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

Mel Cousins, Glasgow Caledonian University

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OVERVIEW OF RECENT CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EUROPEAN COURT OF JUSTICE
(APRIL 2011 – JUNE 2011)

MEL COUSINS*

In this article, we review developments in the case law of the European Court of Justice and Court of Human Rights in the period April to June 2011. In contrast to the last issue which focussed on a number of key judgments – mainly involving an interpretation of the Treaty provisions – that look likely to have an important impact on social security issues,¹ this issue returns to the more mundane case law of the two courts on issues such as the co-ordination of social security for migrants and the application of the right to fair hearing and non-discrimination in the field of social security. However, the Römer case does mark an important confirmation of the Court of Justice’s earlier ruling (in Maruko) on discrimination on grounds of sexual orientation.

1. SPECIAL NON-CONTRIBUTORY BENEFITS (YET AGAIN)

Regulation 1408/71² covers social security benefits (as defined in Article 4(1)), although ‘social assistance’ is excluded from its scope. Hybrid benefits (known as special non-contributory benefits and defined in Article 4(2a)) fall partially within the scope of the Regulation, but are not exportable.³ While there are obvious difficulties in categorising benefits from a wide range of Member States in a consistent manner, the Court’s case law in

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* School of Law and Social Science, Glasgow Caledonian University; e-mail: mcousin11@caledonian.ac.uk

¹ Readers should note that, having taken a bold step forward on Union citizenship in Case C-34/09, Ruiz Zambrano, the Court more recently (and in a non-social security case) took a bold step sideways in Case C-434/09, McCarthy [2011] ECR I-000, in which it held that Article 21 TFEU is not applicable to a Union citizen who has never exercised her right of free movement, who has always resided in a Member State of which she is a national, and who is also a national of another Member State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving her of the genuine enjoyment of the substance of the rights conferred by virtue of her status as a Union citizen, or of impeding the exercise of her right of free movement and residence within the territory of the Member States. Whereas the parent-child relationship in Ruiz Zambrano was apparently sufficient to engage the substance of the rights of Union citizenship, the spousal relationship in McCarthy was not.


³ The precise wording of Article 4(2a) has changed over time, though the Court has never paid much attention to these changes.
the area has been marked by an abysmal lack of clarity. In practice, the Court has held that cash benefits relating to care are to be classified as social security, whereas benefits that provide a subsistence income (even if not means-tested) are special non-contributory benefits. Even if this distinction is not very logical and somewhat atheoretical, its acceptance might have been made easier had the Court ever openly admitted that it is categorising on this basis. Instead, the Court has continued to put forward rather inconsistent and often spurious justifications for the results at which it arrives.

The Court adopts two different approaches in categorising benefits. If it wishes to find that a benefit is social security, it starts from Article 4(1) and examines whether the benefit covers one of the contingencies listed therein and is granted on the basis of a legally defined position, without any individual and discretionary assessment of personal needs. Having found that it falls within the definition of social security, the Court holds that it cannot be a SNCB. Where it wants to find the benefit to be a SNCB, it starts with Article 4(2a) and finds that the benefit in question falls within the scope of that sub-article. Even given the dismal standard of the Court’s jurisprudence to date, its decision in Bartlett marks a new low.

The background to the Bartlett case goes back to the Court’s 2007 judgment in Commission v Council, in which the Court ruled that a series of care/disability benefits were social security rather than SNCBs. One of the benefits involved was the UK disability living allowance (DLA). This non-contributory and non-means-tested benefit has two components: care and mobility. Before the 2007 proceedings reached the Court, the Commission and the UK government had agreed that the mobility component was a SNCB and this was accepted by the Advocate General and the Court, without detailed consideration. However, the Court held that the care component was a social security benefit. This outcome seemed odd to a number of UK

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4 Cousins (2007a).
7 In its post-2005 form, this covers benefits intended to provide either (i) supplementary, substitute or ancillary cover against the social security risks (set out in Article 4(1)), and which guarantee the persons concerned a minimum subsistence income; or (ii) solely specific protection for the disabled.
8 Case C-537/09, Bartlett [2011] ECR I-1000.
10 This, in part, reflects the fact that it replaced separate mobility and attendance allowances. Interestingly, in Case C-356/89, Newton [1991] ECR I-3017 the Court had held that the then mobility allowance was a social security benefit.
experts, and cases were brought before the UK tribunals by persons entitled to the mobility component of DLA, arguing that it was, in fact, a social security benefit. Ultimately, these cases reached the specialist Upper Tribunal, where it was considered by the experienced Judge Mesher. In a thorough and thoughtful consideration of the issues, Judge Mesher decided to refer a series of questions to the Court of Justice.\(^{11}\) His own view was that the mobility component was a social security benefit. However, given the ruling in *Commission v Council*, he felt unable to decide this without a further reference to the Court.

