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

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In this article, we consider two important decisions: one of the Court of Human Rights on the rights of prisoners which concerns access to pension insurance (*Stummer*); and one from the Court of Justice concerning the link between residence and social security (*Stewart*).\(^1\) On the legislative front, not much happened.\(^2\)

1. **COMPARISONS ARE ODOROUS’ – PRISONERS AND THE RIGHT TO PENSION INSURANCE**

The *Stummer* case is concerned with whether prisoners who are obliged to work as part of their prison regime should be insured for old-age pensions.\(^3\) Mr. Stummer spent about twenty-eight years of his life in prison and worked for lengthy periods in the prison kitchen or the prison bakery. However, under Austrian law, he was not affiliated to the old-age pension system.\(^4\)

Courts in Europe appear to have generally rejected the notion that excluding prisoners in such circumstances from insurance involves any breach of national or international legal norms. The European Commission and the Court of Human Rights have previously rejected such

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\(^1\) In *Iwaszkiewicz v Poland*, 30614/06, 26 July 2011, the Court of Human Rights (with much unnecessary hesitation) again held that the termination of a disability pension to which the applicant was never entitled in the first place is not a breach of P1-1.


\(^3\) *Stummer v Austria*, 37452/02, 7 July 2011.

\(^4\) Section 4 of the General Social Security Act provides that employees are compulsorily affiliated to the old-age pension scheme and defines an employee as any person working in consideration of remuneration in a relationship of personal and economic dependency. There is also a low earnings threshold below which persons are not compulsorily insured (and it appears from the judgment that Mr. Stummer’s earnings would have been below this threshold). The Court noted that, since 1994, prisoners have been insured for unemployment insurance.
claims as manifestly unfounded. The Austrian supreme court has also taken the view that work performed on the basis of a statutory, rather than a voluntarily accepted, duty to work did not fall within the scope of the compulsory insurance scheme and this did not breach equal treatment principles. The US courts have also rejected such arguments. However, instead of being dismissed as manifestly unfounded, Mr. Stummer’s case was referred to the grand chamber.

The Court considered the claim from two aspects. First, Mr. Stummer complained that the exemption of those engaged in prison work from affiliation to the old-age pension system was discriminatory and in breach of Article 14, taken in conjunction with P1-1. Clearly the pension was a possession within the meaning of P1-1 and the Court had previously ruled that being a prisoner was a status. The first issue to be considered was, therefore, whether Mr. Stummer was in a comparable position to an insured person. While accepting that ‘prison work differs from the work performed by ordinary employees in many aspects [and] serves the primary aim of rehabilitation and resocialisation’ the Court took the view that this was not decisive. Rather the issue was ‘not so much the nature and aim of prison work itself but the need to provide for old age’. The Court found that in this regard the applicant as a working prisoner was in a relevantly similar situation to ordinary employees.

The Court therefore turned to examine whether the difference in treatment was justified. It accepted that the aims relied on by Austria, i.e. preserving the economic efficiency and overall consistency of the old-age pension system by excluding from benefits persons who have not made meaningful contributions, were legitimate. In its consideration of

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6 Supreme Court, 27 February 1990 (10 Obs 66/90); 16 March 1999 (10 ObS 52/99s). The main points of the court’s approach are set out at para. 26 of the judgment.
7 See, for example, Harbold v. Richardson, 464 F.2d 1063 (3rd Cir., 1972) where the court rejected a similar challenge on the basis that the exclusion of prison work is rationally related to the purpose of the Social Security Act, which is to replace loss of support in the national economy for workers, their dependents and their survivors.
8 The Court (at para. 88) reiterated its ‘but for’ approach whereby ‘the relevant test is 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’. We noted in the last issue of this journal the failure of the Court to adopt this approach in Puricel v Romania, 20511/04, 14 June 2011.
9 Shelley v United Kingdom 23800/06, 4 January 2008, 46 EHRR SE16 (an issue not, in fact, mentioned in this judgment).
10 At para. 93.
11 At paras. 93-5.
proportionality, the Court noted that although there is no European consensus on the matter, there is an evolving trend towards inclusion of prisoners in social security, reflected in the 2006 European Prison Rules, which recommend in Rule 26.17 that ‘as far as possible prisoners who work shall be included in national social security systems’. Furthermore, the Court noted that at the material time (i.e. between the 1960s and 90s) there was no common ground regarding the affiliation of working prisoners to national social security systems. The Court concluded that

