notes that there are a number of other infringement proceedings against other new Member States on pensions issues.