The Court seemed less than pleased to be asked to reconsider its earlier decision, and ruled shortly that the mobility component was a SNCB.\(^{12}\) The Court appeared very confident that the answer to the reference was clear and did not find it necessary to await a written opinion from the Advocate General. Indeed, the Court seemed so confident in the obvious correctness of its approach that it did not find it necessary to explain the reasons for its decision. Insofar as it bothered to provide any reasons, these were as follows:\(^{13}\)

1. The mobility component sought to provide specific protection for disabled people within the meaning of Article 4(2a);
2. The amount of mobility component was closely linked to the social environment of a person in the UK; and
3. It was awarded in the ‘overwhelming majority’ of cases to persons who cannot work because of their disability (the implication appearing to be that although not means-tested, it was in some way a minimum income payment or involved a social assistance element).\(^{14}\)

On the first point, Judge Mesher had expressed doubts as to whether the mobility component ‘solely’ provided specific protection for disabled persons, arguing that its purpose was analogous to that of allowing a disabled person to bear the costs of disability and to improve his

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\(^{11}\) *JT v Secretary of State for Work and Pensions* [2009] UKUT 286 (AAC).

\(^{12}\) Judge Bonichot acted as rapporteur in both cases. However, less hubris might have been appropriate, given that in *Commission v Council*, the Court had been forced to overturn (sub-silentio) its earlier (ill-considered) decisions in Case C-20/96 Snares [1997] ECR I-6057 and Case C-297/96 Partridge [1998] ECR I-3467.

\(^{13}\) I exclude its references to the fact that its earlier decision had already held that it was ‘not in dispute’ that the mobility component was a SNCB (at paras 24-5) given that this was precisely what was in dispute.

\(^{14}\) At paras. 27-29.
or her health and quality of life, like the Swedish disability allowance held to be social security in *Commission v Council*. On the second, point, I am unaware of any social security benefit where the social security authorities have argued (or the Court has found) that it was *not* closely linked to the national social environment. On the third point, Judge Mesher had stated that the mobility component did ‘not guarantee a minimum subsistence income’ and that the amount of benefit was not ‘linked to any notion of guaranteeing a minimum subsistence income or even to the claimant's individual mobility-related expenses’. He had argued that:

‘[t]he argument that was accepted in the circumstances of *Kersbergen-Lap* as showing sufficient elements of social assistance, that the majority of disabled young people (identified by the degree of incapacity and not having the insurance record for general incapacity benefit) would not otherwise have sufficient means of subsistence, does not work in relation to mobility component.’

For the reasons set out above, and primarily on the ground that the mobility component did not have the essential characteristic of social assistance, Judge Mesher would have decided that it was not a SNCB. In contrast, the approach adopted by the Court does not warrant serious analysis. If there was a ratings agency for judgements, this one would be junk.

2. NATIONALITY DISCRIMINATION

In *Puricel*, the applicant was a Romanian national who, from 1974, was in receipt of a state pension. In 1989, she left Romania. Under the law at that time, persons who left the country were compelled to give up the social and political rights conferred on them by the Romanian

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15 [2009] UKUT 286 at 34
16 [2009] UKUT 286 at 28 and 34.
17 Ibid at 28.
18 In Case C-206/10, *Commission v Germany* [2011] I-ECR 000, the Court ruled that a number of regional benefits for disabled persons were social security and within the scope of Regulation 1408 (following *Hosse*). It appears that the German authorities did not seriously contest the case, having already included these benefits as social security in Regulation 883. Somewhat unusually, the Court also held that the benefits were exportable as social advantages under Regulation 1612/68. This is the latest in a number of cases where benefits have been ruled to be exportable by this alternative legal route, but the (more or less) undefended nature of the case may mean that this particular decision does not carry great precedential weight.
19 *Puricel v Romania*, 20511/04, 14 June 2011.
state, including both Romanian nationality and pension entitlements. In 2001 her nationality and pension entitlements were restored. However, she claimed arrears of pension to 1999 (three years being the general cut-off period for pecuniary claims). Her claim was rejected in respect of periods up to May 2001 on the basis that the legislation in force until May 2001 had not provided for the payment of pensions to persons who did not have Romanian citizenship and/or did not reside in Romania. The applicant complained that she was discriminated against on grounds of nationality and residence in relation to her pension rights, contrary to Article 14 of the Convention and to P1-1 taken together.