‘On the basis of the facts of the present case and all the information before it, ... the system of prison work and the social cover associated with it taken as whole is not “manifestly without reasonable foundation”. In a context of changing standards, a Contracting State cannot be reproached for having given priority to the insurance scheme, namely unemployment insurance, which it considered to be the most relevant for the reintegration of prisoners upon their release.’\(^{12}\)

Therefore, ‘while the respondent State is required to keep the issue raised by the present case under review’, the Court concluded that Austria had not exceeded the margin of appreciation afforded to it.

However, this aspect of the case was a majority ruling by the rather narrow vote of 10 to seven. The dissenting judges argued that

‘the non-affiliation of working prisoners to the old-age pension system creates a distinction between prisoners and ordinary employees, which risks producing – and in the applicant’s case actually produces – a long-term effect going well beyond the legitimate requirements of serving a particular prison term’\(^{13}\)

Mr. Stummer also argued that since he was not affiliated to the old-age pension system, work performed as a prisoner could not be regarded as falling under the terms of Article 4(3) (a) of the Convention and therefore violated Article 4(2).

Article 4 provides that

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.

\(^{12}\) Paras. 109-110.

\(^{13}\) Dissent, para. 11.
3. For the purpose of this article the term ‘forced or compulsory labour’ shall not include:
   (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of [the] Convention or during conditional release from such detention’.

The Court (ungrammatically) noted that Article 4(3)
   ‘is not intended to “limit” the exercise of the right guaranteed by paragraph 2, but to “delimit” the very content of that right, for it forms a whole with paragraph 2 and indicates what the term “forced or compulsory labour” is not to include.’

Despite the rather obvious answer, the Court went on to a lengthy consideration of the concept of ‘forced or compulsory labour’ and the exception thereto. In particular, Mr. Stummer argued that prison work without affiliation to the old-age pension system was not covered by Article 4(3). The Court, therefore, examined whether Article 4 requires Contracting States to include working prisoners in the social security system. The Court concluded that having regard to the current practice of the Contracting States, it did not consider that Article 4 imposed such an obligation.
   ‘... while an absolute majority of Contracting States affiliate prisoners in some way to the national social security system or provide them with some specific insurance scheme, only a small majority affiliate working prisoners to the old-age pension system.’

The Court concluded that ‘there is no sufficient consensus on the issue of the affiliation of working prisoners to the old-age pension system’. While the 2006 Prison Rules reflected an evolving trend, this could not be translated into an obligation under Article 4 of the Convention. Therefore, the work performed by the applicant as a prisoner without being affiliated to the old-age pension system must be regarded as ‘work required to be done in the ordinary course of detention’ within the meaning of Article 4(3).

The Court has provided a detailed consideration of this issue. Although it rejected the instant case, it clearly hinted (as noted by the dissent) that it might change its view in the future as

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14 Para. 120.
15 Paras. 131-2.
16 Judge Tulkens also dissented on this point.
the consensus position evolves further. It will certainly be welcomed by those seeking to advance the position of prisoners. However, from a legal perspective, there are a number of weaknesses in the judgment. Firstly, in terms of comparison, the Court suggested that the relevant issue was ‘the need to provide for old age’. Now, if the Austrian system was one for all residents, the Court would have been correct. However, it is clear that the Austrian system is one based on employment and, from this perspective, Mr. Stummer was not in a comparable position. By the Court’s logic many other groups who do ‘work’ (women in the home, carers) could also claim to be excluded from insurance.

Even if one hesitates to dismiss the case on comparability grounds, assuming (for the purposes of argument) that Mr. Stummer was in a comparable position, the very significant differences between the type of work involved (compared to the type of work covered by social insurance) arguably justified a difference in treatment (as the government’s submitting to treat persons who were lawfully imprisoned in the same way as employees would lead to equal treatment of unequal facts).

