Overview of Recent Cases before the European Court of Human Rights and the European Court of Justice (May–July 2010)

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In this review, we look, inter alia, at a number of decisions of the Court of Human Rights including rulings concerning the rights of same-sex couples (*Schalk* and *P.B. v Austria*); a case which considers the position concerning the Convention and the transfer by a local authority of a resident to a new residential care home (*Watts*); and an interesting case concerning the scope of ‘other status’ under Article 14 of the Convention (*Peterka*). We also consider a number of ECJ cases including a further ‘development’ of the Court’s case law with regard to cross-border access to health care (*Commission v Spain*); and an interesting case concerning gender equality (*Brouwer*).

1. **RECENT CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS**

1.1 **SAME-SEX COUPLES AND THE RIGHT TO MARRY**

*Schalk* concerns the important issue of whether same-sex couples have a right to marry under the Convention on Human Rights.\(^1\) Whilst the case does not directly concern social security rights, the approach adopted has important implications for social security cases.

The applicants were a same-sex couple living in Austria. In 2002 they applied for permission to marry, which was refused by the relevant authorities on the grounds that marriage could only be contracted between two persons of opposite sex. This decision was upheld on appeal. The Austrian Constitutional Court ruled that

‘Neither the principle of equality set forth in the Austrian Federal Constitution nor the European Convention on Human Rights (as evidenced by ‘men and women’ in Article 12) require that the concept of marriage as being geared to the

\(^{1}\) *Schalk and Kopf v Austria*, 30141/04, 24 June 2010.
fundamental possibility of parenthood should be extended to relationships of a different kind.’

Subsequently, Austria adopted the Registered Partnership Act to provide same-sex couples with a formal mechanism for recognising and giving legal effect to their relationships. This entered into force from 1 January 2010. The Registered Partnership Act provides such partners with the same status as spouses in various fields of law, such as inheritance law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners. However, some differences between marriage and registered partnerships remain.

The applicants argued that Austria’s refusal to allow them to contract marriage was in breach of Article 12 of the Convention. Article 12 provides that

‘Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.’

They further argued that they were discriminated against – contrary to Article 14 taken with Article 8 of the Convention – on account of their sexual orientation, since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act.

Article 8 reads

‘1. Everyone has the right to respect for his private and family life…
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Article 14 provides that

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2 Decision of 12 December 2003 as quoted in the ECHR judgment.
3 See paras. 22-23 of the judgement.

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‘The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.’

**Article 12**

The Court referred to its established case-law according to which Article 12 ‘secures the fundamental right of a man and woman to marry and to found a family’. While this right is ‘subject to the national laws of the Contracting States’, the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.

The applicants argued that, as the Court has held that the Convention is a living instrument which is to be interpreted in present-day conditions, Article 12 should be read as granting same-sex couples access to marriage or, in other words, as obliging States to provide for such access in their national laws. The Court did not accept this argument. It noted that there is no European consensus regarding same-sex marriage and that the present case could be distinguished from the *Goodwin* case involving transsexuals where the Court perceived ‘a convergence of standards regarding marriage of transsexuals in their assigned gender’.

The Court also referred to Article 9 of the Charter of Fundamental Rights of the European Union. The Court noted that the Charter had deliberately dropped the reference to men and women and that Article 9 is meant to be broader in scope than the corresponding articles in

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4 At 49.
6 At 57.
7 At the time of the judgement, six out of forty-seven Member States granted same-sex couples equal access to marriage, namely Belgium, the Netherlands, Norway, Portugal, Spain and Sweden. A further thirteen Member States did not grant same-sex couples access to marriage, but had legislation permitting same-sex couples to register their relationships: Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Luxembourg, Slovenia, Switzerland and the United Kingdom. In Ireland and Liechtenstein reforms to give same-sex couples access to some form of registered partnership were pending or planned (the Irish measure has now become law). In addition Croatia had a Law on Same-Sex Civil Unions which recognises cohabiting same-sex couples for limited purposes.
8 At 58-9.
9 Article 9 provides that: ‘The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.’
other human rights instruments.\textsuperscript{10} ‘Regard being had to Article 9 of the Charter’, the Court took the view that the right to marry enshrined in Article 12 should no longer ‘in all circumstances be limited to marriage between two persons of the opposite sex’\textsuperscript{11}. Therefore, in a rather tortuous construction, it found that Article 12 was not inapplicable to the applicants’ complaint. However, the Court went on to say that ‘as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State’. As ‘marriage has deep-rooted social and cultural connotations which may differ largely from one society to another’, the Court did not wish to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society.\textsuperscript{12} Therefore, the Court found that Article 12 of the Convention did not impose an obligation on the respondent Government to grant a same-sex couple access to marriage.

\textit{Articles 8 and 14}

Turning to the issue of Article 8, the Court noted that it was undisputed that the relationship of a same-sex couple like that of the applicants’ falls within the notion of ‘private life’ within the meaning of Article 8.\textsuperscript{13} However, the Court had not previously found that such a relationship also fell within the notion of ‘family life’.\textsuperscript{14} Nonetheless the Court found that there had been a rapid evolution of social attitudes towards same-sex couples in many States. As noted above, a considerable number of States have afforded legal recognition to same-sex couples and provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of ‘family’. In view of this evolution, the Court considered it artificial to maintain the view that a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable \textit{de facto} partnership, fell within the notion of ‘family life’.\textsuperscript{15}

The Court then examined the impact of Article 14. It turned first to the issue of whether the applicants were in a relevantly similar position to a couple of the opposite sex.\textsuperscript{16} It started

\footnotesize{\textsuperscript{10} At 60.  \hspace{1em} \textsuperscript{11} At 61.  \hspace{1em} \textsuperscript{12} At 62.  \hspace{1em} \textsuperscript{13} At 90 \textit{et seq}.  \hspace{1em} \textsuperscript{14} See \textit{Mata Estevez v. Spain}, 56501/00, 10 May 2001.  \hspace{1em} \textsuperscript{15} At 94.  \hspace{1em} \textsuperscript{16} Rather surprisingly the Court stated that the parties had not explicitly addressed the issue.}
from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationship and, therefore, they were in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.