The Court, however, ruled that her claim did not involve a possession within the scope of P1-1. The Government argued that she did not have any ‘possessions’, or a legitimate expectation of payment of a pension from 1990 until 2001, as firstly, she had waived her right to receive a pension, and secondly, she had not met the legal conditions prescribed by law. The applicant argued that she had been forced to give up her pension rights by the legislation in force at the time. The Court reiterated that P1-1 only applies to a person’s existing possessions and does not guarantee the right to acquire possessions. Therefore, there is no right to receive a social security benefit or pension payment of any kind or amount, unless national law provides for such an entitlement. In the present case, the national law, before being amended in 2001, explicitly prescribed that, unless one had Romanian citizenship and/or Romanian residence, one did not have a right to a social security benefit or pension. The Court ruled that the applicant had signed a declaration in which she renounced her Romanian citizenship, with the direct legal consequence, prescribed by the law, of her losing her civil and social rights, including the right to receive an old-age pension.\(^\text{20}\) It followed its previous jurisprudence to the effect that:

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\text{‘the hope that a long-extinguished property right may be revived cannot be regarded as a “possession” within the meaning of Article 1 of Protocol No. 1; nor can a conditional claim which has lapsed as a result of the failure to fulfil the condition.’}^{\text{21}}
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\(^{20}\) At para. 22.

\(^{21}\) *Gratzinger and Gratzingerova v. Czech Republic*, 39794/98, ECHR 2002-VII.
Therefore, it ruled that the applicant’s complaint under P1-1 taken alone must be rejected as incompatible *ratione materiae*.

Despite this, the Court went on to consider whether there had been a breach of Article 14. Although it had just held that the applicant had no claim to a possession within the meaning of P1-1, it now ruled that:

‘... the Romanian pension legislation provided for the pension payment to the applicant, upon condition that she fulfilled specific requirements; the proprietary interest thus generated is self-evident, rendering the facts of the case to fall within the scope of Article 1 of Protocol No. 1. This is also sufficient to render Article 14 of the Convention applicable.’ 22

However, in considering the issue of discrimination, the Court followed its decision in *Carson* to the effect that the payment of national insurance contributions alone was not sufficient to place the applicant in a similar position to all other pensioners, including those living in Romania. 23 In addition, the Court concluded that the difference in treatment complained of pursued at least one legitimate aim, which is broadly compatible with the general objectives of the Convention, namely, the protection of the country’s economic system, especially in the context of the country’s transition to a democratic system. 24

The case is almost certainly correct as to its outcome. However, it is arguable that the Court should have accepted that a claim for a possession was at stake. In *Stec*, the Court held that, in the case concerning a complaint under Article 14 taken with P1-1, the applicant had been denied all or part of a particular benefit on a discriminatory ground covered by Article 14, the relevant test being ‘whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question’. 25 The Court did not follow this approach in *Puricel*. 26 As to the

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22 At 26.
23 *Carson v. United Kingdom*, 42184/05, ECHR 2010.
24 At 30.
26 And having ruled that the claim did not fall within the scope of P1-1, it is not perhaps ‘self-evident’ how the case did so for the purposes of Article 14.
discrimination issue, the Court was perhaps correct to accept that there was objective justification for the restoration of pension rights from 2001 (although the criticisms advanced against the *Carson* approach of subsuming justification into comparison can also be advanced here).27

The *Landtová* case arose from a partition of the Czechoslovak Republic in 1993. In order to address issues concerning access to social security benefits, the Czech Republic and the Slovak Republic concluded an international agreement. In particular, the agreement adopted a rather crude criterion to determine the applicable scheme and the authority with competence to grant such benefits, which was that of the state of residence of the employer at the time of dissolution, that is, 31 December 1992. This means that persons employed by an employer established in the territory of what is now the Slovak Republic on 31 December 1992 were subject to the legislation and competence of the social security authorities of that state, regardless of their own place of residence at that time (or previously). Because the benefits provided by the Slovak Republic were – reflecting its level of national income – lower than those provided by the Czech Republic, this gave rise to a number of issues. This case did not deal with the question of whether the rule determining the allocation of competence was compatible with higher legal norms, but rather related to an internal dispute between the Czech courts and Czech administration as to the treatment of certain Czech nationals.

Czech nationals who, before the division, worked for employers established in the territory of what is now the Slovak Republic were subject to the legislation and competence of the social security authorities of that state, and received a lower pension than if they had been subject to Czech law. The Czech constitutional court held that, pursuant to Article 30 of the Charter of fundamental rights and freedoms of the Czech Republic, Czech nationals resident in the Czech Republic are entitled to claim a supplement to the retirement benefit for which they were eligible under the agreement of 29 October 1992 from the Czech authorities. The court held that:

> ‘where a national of the Czech Republic fulfils the statutory conditions for entitlement to a benefit and that entitlement would, according to national

27 And the government appears to have advanced a better case for objective justification (see para. 24) than the weak reference to ‘protection of the economic system’ accepted by the Court.
(Czech) law, be higher than the entitlement under the [Czech-Slovak] Treaty, it is for [a Czech social security institution] to ensure the drawing of pension payments in an amount corresponding to the higher claim under the national laws, that is, to decide to make up the amount of pension drawn from the other party, bearing in mind the amount of pension drawn in conformity with the [Czech-Slovak] Treaty from the other party to the Treaty such that it does not result in the duplicated drawing of two pensions of the same type granted for the same reasons from two different [social security institutions].