As to Article 4, the Court again adopted a rather broad interpretation, suggesting that in order to come within the remit of Article 4(3), prison work might have to be insured. Judge de Gaetano (concurring as to the result) argued to the contrary that

‘Work which is excepted under Article 4(3) (because it is required to be done “in the ordinary course of detention”) does not cease to be so excepted because it is paid or unpaid, or because the prisoner is or is not affiliated to a pension scheme.’

While the Court is clearly correct to take the view that the Convention is a living document, the Court’s heavy emphasis on ‘consensus’ comes at some cost to legal certainty. The Court has clearly hinted that it may reconsider this issue at some stage in the future, but at what stage does a sufficient consensus develop to justify a new approach?

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17 Dissent, para. 12.  
18 See Judge de Gaetano concurring as to the result (para. 2).  
19 Para. 3.
2. ‘PEOPLE ARE USUALLY THE HAPPIEST AT HOME’ – RESIDENCE, PRESENCE AND THE RIGHT TO SOCIAL SECURITY

The *Stewart* case concerns – yet again – issues of residence and the right to social security. It involved a rather unusual social security benefit: the UK incapacity benefit in youth (IBY). Incapacity benefit is a straightforward social security contribution-based benefit payable in the event of short-term incapacity. IBY – which is not, in fact, a separate benefit – involves a derogation from the contribution rules in the case of persons born with or acquiring a serious disability in youth and is based on the assumption that such persons are unlikely to be able to work in insurable employment so as to qualify for ‘ordinary’ incapacity benefit. The IBY therefore replaced the general contribution requirements with a residence/presence requirement. The measure may thus be seen as a policy measure to ensure equality for persons with severe disability, in the sense of treating unalike persons differently.

In order to satisfy this the claimant must be ‘ordinarily resident’ in Great Britain, present in Great Britain on the date of claim, and present in Great Britain for not less than 26 weeks in the 52 weeks immediately preceding the relevant day. Ms. Stewart was born in 1989, had Down’s Syndrome and had never worked. In 2000, she moved with her parents to Spain. In 2005 she claimed IBY but this was refused on the grounds that she did not satisfy the presence requirement.

Advocate General Cruz Villalón accepted that, on the basis of the Court’s normal approach, the use of residence clauses was not possible in relation to social security benefits under Regulation 1408/71 (now 883/2004), and it was not disputed that IBY was a social security benefit. However, he argued that the case law concerned situations where residence requirements operated ‘essentially as “additional” or complementary conditions to the conditions for entitlement to social benefits’. In this case, in contrast, the residence requirement operated as a ‘criterion of connection’ to the social security system of the UK. The Advocate General pointed out that, were such a connection not allowed (in the absence of contribution requirements), any national of a Member State in the same situation as Ms. Stewart would have been entitled to IBY.

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21 Any consideration of issues concerning equality or disability is, however, noticeably lacking from the Court’s judgment (and indeed at all judicial levels).
22 She fell within the scope of the Regulation only as a family member.
23 Opinion, paras. 36-48. The referring court did ask whether it should be classified as an invalidity or sickness benefit. The Court held that it was an invalidity benefit (judgment at paras. 29-54).
24 Ibid., para. 51.
Stewart would be able to obtain IBY without ever having been affiliated to the UK social security system. He asked whether EU law is to be interpreted in such a way that it can constrain a Member State to choose between the withdrawal of a social benefit so conceived, the conditions of entitlement to which go beyond what is reasonable, and altering that social benefit in such a way that it may be treated, in accordance with the case-law of the Court of Justice, as a special non-contributory benefit.

He considered that Regulation 1408/71 did not absolutely prohibit residence from forming such a criterion of connection as evidenced by article 18 of that Regulation, which refers to national legislatures making ‘the acquisition, retention or recovery of the right to benefit conditional upon the completion of periods of insurance, employment or residence’. More broadly, the Court of Justice has accepted that while residence conditions are generally to be regarded as restrictions on freedom of movement under Article 18 EC, they may be justified if they are based on objective considerations of public interest independent of the nationality of the persons concerned and are proportionate to the legitimate objective of the national rules.

The Advocate General took the view that the residence condition in this case could be justified ‘only on the dual condition that it serves to provide a connection and that it only comes into play in the absence of any other connection’. The Advocate General speculated as to whether Ms Stewart could rely on her status as a member of the family of a person entitled to a pension within the scope of Article 28 of Regulation 1408/71 in order to provide such ‘other connection’ but did not provide any clear answer to this question. In addition, he argued that a residence condition could not be used to exclude a person who is already entitled to benefit.