The applicants argued that they were discriminated against as a same-sex couple, firstly, in that they still did not have access to marriage. However the Court rejected the view that, insofar as not derived from Article 12, a right to marry might be derived from Article 14 taken in conjunction with Article 8. It pointed out that, because the Convention was to be read as a whole, its Articles should be construed in harmony with one another. As Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, such an obligation could not be derived from Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope.

The applicants also argued that they were discriminated against in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act. Given that a majority of States still did not provide for legal recognition of same-sex couples, the Court held that the area must still be regarded as one of evolving rights with no established consensus, where States enjoy a margin of appreciation in the timing of the introduction of legislative changes. Therefore, Austria could not be reproached for not having introduced the Registered Partnership Act any earlier.17

Finally, the Court examined the applicants’ argument that they are still discriminated against as a same sex-couple on account of differences conferred by the status of marriage on the one hand and of a registered partnership on the other. The Court rejected the argument that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which corresponds to marriage in each and every respect. It considered that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition. The Court noted that it was not called upon in the present case to examine each and every one of these differences in detail as the applicants had not argued that they were affected by all such differences. Overall, the Court did not find

17 At 106.
that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by a registered partnership.

The ruling as to Article 8 was a decision of only a narrow majority of the Court. Three of its seven members dissented and would have held that there was a breach of the Convention in the period prior to the adoption of the Registered Partnership Act because Austria did not advance any argument to justify the difference of treatment, relying in this connection mainly on its margin of appreciation.\(^\text{18}\) The minority argued that

‘in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation.’

**Discussion**

The outcome of this case is consistent with the Court’s incremental approach in this area in that it ruled that Article 12 could apply to same-sex couples and that such couples fell within the scope of the right to respect for family life, while still rejecting the applicants’ argument that the Convention created a right to marry for same-sex couples. Given the (relatively) low level of recognition for such couples at present amongst the Contracting States and the fundamentally ‘political’ nature of the issue, it is unsurprising that the Court rejected the claim. However, the jurisprudential basis of the decision is rather disappointing. It is not clear why the Court should have taken the view that the fact that Article 9 of the EU Charter was intended to be broader than existing instruments was a basis for finding that existing instruments could also carry such a broad interpretation.\(^\text{19}\) However, if Article 12 does apply to same-sex couples, then surely a total ban on marriage by such couples does precisely ‘restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired’.

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\(^{18}\) At para 8 of the dissent. The minority expressly noted that they did ‘not want to dwell on the impact of the Act’ (at para 7 of the dissent).

\(^{19}\) Two judges dissented on this point.
1.2 DISCRIMINATION BETWEEN SAME-SEX AND OPPOSITE-SEX COHABITING COUPLES

Shortly after the Schalk judgment, a similarly constituted chamber of the Court considered the rights of a same-sex couple as regards access to social insurance cover. The applicants were a same-sex couple living in Austria. One was a civil servant covered by a public scheme of social insurance and it was requested that the partner should be recognised as a dependent and covered under the scheme. At that time, the relevant legislation provided that the persons covered by insurance included

‘a person of the opposite sex who is not related to [the insured] who has been living with him or her in the same household for at least ten months and since then has been doing the domestic work for the insured without payment, unless there is a spouse living in the same household who is able to work ...’

The request for cover was refused on the basis that the applicants were of the same-sex. The Austrian Constitutional Court refused to hear an appeal concerning this case on the basis of its then case-law, which indicated that, in the issue at hand, the legislator had a very wide margin in which to reach a decision and the decision taken had been within that margin. However, the administrative court subsequently heard and dismissed the complaint. As summarised by the Court of Human Rights, it found that the authorities had correctly concluded that the law only applied to heterosexual partnerships. There was no issue under Article 14, read in conjunction with Article 8, because Article 8 did not guarantee specific social rights, and, therefore, the case did not fall within the ambit of that provision. The exclusion of homosexual partnerships from the scope of the law also complied with the principle of equality because that difference in treatment was justified. The court held that while it was, as a rule, safe to conclude that, where persons of different sex were living together in a household in which one of them was running that household while not being gainfully employed, they were cohabiting, this was not the case if two persons of the same sex were living together. In the absence of any possibility to register a homosexual partnership, it would have been necessary to undertake delicate enquiries into the most intimate sphere of the persons concerned. The Austrian court held that this difference in the factual situation justified different treatment in law.