The Czech authorities (and it appears the Czech administrative courts) did not accept this interpretation, believing it to be contrary to EU law and, in the instant case, appealed a decision that Ms. Landtová be awarded a supplement. The administrative court referred two questions to the Court of Justice concerning the compatibility of the Constitutional Court’s ruling with EU law. The Court held that there was no breach of the rules of Regulation 1408 as regards calculation of pension. However, the decision of the Czech court clearly involved direct discrimination on grounds of nationality. More confusingly, the Court also held that the residence condition constituted indirect discrimination on grounds of nationality. In fact, the residence requirement in this case only applies to persons who are already Czech nationals, so it could not possibly involve nationality discrimination. If one assumes the Court wished to examine the residence condition in isolation from the nationality condition, it has previously ruled that such conditions are discriminatory, only if they cannot be objectively justified (a matter for the national court to decide).

The main issue was the impact of this finding of discrimination. Clearly the Czech authorities wished to use the finding of the Court to overrule that of the Czech Constitutional Court. However, the Court of Justice pointed out that:

‘where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the

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28 Quoted in the opinion of the Advocate General at para. 17.
29 Judgment, para. 43. Unlike the Advocate General (opinion, para. 46) the Court made no reference to possible justification of such discrimination.
30 Judgment, para. 49.
principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining.\textsuperscript{32}

The difficulty in this case was that Ms. Landtová was in the ‘favoured’ rather than the disadvantaged group. However, the Court concluded that as the Czech authorities could not ‘lawfully refuse to extend entitlement to the supplement to those who are placed at a disadvantage, nothing precludes that authority from maintaining that right for the category of persons who already benefit from it under the national rule’.\textsuperscript{33} It accepted that EU law did not preclude a reduction in the benefits provided to the favoured group as part of measures to re-establish equal treatment but, pending such measures, EU law did not require that the favoured group be deprived of their advantages.

However, the Court’s approach ignores the fact that the general law does not discriminate directly on grounds of nationality. Rather, the discrimination has been introduced by the judgment of the Czech Constitutional Court. In addition, it is entirely unclear who the ‘disadvantaged’ group are. If one takes the Court’s ruling that both nationality and residence clauses are discriminatory, then the disadvantaged group includes all those in receipt of a (lower) Slovak pension of any nationality and resident anywhere. But why should the Czech authorities assume responsibility for such persons? In addition, the underlying issue here - i.e. the very crude rule allocating responsibility based on the location of the employers’ establishment on 31 December 1992 - was not considered at all. Further litigation on this issue seems guaranteed.

3. CARE BENEFITS UNDER REGULATION 1408

\textsuperscript{32} Judgment, para. 51.
\textsuperscript{33} Para. 53. In contrast, the Advocate General had accepted that ‘the referring court cannot extend the supplement to victims of the discrimination even if that is only for the simple reason that they are not parties to the proceedings’ (at 72).
The *da Silva Martins* case concerned whether Mr. da Silva Martins could retain optional insurance under the German scheme in relation to care costs although he was, at the same time, insured under the Portuguese insurance scheme.\(^{34}\) As the Court of Justice pointed out:

‘… the intention of the provisions of Regulation No 1408/71 determining the legislation applicable to employed and self-employed persons moving within the European Union is that those persons should in principle be subject to the social security scheme of one Member State only, so as to avoid the application of more than one national legislation and the complications that might ensue. That principle of a single social security scheme finds expression in particular in Article 13(1) of Regulation No 1408/71.’

The wording of Article 15(2) of the Regulation appeared to rule out simultaneous insurance under both national schemes in the instant case.

Mr. da Silva Martins was a Portuguese national who worked, and was insured, in Germany for many years. He received retirement pensions from both Germany and Portugal, and also received German care benefits in kind. However, the German care insurance institution subsequently refused to allow Mr. da Silva Martins to maintain his insurance under the German care insurance scheme and to pay him, as from the date of his definitive return to Portugal (in 2002), the corresponding care allowance. Advocate General Bot seemed to provide a perfectly adequate solution to the case, proposing (i) that Articles 39 EC and 42 EC and Articles 9(1) and 15(1) of Regulation 1408/71 should be interpreted as meaning that a former migrant worker who is compulsorily insured under the social security scheme of his Member State of residence may, where that insurance does not cover the risk of reliance on care, maintain during the same period his optional continued insurance under the care insurance scheme organised by his former State of employment; and (ii) (on the assumption of the referring court that no care benefits were provided under the Portuguese system) that Article 28 of Regulation 1408 applied and the care allowance paid on the basis of that optional continued insurance must be provided to the person concerned in his Member State of residence. The Court took a much more convoluted approach.