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20 P.B. v Austria, 18984/02, 22 July 2010.
21 At para 11.
However, the Constitutional Court, in separate proceedings, subsequently altered its position in relation to very similar provisions of social insurance law. The Constitutional Court explicitly referred to the judgment of the European Court of Human Rights in Karner v. Austria and held that the legislation at issue was discriminatory because it was restricted to persons of the opposite sex. Arising from this decision, the relevant civil service insurance legislation was amended. First, in 2006, the law was altered to provide that a cohabitee (regardless of sexual orientation) could be covered if he or she were bringing up children living in the household, or were entitled to payments for nursing care, or were doing nursing work for the insured. In June 2007, a more far reaching amendment was introduced which meant that cohabitees (of whatever sexual orientation) were no longer insured unless they were caring for children or providing nursing care. However, the law provided that cover would be retained on a transitional basis for opposite-sex partners covered prior to June 2007.

The applicants argued that the exclusion of same-sex couples (prior to 2006) was in breach of Article 8 of the Convention taken with Article 14. As in Schalk (though without referring to that decision) the Court ruled that the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, fell within the notion of ‘family life’, just as the relationship of a different-sex couple in the same situation would. The Court discussed whether the issue fell within the ambit of Article 8. It pointed out that the case concerned the possibility of extending accident and sickness insurance cover under a statutory insurance scheme to cohabiting partners. It took the view that the possibility of extending insurance cover must be considered as ‘a measure intended to improve the principally insured person’s private and family situation’. Therefore the extension of insurance cover at issue fell within the ambit of Article 8.

Turning to whether there had been a breach of Article 14, the Court noted that Austria had not advanced any justification for the difference in treatment. In relation to the period prior to 2006, the Court followed its approach in Karner v. Austria, where it held that in cases in

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23 Austrian Constitutional Court, 10 October 2005, G 87-88/05 V/05.
24 They also argued that there was a breach of P1-1 taken with Article 14 but given its decision on Article 8 the Court did not find it necessary to consider this.
25 At 30.
26 At 33. While nothing turns on the point, as the issue would have fallen within the ambit of P1-1, the Court’s approach to the ambit of Article 8 remains very poorly defined.
which the margin of appreciation afforded to States is narrow, as where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is appropriate for realising the aim sought. It must also be shown that it is necessary to achieve that aim to exclude certain categories of people – in this case persons living in a same-sex relationship – from the scope of the law. The Court concluded that neither the Government nor the domestic authorities and courts had advanced any arguments that would provide such justification.27 The 2006 amendment did not alter the discriminatory nature of the law as the rules remained different for same-sex and opposite-sex couples.28

However, in the period from 2007, the Court noted that the law was formulated in a neutral way concerning the sexual orientation of cohabitees and it had not been suggested that homosexuals were excluded from caring for children.29 Article 14 guaranteed equal treatment and not access to specific benefits and, therefore, even though access to insurance for same-sex couples had become more difficult, there was no breach of Article 14. The applicants also complained of the transitional provisions, which meant that certain opposite-sex couples could still benefit from access to social insurance for a period. The Court ruled that it was not

‘incompatible with the requirements of Article 14 for those who have previously been entitled to a specific benefit under the law in force at the time to be given sufficient time to adapt to changing circumstances.’30

Discussion
The decision marks an important step in the protection of the social security rights of same-sex couples – albeit one predicted by the Austrian Constitutional Court five years ago. It

27 At 42. A minority of two dissented in relation to the period to 2006 pointing out that ‘at that time very few European States had enacted legislation on registered partnerships (such as the French PACS), and there was also a very small number of States that treated on an equal footing, for social security purposes, two cohabiting persons of the opposite sex and two homosexuals living together.’ However, while the Court obviously has regard to whether there is a ‘European consensus’ on social issues, it must also have regard to whether there is any rationale for the difference in treatment involved and none was advanced here.

28 At 43.

29 At 45, 47. The question as to whether same-sex couples may be more likely to satisfy the child raising requirement, thereby raising disproportionate impact, does not seem to have been considered.

30 At 48. While the general principle is unobjectionable, given that the Court had held that the pre-2006 position was in breach of Article 14, one might be surprised that the Court allowed such discrimination to be continued albeit on a transitional basis.
should, however, be noted that the issue concerned the different treatment of cohabiting same-sex and opposite-sex couples and did not raise the issue of a comparison between married opposite-sex couples and unmarried same-sex couples. Thus the outcome of the case is not inconsistent with that in Mata Estevez in which the Court rejected a claim from the survivor of an unmarried same-sex couple for a widower’s pension.\footnote{Mata Estevez v. Spain, 56501/00, 10 May 2001. Note also that Austria did not advance any justification for the difference in treatment.}

1.3 JOBSEARCH OBLIGATIONS AND PROTECTION AGAINST FORCED LABOUR

Schuitemaker involves an unusual complaint concerning Article 4(2) of the Convention of Human Rights which provides that ‘No one shall be required to perform forced or compulsory labour.’\footnote{Schuitemaker v Netherlands, 15906/08, 4 May 2010. The issue had previously arisen in Talmon v Netherlands 30300/96, 26 February 1997, where the Commission rejected an argument that the obligation to make efforts to obtain employment in order to qualify for Dutch unemployment benefits was in breach of articles 4, 9 or 10 of the Convention. The applicant in that case – who considered that the only suitable employment was as an ‘independent scientist and social critic’ – claimed that the reduction in benefits imposed on him because of his failure to seek other employment to which he had conscientious objections (the nature of which are not specified in the decision) was a violation of the Convention. The Commission noted that the applicant had not been forced to perform any kind of labour and, unsurprisingly, held that the complaint did not raise any issues under the relevant articles.} Prior to 2004, Ms. Schuitemaker had been in receipt of general welfare benefits and had been obliged to seek and accept employment ‘deemed suitable’ for her. In 2004 the Netherlands introduced an obligation to seek and take up ‘generally accepted’ employment. The Court accepted that the new wording was intended to have a much wider scope. The applicant objected to this requirement and argued that it was in breach of Article 4.

Although her benefits had not actually been reduced as a result of the change in the law, the Court pointed out that persons may have standing to bring a complaint where they run the risk of being affected by a particular provision. It did not find it necessary to decide whether this was the case as it found the case to be inadmissible on substantive grounds.

The Court took the view that

‘... it must in general be accepted that where a State has introduced a system of social security, it is fully entitled to lay down conditions which have to be met for a person to be eligible for benefits pursuant to that system. In particular a condition to the effect that a person must make demonstrable efforts in order to...’
obtain and take up generally accepted employment cannot be considered unreasonable in this respect.’

This was particularly the case given that the Dutch law did not require claimants to seek and take up employment which is not generally socially accepted or in respect of which they have conscientious objections. This decision leaves open the possibility that an obligation to seek work might in some cases breach Article 4 but the requirements would have to be considerably more onerous than in the instant case.

1.4 RESIDENTIAL HOME TRANSFERS AND THE CONVENTION
In the Watts case, the Court considered the position concerning the Convention and the transfer by a local authority of a resident to a new residential care home (as a result of the closure of the existing care home).\(^{33}\) The applicant complained under Article 2 of the Convention that the risk inherent in her transfer by the local authorities to a new residential care home constituted a violation of her right to life; under Article 3 of the Convention that the stress and distress of the move constituted a violation of Article 3; under Article 6 that there was no adequate appeal against the closure of a care home; and under Article 8 that the transfer constituted an unjustified interference with her private and family life in light of the deep relationships formed between residents and staff of a care home and with her right to respect for her physical and psychological integrity.

As to Article 2, the Court concluded that it has not been established that the applicant faced a particular and quantified risk to her life as a result of the transfer. However, it was persuaded that a badly managed transfer of elderly residents of a care home could have a negative impact on their life expectancy as a result of the general frailty and resistance to change of older people. Accordingly, it concluded that Article 2 was applicable. However, it took the view that the extent of any obligation on the state to take specific measures and in particular the proportionality of any measures called for by the applicant, must be assessed in light of the equivocal medical evidence as to the extent of any risk to life.\(^{34}\) The applicant argued that the only appropriate measure was to allow her to remain at the first home indefinitely. However, the Court noted that the various medical reports relied upon before the domestic courts indicated that careful planning of a transfer, as well as the implementation of specific

\(^{33}\) Watts v United Kingdom, 53586/09, 4 May 2010.

\(^{34}\) At paragraph 88.
measures in particular cases, could reduce any risk to a resident's life or health. Having regard
to the operational choices which must be made by local authorities in their provision of
residential care to the elderly and the careful planning and the steps which had been
undertaken to minimise any risk to the applicant's life, the Court considered that the
authorities had met their positive obligations under Article 2.

As to Article 3, the Court concluded there was nothing to suggest that any stress or distress
experienced by the applicant as a result of an involuntary transfer met the threshold required
by Article 3 of the Convention. Accordingly, it considers it more appropriate to consider this
complaint under Article 8.35 The Court considered that the transfer of the applicant did
constitute an interference with her private life insofar as it gave rise to stress and distress
which could have had an impact on the applicant's health. In regard to her general Article 8
complaint regarding the impact of a transfer on her private and family life, the Court
proceeded on the basis that the applicant's private life was engaged and that the proposed
transfer would constitute an interference within the meaning of Article 8.

The Court noted that there was no suggestion that the transfer was unlawful or that it did not
pursue a legitimate aim. Turning to the proportionality of the transfer, the Court referred to its
finding that the positive obligations arising under Article 2 did not prohibit the transfer of the
applicant in light of the alternative measures which were taken to minimise any risk to her
life and the countervailing interests in closing the home and found that similar consider-
ations apply in assessing proportionality under Article 8(2).36 It concluded that the transfer was
proportionate and justified under Article 8(2).

As to the Article 6 complaint, the Court noted that the applicant had been able to take judicial
review proceedings to challenge the decision and concluded that this provided adequate
access to Court.37

35 At paragraph 95.
36 At paragraph 98. The Court referred in detail to the various reviews and studies carried out; the detailed
consultation with residents; and the margin of appreciation afforded to States in this area.
37 At paragraph 101. Although the issues appear to have received considerable attention in the national
courts, the Court unfortunately did not refer to Tsfayo v United Kingdom, 60860/00, 14 November 2006
in which it held that judicial review was insufficient to satisfy Article 6 in the case of housing benefit
appeals nor to attempt to reconcile the two decisions.
The decision is generally (with the exception of the Article 6 issues) a detailed and careful analysis of the issues involved which engages in detail with both the facts and the national jurisprudence. Although the applicant was unsuccessful, the case does set out important guidelines as to the standards which should be followed in such transfers and establish important principles in this area of law.

1.5 SCOPE OF “OTHER STATUS” UNDER ARTICLE 14

In Peterka the Court considered the type of discrimination falling within the scope of Article 14. Mr. Peterka would have been entitled to a pension but for the fact that he continued to work under a contract of indefinite duration. Persons working under contracts of up to one year and self-employed persons were, in contrast, entitled to pension. The Court correctly concluded that P1-1 (and, therefore, Article 14) was engaged. However, again correctly (if rather unusually) the Court considered whether the discrimination fell within the scope of Article 14. It concluded that criteria such as length of employment contract or being employed or self-employed, which did not reflect any personal characteristic or conviction and which might change randomly, did not fall under the term "other status" under Article 14 of the Convention. This is certainly a reasonable position and one consistent with the occasional comments of the Grand Chamber, but is certainly not the approach normally followed by Chambers.