The Court pointed out that care benefits are a relatively new feature of European social security and are not explicitly recognised in Regulation 1408. Accordingly, in the *Molenaar* case, the Court – in order to bring care benefits within the scope of Regulation 1408 – had classified them as ‘sickness benefits’.\(^{35}\) However, the Court now distinguished between such benefits and sickness benefits ‘strictu sensu’.\(^ {36}\) Therefore, while Article 15(2) of Regulation 1408 prohibited insurance under ‘overlapping’ compulsory and optional schemes, the Court was able to hold that there was no overlapping involved here as, while the Portuguese scheme did cover sickness benefits *strictu sensu*, it did not cover care insurance (aka, but for certain purposes only, ‘sickness benefits’).\(^ {37}\) Therefore, Regulation 1408/71 did not preclude optional continued affiliation to the German care insurance scheme.

As regards payment of care benefits, the Court ruled that ‘the aim of Articles 45 TFEU and 48 TFEU would not be achieved if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid.’\(^ {38}\) Therefore, EU law on the coordination of social security could not, ‘except in the case of an express exception’ in conformity with the underlying objectives of the law, be applied in such a way as to deprive a migrant worker of benefits granted solely by virtue of the legislation of a single Member State. Therefore, the Court ruled that:

> ‘It would thus be inconsistent with the aim pursued by Article 48 TFEU ... if a former migrant worker in a position such as that of Mr. da Silva Martins were to lose, simply because he is entitled pursuant to Article 27 of Regulation No 1408/71 to sickness benefits *strictu sensu* under the legislation of his Member State of residence, all advantages representing the counterpart of contributions paid by him in a former Member State of employment in respect of a separate

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\(^{35}\) Case C-160/96 *Molenaar* [1998] ECR I-843. Contrary to what Advocate General Bot appears to suggest (at para. 8 of the opinion), this issue is not addressed by Regulation 883/2004 which continues to treat care benefits as ‘sickness benefits’, although Article 34 of that Regulation does contain provisions concerning overlapping of long-term care benefits.

\(^{36}\) Judgment at para. 47.

\(^{37}\) At para. 57.

\(^{38}\) At para. 74.
insurance scheme relating not to the risk of sickness within the strict sense of Article 4(1)(a) of Regulation No 1408/71 but to the risk of reliance on care.  

The Court further held that, if Portugal did provide care benefits, but at a lower level than the German benefits, a top-up should be paid by the German authorities (as in the case of family benefits).  

On the one hand, there is perhaps more justification than usual, in this case, for seeking to find a way around the strict wording of the Regulation as regards insurance cover. On the other, the Court’s distinction between (i) sickness benefits *strictu sensu* and (ii) sickness benefits (care benefits) involves legislation rather than interpretation – especially given that the legislature has recently (i.e. in Regulation 883/2004) chosen not to introduce a specific category of care benefits. In addition, the difficulties caused by this approach are evident in the second part of the judgment, where the Court, rather than simply applying Article 28 of Regulation 1408 (on the basis that no care benefits were payable in Portugal), relied on the Treaty provisions to ‘interpret’ (or, rather, disapply) Article 27 of that Regulation. The full implications of this approach remain to be seen.

4. **INTERFERENCE IN THE JUDICIAL PROCESS**

The *Maggio* case concerned a number of Italian residents who had worked in Switzerland. They claimed that, under the Italo-Swiss Convention on Social Security, their entitlement to an Italian pension should be calculated in accordance with their actual wages earned in Switzerland. However, the Italian pension institution (*Istituto Nazionale della Previdenza Sociale*) argued that it should be calculated on the basis of a theoretical (and lower) amount. The Italian Court of Cassation ruled, in 2004, that the calculation of pensions should be based on the real remuneration received by that person, including any work undertaken in

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39 At para. 78.
40 At para. 83. The case is also remarkable for the lack of clarity about factual issues of basic importance to the case, such as whether the Portuguese system provides cash benefits relating to care (judgment, paras. 63-4).
41 The Advocate General had taken the view that Article 28, rather than Article 27, was applicable (opinion, paras. 53-4).
42 Or alternatively, simply applying Article 27 of that Regulation if such benefits are payable.
43 *Maggio v Italy*, 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011
Switzerland, irrespective of the fact that contributions paid in Switzerland had been calculated on the basis of much lower rates than those established under Italian legislation. However, in 2006, Italian legislation reversed this position, providing that, in the case of ‘international social security treaties and conventions’, pension entitlement was to be calculated having regard to an adjustment for the contribution rate paid, i.e. the position favoured by the INPS.\(^{44}\) However, pension claims already determined under the more favourable approach before the entry into force of the law were excluded.