2. RECENT CASES BEFORE THE EUROPEAN COURT OF JUSTICE

2.1 CROSS-BORDER MEDICAL CARE (AGAIN)

The recent decision in Commission v Spain represents a further important step (this time sideways) in the Court’s case law on cross-border access to health care. As is well known, this path began in 1998 with the Kohll decision. In that case, the Court ruled that neither the fact that the national rules fell within the sphere of social security nor the fact that refusal to reimburse cross-border expenditure was compatible with the provisions of Regulation 1408/71 precluded the application of the Treaty provisions on the freed movement of

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38 Peterka v Czech Republic, 21990/08, 4 May 2010. This potentially important judgement is not available in English.
39 For example, in Carson v United Kingdom, 42184/05, 16 March 2010.
40 Case C-211/08, Commission v Spain, [2010] ECR I-000.
services. Having classified the relevant health treatment as a service within the meaning of (now) Article 50 EC, the Court held that the national rules requiring prior authorisation of treatment in another Member State deterred insured persons from availing of medical services established in another Member State and constituted a barrier to freedom to provide services. The Court further found that this barrier was not justified, holding that the reimbursement requested would have no significant effect on the financing of the social security system and that it had not been shown that the restrictions were necessary to achieve the objective of maintaining a balanced medical and hospital service open to all. The Court therefore ruled that (now) Articles 56 and 57 TFEU (formerly Articles 49 and 50 EC)

‘preclude national rules under which reimbursement, in accordance with the scale of the State of insurance, of the cost of dental treatment provided by an orthodontist established in another Member State is subject to authorisation by the insured person’s social security institution.’

While, in many ways, the Kohll decision was a welcome recognition of the importance of freedom to provide and access services in a very practical sense, the creation of a dual system of cross-border entitlement to health care (under both Regulation 1408/71 and the Treaty) and, more importantly, the EU legislature’s failure to date to respond to the Court’s decisions, have created an administrative nightmare or (in many cases and to mix metaphors) a mirage, given that it is far from clear that the Court’s rulings have had a major impact in practice in some EU countries.

In the Vanbraekele decision,42 the Court went a step further holding that Article 56 TFEU meant that

‘if the reimbursement of costs incurred on hospital services provided in a Member State of stay, calculated under the rules in force in that State, is less than the amount which application of the legislation in force in the Member State of registration would afford to a person receiving hospital treatment in that State, additional reimbursement covering that difference must be granted to the insured person by the competent institution.’43

43 At 53.
This decision goes much further than Kohll itself and would appear to suggest that the cross-border patient is entitled to, in effect, the better of either world. However, in Watts, the Court, somewhat inelegantly and without much explanation, tentatively edged back down the branch it had boldly climbed onto in Vanbraekel. In Watts the Court ruled that Article 56 TFEU must be interpreted as meaning that, where the legislation of the competent Member State provides that hospital treatment provided under the national health service is to be free of charge, and where the legislation of the host Member State does not provide for the reimbursement in full of the cost of that treatment, the competent institution must reimburse that patient the difference (if any) between the cost of equivalent treatment in a hospital covered by the service in question up to the total amount invoiced for the treatment provided in the host Member State, and the amount which the institution of the latter Member State is required to reimburse under Article 22(1)(c)(i) of Regulation 1408/71.

To follow the metaphor, in the current case, the Court has declined the Commission’s invitation to climb out onto a very similar looking branch. The case concerned infringement proceedings taken by the Commission against Spain. As Advocate General Mengozzi explained, under Spanish law, except in exceptional cases where ‘urgent, immediate and vital’ treatment is necessary, the national health system only pays for hospital treatment carried out in the system’s own facilities. Therefore, costs incurred by a person covered by the Spanish social security system for hospital treatment that is necessary on medical grounds and carried out during a temporary stay in another Member State in accordance with Article 22(1)(a) of Regulation 1408/71 are not refunded.44 This appeared inconsistent with the Court’s approach under Article 22(1)(c) in Vanbraekel.

The main defences put forward by the Spanish authorities (e.g. that this approach was consistent with Regulation 1408/71) clearly missed the point of the argument as both the Advocate General and the Court pointed out.45 More substantially, Spain argued that (a) any restriction of freedom to access or provide services was purely hypothetical; and (b) if there

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44 Opinion at 43. Article 22(1) of Regulation 1408/71 (see now Articles 19 and 20 of Regulation 883/2004) distinguishes between a person (a) whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another Member State; and one (c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition.

45 Opinion at 55, judgement at 45.
was a restriction it was justified by the need to ensure the financial stability of the health system.