The Italian constitutional court upheld the 2006 amendment, ruling that:

\begin{quote}
‘the changes brought about by the impugned law sought to bring the relationship between pensionable remuneration and contributions in line with the system in force in Italy during the same period of time. The law provided that remuneration received abroad (used as a basis for pension calculations) was to be adjusted by applying the same percentage ratios used for pension contributions paid in Italy during the same period. Thus, the norm made explicit what had been in the original interpretative provisions. Consequently, there had been no breach of the principle of legal certainty. Nor was the norm discriminatory since the acquired and more favourable rights of earlier pensioners were, by then, unassailable. Furthermore, the law did not discriminate against people who had worked abroad, because it simply ensured an overall balance in the welfare system, and avoided the situation whereby persons who had made small contributions to a foreign pension scheme could receive the same pension as those who had paid the much higher Italian contributions. The contested law did not provide for any \textit{ex post} reductions, as it merely imposed an interpretation which could already have been inferred from the original provisions. Lastly, this system still allowed for a sufficient and satisfactory pension, adequate for the lifestyle of a worker. Accordingly, the claim of unconstitutionality of the said law was manifestly ill-founded.’\(^{45}\)
\end{quote}

\(^{44}\) Article 1, paragraph 777, of Law 296/2006.  
\(^{45}\) As summarised in para. 35 of the judgment.
The applicants, who had all been involved in ongoing litigation concerning their pension claims in 2006, argued that the change in the law was in breach of the right to a fair hearing under Article 6.1 of the Convention. The Court agreed.

It pointed out that it had repeatedly ruled that:

‘although the legislature is not prevented from regulating, through new retrospective provisions, rights derived from the laws in force, the principle of the rule of law and the notion of a fair trial enshrined in Article 6 preclude, except for compelling public-interest reasons, interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute.’

In this case:

‘the enactment of Law 296/2006, while the proceedings were pending, in reality determined the substance of the disputes and the application of it by the various ordinary courts made it pointless for an entire group of individuals in the applicants' positions to carry on with the litigation. Thus, the law had the effect of definitively modifying the outcome of the pending litigation, to which the State was a party, endorsing the State's position to the applicants’ detriment.’

Nor was there any compelling general interest reason capable of justifying such a measure. Neither financial considerations nor the desire to restore the interpretation of the INPS could amount to justification for legislative interference while proceedings were pending, particularly when the INPS’ interpretation had been found to be fallacious on a majority of occasions by the domestic courts, including the Court of Cassation.

The first applicant had also argued that the 2006 law was a breach of his rights under P 1-1 and Article 14. The Court did not find it necessary to decide whether the claim involved a

46 At 43.
47 At 44.
‘possession’ as, assuming it did, it ruled that there had been no breach of P1-1. The Court appeared to assume (but without explicitly saying so) that the 2006 law amounted to an interference with the pension entitlements. However, it has previously ruled that retrospective interference with possessions did not, in itself, prevent such interference from being lawful. The Court also accepted that the law pursued the public interest in providing a harmonised pension calculation, aiming at a balanced and sustainable welfare system. In the circumstances, the Court did not find that the law imposed an excessive individual burden on the applicant who had only suffered a partial reduction in pension. The Court concluded that:

‘In consequence, the applicant's right to derive benefits from the social insurance scheme in question has not been infringed in a manner resulting in the impairment of the essence of his pension rights. In this respect the Court notes that the applicant had in fact paid lower contributions in Switzerland than he would have paid in Italy, and thus he had had the opportunity to enjoy more substantial earnings at the time. Moreover, this reduction only had the effect of equalizing a state of affairs and avoiding unjustified advantages (resulting from the decision to retire in Italy) for the applicant and other persons in his position. Against this background, bearing in mind the State's wide margin of appreciation in regulating the pension system and the fact that the applicant only lost a partial amount of pension, the Court considers that the applicant was not made to bear an individual and excessive burden.’

The Court turned finally to Article 14. The first applicant complained that he had suffered discrimination in the enjoyment of his Convention rights because his pension claims had not been determined at the material time, as opposed to others, whose proceedings had been finalised. The Court rather cavalierly ignored the question of whether this distinction could amount to a ‘status’ for the purposes of Article 14. It turned immediately to whether there was objective and reasonable justification for the difference in treatment. It followed its

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48 An issue on which, as we have seen in Puricel, the Court appears determined to impose unclarity.
49 At 60, citing Maurice v. France, 11810/03, 6 October 2010; Draon v. France, 1513/03, 6 October 2005, and Kuznetsova v. Russia, 67579/01, 7 June 2007.
50 At 63.
51 Article 14 was applicable on the basis that Article 6 was engaged.
52 Of course, despite the grand chamber’s views in Carson, the Court routinely accepts any and (more or less) every distinction as amounting to status.
previous jurisprudence to the effect that the choice of a cut-off date, when transforming social security regimes, must be considered as falling within the wide margin of appreciation afforded to a State when reforming its social policy.\(^{53}\)

Thus, the overall effect of the ruling is rather narrow in that the state may not, in breach of Article 6, alter the law so as to determine the outcome of pending litigation, but it may, more generally, introduce amending legislation to impact (even retrospectively) on pension rights more generally.