The care in question clearly fell with the scope of the provisions concerning freedom to provide services.⁴⁶ Therefore, it was necessary to establish if there was a restriction on such freedom. The Commission argued that the Spanish legislation was likely to cause persons insured under the Spanish health system who need hospital treatment during a temporary stay in another Member State to return to Spain earlier than intended in order to undergo such treatment there if the level of cover of health expenses in the State of stay is lower than under Spanish regulations. Therefore, the freedom to provide both (a) medical services and (b) the services that prompted the journey in the first place would be impeded. The Commission also argued that the Spanish legislation would deter persons, in particular elderly persons or persons with existing or chronic health conditions, from travelling to a Member State where part of the cost of health services is charged to the patient, thereby preventing them from enjoying non-medical services in such States. The Advocate General did not accept this argument in relation to non-medical services, considering it to be ‘based on mere supposition’.⁴⁷ However, he did accept that the rules would impose a restriction as regards freedom to provide medical services.⁴⁸

The Court took a different view. First it distinguished between ‘unscheduled’ care under Article 22(1)(a) and scheduled care under Article 22(1)(c).⁴⁹ The Court argued that in the case of a person whose travel to another Member State is for reasons relating to tourism or education, for example, and not to any inadequacy in the health service under which he is insured,

‘the rules of the Treaty on freedom of movement offer no guarantee that all hospital treatment services which may have to be provided to him unexpectedly in the Member State of stay will be neutral in terms of cost.’ ⁵⁰

In the Court’s view, given the disparities between one Member State and another in social security cover and the fact that the objective of Regulation 1408/71 is to coordinate the

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⁴⁶ Opinion at 76, judgement at 47 et seq.
⁴⁷ Opinion at 82.
⁴⁸ Opinion, 83-89.
⁴⁹ See opinion at 78 for a contrary view.
⁵⁰ Judgement at 61.
national laws, not to harmonise them, the conditions attached to a hospital stay in another Member State may, in some circumstances, be to the insured person’s advantage or disadvantage.\(^\text{51}\) This, of course, answers the case and yet provides no logical reason for the answer. We’re here because we’re here because we’re here ....

The Court went on to argue that in the case of ‘scheduled’ hospital treatment in another Member State, a person could generally obtain an estimate of the cost of that treatment, enabling him or her to compare the levels of cover applicable in the Member State of stay and the Member State of affiliation. In such cases, the fact that the legislation of the Member State of affiliation does not guarantee the insured person the right to receive reimbursement of any difference between the level of cover applicable in that Member State and the level of cover applicable in the Member State in which the hospital treatment is scheduled to take place is likely to induce the insured person to cancel the treatment planned in that other Member State, which, as the Court held in Vanbraekel and in Watts, would amount to a restriction on the freedom to provide services.\(^\text{52}\) In contrast, in unscheduled cases, the Court argued that there was often no alternative but to provide the insured person with hospital treatment in an establishment in the Member State of stay and in these cases, the legislation could not be regarded as having any restrictive effect on the provision of hospital treatment services.

This argument is logical as far as it goes. However, the Court went on to accept that cases of unscheduled treatment also involve less serious cases where the person could still chose whether to remain in the Member State of stay or to return to the Member State of affiliation.\(^\text{53}\) It pointed out that Decision 194 (of the Administrative Commission) makes clear that the system established under Article 22(1)(a)(i) is intended precisely to prevent the insured person from having to return early to the Member State of affiliation to receive the necessary treatment there, by conferring on that person the right – which he would not otherwise have – of access to hospital treatment in the Member State of stay on conditions of reimbursement as favourable as those enjoyed by insured persons covered by the legislation.

\(^{51}\) Ibid. Why the Treaty provision on freedom to provide services are now to be interpreted in the light of the purpose of Regulation 1408/71 is not explained. The argument might have been slightly more convincing had the Court at least referred to the fact that Article 48 TFEU (the enabling provision for the co-ordination regulations) clearly envisages co-ordination rather than harmonisation.

\(^{52}\) Judgement at 62-3.

\(^{53}\) At 66.
of that State.\textsuperscript{54} It is not immediately obvious how this in any way answers the argument that the rules therefore impose a restriction on somebody who could otherwise avail of health care in the Member State of stay – unless one accepts that while it would be clearly incorrect to read the Treaty provision in the light of Article 22(1)(c), they should be read in a manner consistent with Article 22(1)(a) (as interpreted, of course, by Decision 194).

The Court further suggested that the comparative costs would be ‘uncertain’ at the point where persons are availing of unscheduled treatment.\textsuperscript{55} There are a number of problems with this argument not the least being the lack of clarity as to its evidential basis. It seems not unlikely that, in many cases, patients would have a reasonable idea as to which health care system is more generous. It would also seem undesirable that the Court should rely on the opacity of comparative health care costs – surely a barrier to freedom to provide services – as a justification for a restrictive approach.

As regards services other than medical services, the Court ruled that the argument that there might be a restriction on the freedom to provide such services appeared ‘too uncertain and indirect’.\textsuperscript{56}

\textit{Justification}

Turning to the issue of justification, the Advocate General had pointed out that a person insured under a national health scheme where services are in principle free of charge is not entitled to the full reimbursement of expenses incurred on health treatment abroad but only to reimbursement of the difference between the cost of the services borne by the institution in the State of stay and the cost of similar treatment in the Member State of insurance if that difference is charged to the patient under the legislation of the Member State of stay. Hence, it is not a question of charging national systems in which services are free of charge for the costs which, under the legislation of other Member States, are borne by the patient, since the State of affiliation is not in any case required to reimburse more that the cost that would have been borne by its own health institutions if treatment had been given on the national territory.

\textsuperscript{54} At 67.  
\textsuperscript{55} At 68.  
\textsuperscript{56} At 72. Though, see in contrast, the Court’s willingness to take a very expansive approach in the Flemish care insurance case: \textbf{Case C-212/06}, Government of the French Community [2008 ECR I-1683. Of course, the circumstances were different in that the Court wanted to uphold the Commission’s argument in that case.
or in a contracted establishment. According to the Advocate General, the risk of financial repercussions on the national health service could not of itself justify a systematic refusal to grant additional reimbursement in Article 22(1)(a) cases.

The Advocate General also rejected the argument that the Spanish approach was justified by the objective of maintaining a balanced medical and hospital service open to all and, more specifically, avoiding ‘health tourism’. He concluded that Regulation 1408/71 allowed the imposition of conditions which would limit the scope of reimbursement and that, in any case, less restrictive measures could be introduced other than a systematic refusal of reimbursement.

The Court again took a different approach taking the view that

‘the ever-increasing mobility of citizens within the European Union, particularly for reasons of tourism or education, is likely to mean an ever greater number of cases of unscheduled hospital treatment, for the purposes of Article 22(1)(a) of Regulation 1408/71, which the Member States can in no way control.’

The Court pointed out that the principle underlying the Regulation (in this area) was that cases in which unscheduled hospital treatment provided to a person during a temporary stay in another Member State bring about a heavier financial burden for the Member State of affiliation than if that treatment had been provided in one of its own establishments, are deemed to be counterbalanced overall by cases in which, on the contrary, application of the legislation of the Member State of stay leads the Member State of affiliation to incur lower costs for the hospital treatment in question than those which would have resulted from the application of its own legislation. Therefore imposing on a Member State the obligation to guarantee complementary reimbursement whenever the level of cover applicable in the Member State of stay proves to be lower than that applicable under its own legislation would ultimately ‘undermine the very fabric of the system which Regulation 1408/71 sought to establish’. In every case concerning such treatment, the Member State of affiliation would have to pay the highest financial burden, whether through the application, in accordance with

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57 Opinion, 94 et seq.
58 Judgment, at 76.
59 Judgement, 78-79.
60 At 79.
Article 22(1)(a), of the legislation of a Member State of stay under which the level of cover is higher than that provided for under its own, or through the application of its own legislation in the contrary situation.

The Court noticeably does not burden the reader with any evidence as to the ever-increasing mobility of citizens, the ever greater number of cases of unscheduled treatment, the inability of the Member States to control this, or the likely financial consequences and their risk of undermining the ‘very fabric’ of the co-ordination regulation. Indeed no evidence was adduced (whether or not it exists) that travel is, in itself, likely to lead to a greater need for health care or to more expensive health care.

Many will welcome the outcome of this case. Indeed many might question why the Court found it necessary in Vanbraekel to opt for the ‘best of both worlds’ approach. However, the Court’s distinguishing of Vanbraekel is unconvincing in the extreme and leads to an even more confusing situation whereby travellers requiring planned care can opt for the higher level of reimbursement (subject to the Watts cap) while those (at least officially) seeking unscheduled care cannot. The Court appears to have had three options in dealing with this case. It could have simply followed its own case law and applied the logic of Vanbraekel to unscheduled treatments. Second, it could have decided that the Vanbraekel judgment was incorrect and rowed back on this approach. Or, it could attempt to distinguish the two situations in some coherent and convincing manner. One might assume that it wished to follow the third option. If so it failed miserably.

2.2 EQUAL TREATMENT OF MEN AND WOMEN

The Court of Justice also considered one of the now infrequent cases concerning Directive 79/7 on equal treatment for men and women in social security. The case concerned the fact that, in the period prior to 1995, Belgian pension law had, in certain cases, calculated the amount of pension payable on the basis of notional earnings which were different for men and women. The Belgian authorities initially argued that this simply reflected actual differences in pay at that time, but the Belgian courts held that even if differences of treatment on grounds of sex arose from the factual situation which prevailed at the time, involving a difference in the level of pay of men and women, such a situation was

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61 Case C-577/08, Brouwer, [2010] ECR I-000.
incompatible with Article 141 EC and the obligation to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

At the Court hearing, Belgium changed its position and did not defend the use of differential pay levels. Unsurprisingly, the Court ruled that, for the period from 1984 (when Directive 79/7 came into effect) to 1995, Article 4(1) of Directive 79/7 precluded national legislation under which the calculation of retirement and old-age pensions of female frontier workers was based on notional and/or flat-rate wages lower than those of male frontier workers.\(^{62}\) The Court rejected Belgium’s request to limit the temporal effect of the judgment on the basis that there was no objective uncertainty concerning the issue.\(^ {63}\)

The outcome is unsurprising. The case does, however, raise the issue as to whether direct discrimination on grounds of sex might be justified. The Belgian courts took the view that it could although that it was not so justified on the facts. The Court of Justice only indirectly addressed this issue in its consideration of whether the temporal effect of the judgment could be limited. It stated that ‘the Belgian authorities were not entitled to take the view that the fact that the wages of female workers were lower than those of male workers resulted from the existence of objective factors and not from simple wage discrimination.’\(^ {64}\) While not ruling out that justification of direct discrimination might be possible, this does not greatly clarify the position. Why the Belgian authorities should not be able to take particular views as to the reasons for differences in wages is not explained.\(^ {65}\)

In the early cases on Directive 79/7, the Court held that direct differences in social security rates based on gender were in breach of Article 4 of the Directive without any consideration of possible justification.\(^ {66}\) The rationale for such differences was of course – at least in part – that women earned lower wages than men but this was never considered as providing a possible justification. The Belgian law simply provides for a slightly more indirect method of achieving the same (unequal) result. On the basis of the Court’s case law such generalised rules – which result in women receiving lower benefits regardless of their actual wages –

\(^{62}\) Judgement, para 31.
\(^{63}\) Judgement, para 37.
\(^{64}\) At 38.
\(^{65}\) Taken to extremes, this statement might call into question any system which links benefits to wages given that, in all EU countries, female wages are generally still lower than male wages.
should be considered to be directly discriminatory and in breach of Directive 79/7. In contrast, rules linking benefits to former wages which have the effect that, on average, women receive lower benefits than men, should be regarded as having disproportionate impact which may be justified by objective factors unrelated to gender.