5. SEXUAL ORIENTATION AND PENSION RIGHTS

Finally, in \textit{Römer}, the grand chamber of the Court of Justice delivered a strong judgment on the rights of members of a ‘life partnership’ (civil partnership).\(^{54}\) The Court largely followed its earlier decision to the same effect in \textit{Maruko}.\(^{55}\) However, it appears from the opinion of the Advocate General that the lower German courts had not necessarily applied that judgment in the sense intended by the Court. The case concerned a public service pension payable to Mr. Römer. The pension was calculated more favourably in the case of a married person than in the case of a person – such as Mr. Römer – who was a member of a life partnership under German law. He argued that this was discriminatory in breach of Directive 2000/78 on equal treatment in employment.

The Court – following its ruling in \textit{Maruko} – held that, as the pension was categorised as pay for the purposes of Article 157 TFEU, it was not excluded from the scope of Directive 2000/78 as a payment ‘of any kind made by state schemes or similar, including state social security or social protection schemes’.\(^{56}\) Advocate General Niilo Jääskinen considered the referring court’s question as to whether the German provisions were excluded from the scope of the Directive by Recital 22 of the Directive (which provides that it ‘is without prejudice to national laws on marital status and the benefits dependent thereon’). The Court in \textit{Maruko}

\(^{53}\) At 71, citing \textit{Twizell v. United Kingdom}, 25379/02, 20 May 2008. Even if the point is clearly correct, the use of precedent is typically unconvincing.

\(^{54}\) Case C-147/08 \textit{Römer} [2011] ECR I-000.


\(^{56}\) Article 3(3) of Directive 2000/78. See opinion, para. 65 for a discussion as to the type of schemes that might still be caught by the reference to ‘state schemes or similar’. 16
had taken the view that Member States, while retaining competence in relation to such laws, must respect EU law in the exercise of that competence – including the non-discrimination provisions. However, it appeared that the German courts had taken a more expansive view of the effect of this recital. The Advocate General proposed that the Court should specify that Recital 22 of the Directive did not call into question the Directive’s application to pensions (which are classified as pay). The Court broadly followed this approach.

The referring court had asked whether the difference in treatment constituted discrimination (either direct or indirect), whether direct discrimination could be justified, and, if so, what factors should be taken into consideration. In particular, the court referred to the German constitutional protection of marriage, and asked how this could be reconciled with EU law (or whether it was simply overruled by EU law). The Court ruled that the ‘existence of direct discrimination, within the meaning of the Directive, presupposes, first, that the situations being weighed up are comparable.’ Although this was ultimately a matter for the national court to decide, the Court strongly hinted that the situations were comparable. The Court held that Directive 2000/78 precluded a national law under which a pensioner who has entered into a registered life partnership receives a retirement pension lower than that granted to a married pensioner, if (a) in the Member State concerned, marriage is reserved to persons of different gender and exists alongside a registered life partnership which is reserved to persons of the same gender, and (b) there is direct discrimination on the ground of sexual orientation because, under national law, that life partner is, in a legal and factual situation, comparable to that of a married person as regards that pension. It ruled that it was for the referring court to assess the comparability ‘focusing on the respective rights and obligations of spouses and persons in a registered life partnership, as they are governed within the corresponding institutions, which are relevant taking account of the purpose of and the conditions for the grant of the benefit in question.’

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57 Opinion, para. 72.
58 Opinion, para. 81.
59 Judgment, para. 35.
60 Judgment, para. 41. The Court specified that the situations did not need to be identical (apparently a response to German case law on this point, see opinion, para. 45).
61 At paras. 42 et seq. The Advocate General, in contrast, has simply concluded that the two situations were comparable (opinion, para. 100, though see para. 112, where he appears to leave this issue to the national court).
62 At 52. The Court also ruled that if there was discrimination, the right to equal treatment could be claimed from 3 December 2003 (i.e. the expiry of the period for transposition of the Directive).
Thus, the Court of Justice has taken a much stronger position than the Court of Human Rights, which allows different treatment of married and ‘partnership’ couples in the field of social security to be justified. However, the approach of the Court gives rise to some questions. Despite the rather lengthy nature of the judgment, the Court could hardly be considered to have responded positively to the Advocate General’s suggestion that this case was a good opportunity to clarify and complete its approach in Maruko. The Advocate General discussed a number of issues that receive much less consideration in the Court’s judgment. In particular, he considered the referring court’s question as to whether there was a general principle of EU law against discrimination on the grounds of sexual orientation. The Advocate General recalled that in the Mangold case the Court had ruled that Directive 2000/78 does not, itself, lay down the principle of equal treatment in the field of employment and occupation, the source of the actual principle underlying the prohibition of those forms of discrimination being found in various international instruments and in the constitutional traditions common to the Member States. Thus, the Court had recognised a general principle of EU law concerning non-discrimination based on age. From a legal perspective, Advocate General Niilo Jääskinen could not see any justification for a less vigorous application of the principle of equal treatment in relation to sexual orientation. The Court did not consider this question directly, but only in the context of its consideration of the temporal scope of its decision. It ruled that the Directive prevented discrimination, only from December 2003, and, therefore, it had to consider the broader question. While it noted its decision in Mangold, it ruled that:

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63 See Schalk v Austria, 30141/04, 24 June 2010.
64 As usual, about half the judgment consists of a presentation of the factual and legal background already outlined in the Advocate General’s opinion.
65 Opinion, para. 3-4.
66 Opinion, paras. 114 et seq. Although the Advocate General did not feel that the issue was relevant, based on the answers he proposed. However, as the Court differed on the temporal scope, his answer became relevant.
68 Opinion, para. 129.
‘for the principle of non-discrimination on the ground of sexual orientation to apply in a case such as that at issue in the main proceedings, that case must fall within the scope of European Union law.’\(^{69}\)

Thus, it would appear that there is a general principle of EU law concerning non-discrimination on the basis of sexual orientation but – as in the case of age – the issue of such discrimination does not ‘fall within the scope of EU law’ until a specific rule of EU law applies.\(^{70}\) Indeed, the Court’s approach in *Römer* (where it relied on the terms of Directive 2000/78) appears to be a step back from the approach in *Mangold* and *Kücükdeveci*, where it relied directly on the general principle of non-discrimination.

The referring court had asked whether the discrimination (if any) constituted direct discrimination. The Court, as outlined above, concluded that it could do so, but without discussing the issue in much detail. One might have thought that differential treatment of marriage and life partnership does not directly discriminate on grounds of sexual orientation (as Advocate General Ruiz-Jarabo Colomer had originally suggested in *Maruko*).\(^{71}\) On the other hand, if – as appears to be the case – only opposite sex couples can marry and only same sex couples can form life partnerships, there is considerable justification for treating the issue as involving direct rather than indirect discrimination.\(^{72}\) The referring court suggested that the discrimination was direct and the Advocate General agreed.\(^{73}\) The Court did not expressly reply to the question as to whether a directly discriminatory provision (in the field of sexual orientation) could be justified.\(^{74}\) It is implicit in the Court’s reply that direct discrimination cannot be justified, but it has, to a certain extent, shifted the argument to comparison. The dangers of such an approach have been outlined by Baker, who has argued that:


\(^{71}\) See Tobler and Waaldijk (2009: 735-41).

\(^{72}\) The Court did not, unfortunately, discuss how to distinguish direct from indirect discrimination in such cases (following its all too frequent approach as in, for example, in Case C–73/08, *Bressol* v [2010] ECR I-000 concerning nationality discrimination).

\(^{73}\) Opinion, para. 89.

\(^{74}\) Article 6 of Directive 2000/78 specifically allows such justification in relation to age. See, for example, Case C-555/07 *Kücükdeveci* [2010] ECR I-000.
'Despite its importance, comparison by itself cannot dispose of the question whether unlawful discrimination has occurred. Comparing the cases of two individuals can help isolate the true ground for their different treatment, or can identify factual differences that might, when combined with policy considerations, yield reasons for declining to treat people the same way. Without policy input, however, the exercise of comparing cannot tell us anything about whether distinguishing on a particular ground in a particular case constitutes unlawfully discriminatory treatment.'\(^75\)

Finally, the Advocate General considered the issue of the relationship between EU discrimination law and national constitutional law recognising the special position of marriage. The Advocate General concluded that EU law must have primacy, but suggested that there was not, in fact, a conflict between the two norms, in light of the recent decision of the \textit{Bundesverfassungsgericht} (Federal constitutional court) to the effect that, based on the national principle of equal treatment, a distinction as regards pension rights between married and life partnerships was unlawful.\(^76\) The Court did not explicitly address this question, although it is implicit in its response that EU law has primacy.

While the overall approach of the Court is to be welcomed (with the caveat regarding its focus on comparison), the Court was faced with a situation where its (reasonably clear) judgment in \textit{Maruko} had not led to the desired clarity in the national legal system (at least at the time of the reference). In responding to the new questions, the Court chose to repeat its earlier judgment rather than to attempt to explain it in any way. Whether this is the best way to convince national courts may be a matter of debate.

**REFERENCES**


\(^{75}\) Baker (2006).

\(^{76}\) BVerfG, 1 BvR 1164/07, 7 July 2009. This decision was subsequent to the reference.