3. LEGISLATIVE DEVELOPMENTS

The Employment and Social Affairs Council (EPSCO) meeting on 7 June 2010 marked varying fortunes for a number of proposed social security laws. The proposed directive implementing the principle of equal treatment as regards religion or belief, disability, age and sexual orientation (discussed in previous issues) appears to have made little progress. The Presidency reported that ‘extensive further work’ was needed on the proposal – exactly the same wording as used in the last progress report 6 months ago. The Council agreed noting that ‘further discussions are needed on numerous issues’.

The Council did, however, reach political agreement on the proposed Regulation to extend the provisions of Regulation 883/2004 (on co-ordination of social security) to third-country nationals. This will replace Regulation 859/2003 which fulfilled the same role in relation to Regulation 1408/71. Some might take the view that taking three years to reach political agreement on a three Article Regulation (which will not apply to Denmark or the UK) does not necessarily represent much cause for celebration.

Finally, the Council also reached political agreement on the proposed Directive on patient’s rights in cross-border health care which is a (partial) response to the Court’s case law on the issue discussed above. The main principles of the Directive\(^67\) are that

- In general, patients will be allowed to receive healthcare in another Member State and be reimbursed up to the level of reimbursement applicable for the same or similar treatment in their national health system if the patients are entitled to this treatment in their country of affiliation;
- In the case of overriding reasons of general interest (such as the risk of seriously undermining the financial balance of a social security system) a Member State of affiliation may limit the application of the rules on reimbursement for cross-border healthcare. Member States may also manage the flows of patients by requiring prior

\(^67\) As summarised by the Council, 10760/10, 8 June 2010.
authorisation for certain healthcare (those which involve overnight hospital accommodation, require a highly specialised and cost-intensive medical infrastructure or which raise concerns with regard to the quality or safety of the care) or via the application of the "gate-keeping principle", for example by the attending physician;

- In order to manage inward flows of patients and to ensure sufficient and permanent access to healthcare within its territory a Member State of treatment may adopt measures concerning the access to treatment where this is justified by overriding reasons;
- Member States of treatment will have to ensure, via national contact points, that patients from other EU countries receive on request information on safety and quality standards on their territory in order to enable patients to make an informed choice;
- The cooperation between Member States in the field of healthcare will be strengthened, for example in the field of e-health and through the development of European networks which will bring together, on a voluntary basis, specialised centres in different Member States;
- The recognition of prescriptions issued in another Member State will be improved and, as a general rule, if a product is authorised to be marketed on its territory, a Member State must ensure that prescriptions issued for such a product in another Member State can be dispensed in its territory in compliance with its national legislation;
- However, sales of medicinal products and medical devices via internet, long-term care services provided in residential homes and the access to and allocation of organs for the purpose of transplantation have all been excluded from the scope of the draft Directive.

Following final agreement of the text, the draft Directive will be sent to the Parliament for second reading.

4. GREEN PAPER ON PENSIONS
Finally, we note that the Commission has produced its anticipated Green Paper on pensions (see Rheinhard’s article in this issue of the journal). The document is commendably concise and, in general, outlines the challenges facing the EU’s pension systems including rising longevity (in itself obviously a good thing) and low fertility rates. It outlines the progress

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69 See also the Conclusions of the EPSCO Council of 7 June 2010, 9413/10 and the Interim joint report on pensions (of the Social Protection and Economic Policy Committees), 9989/10, 27 May 2010.
which many Member States have made towards achieving sustainable pensions – basically by lowering replacement rates and increasing pension age and makes clear that some (unnamed) countries need to take further action. It also usefully highlights that, while these reforms have increased sustainability, they have also meant that people are exposed to more risk. The Green Paper is, however, somewhat hesitant in failing to point out that, while sustainability and adequacy may both be necessary, there are tensions between the two objectives and that some of the policies favoured by the Commission (such as linking pensions more closely to work) raise challenges in achieving other favoured objectives (such as protecting women or people with disabilities).

In the area of public pensions, the Green Paper acknowledges that Member States are responsible for pension policy and does not question this prerogative. Given the EU’s limited competence in this area, it is somewhat unclear as to how the EU’s role can be developed other than though a deepening of the open method of co-ordination (OMC).

In the area of private pensions, however, the position should be rather different given that these involve both free movement of persons and capital. This is particularly important with the greater emphasis placed on such pensions in policy overall. However, the Paper notes that there are still ‘considerable barriers’ to the achievement of an internal market for pensions with cross-border activity representing ‘well below’ 10 per cent of total life assurance premiums and ‘some’ Member States having aligned their pension tax systems with EU law. The Commission appears to have little optimism that the EU will play a more dynamic role in this field given, for example, the failure to agree the proposed Directive on acquisition, preservation and transferability of pension rights. The Commission suggests that the Institutions for Occupational Retirement Provision (IORP) Directive needs to be reassessed in the light of developments including the growth in defined contribution (DC) pensions. The logic of the analysis would suggest that much broader measures are required to achieve a real internal market in pensions but there would seem to be little hope that this can be achieved in the short-term (which would point to a continued role for the Court of Justice).