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25 This rather misses the point that the Ms Stewart was affiliated to the UK system which was the applicable legislation.
26 Paras. 49-50.
27 Para. 67.
28 Para. 75.
29 Para. 70.
In summary, he concluded that the EU law did not prohibit making the award of a social benefit subject to a condition of residence provided that such condition (replacing a contribution condition) served only to provide a connection between the claimant and the UK social security scheme and, secondly, was unenforceable against persons having a comparable connection. It was for the Upper Tribunal to determine whether Ms Stewart’s situation and in particular her status as a member of the family of a pensioner could support the conclusion that there is a connection sufficient to preclude that condition of residence from being enforceable against her. It seems unlikely that article 28 would have given rise to a right to benefit and the real issue to be considered would have been whether the fact a person is a member of the family of people affiliated to the social security system of the Member State in question and is dependent upon them formed a sufficient connection.

The Court came to a rather similar conclusion as the Advocate General but by an entirely different route. Ignoring the Advocate General’s argument that an alternative approach be taken to residence conditions which constituted a ‘connection’ to the social security system, the Court held that

‘the purpose of Article 10 of Regulation 1408/71 is to protect the persons concerned against any adverse effects that might arise from the transfer of their residence from one Member State to another. It follows from that principle not only that the person concerned retains the right to receive benefits referred to in that provision acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that the acquisition of such entitlement may not be refused on the sole ground that he or she does not reside in the Member State in which the institution responsible for payment is situated.’

Thus neither the acquisition nor the retention of entitlement to the benefits could be denied on the grounds of non-residence.

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31 Para. 78.
32 Judgment, para. 61.
However, unlike the Advocate General, the Court ruled that the past presence requirement was ‘not necessarily a “residence clause” within the meaning of … Article 10(1) of Regulation No 1408/71’. It is perhaps worth quoting *in extenso* the Advocate General’s view on this issue. He said

‘I must, however, insist that the two conditions relating to presence make sense, within the system as a whole, only in relation to the condition of residence. Indeed, I find it impossible to imagine that the national legislature could have envisaged the award of short-term incapacity benefit in youth solely on the basis of the past and/or actual presence of the claimant, that is to say, in a case where the claimant, whilst not being ordinarily resident in the territory of the Member State, satisfies the other two conditions. That amounts to saying that, whilst it may be argued that the condition of past presence is compatible with EU law, by excluding consistently that the condition of ordinary residence is, in any event, not compatible with it, it is clear that the condition of past presence has, within the general scheme of short-term incapacity benefit in youth, no chance of existing independently.’  

The Court accepted that the past presence condition constituted a restriction on free movement which required to be justified. It accepted that it was legitimate for a Member State to award benefit only where there was a genuine link between the claimant and the competent State. It ruled that such a link could be established by a finding that the person had actually been present in that Member State for a reasonable period. The Court concluded that the UK rules in question (requiring 26 weeks presence in a period of 52 weeks) were not unreasonable but it held that such a condition was ‘too exclusive in nature’. This was on the basis that by requiring specific periods of past presence in the UK, the past presence requirement unduly favoured an element which was ‘not necessarily representative of the real and effective degree of connection’ between the claimant and the UK and went beyond what was necessary to attain the objective pursued.

34 Judgment, para. 74.
35 Opinion, para 34.
36 Judgment, paras. 86-7.
37 Para. 95.
38 Unsurprisingly, the Court ruled that presence on the date of claim could not be an appropriate means of establishing a genuine link (at paras. 105-9).
The Court, therefore, considered whether such a connection could be established from other representative elements.\(^{39}\) It suggested a number of such possible connections. First, Ms. Stewart was already entitled, under United Kingdom legislation, to disability living allowance (now a social security benefit under Regulation 1408/71). Second, under UK law, she was credited with United Kingdom national insurance contributions. Thirdly, the Court referred to family circumstances, i.e. her dependency on her parents, both of whom were in receipt of UK pensions. Finally, the Court pointed out that Ms. Stewart had passed a significant part of her life in the United Kingdom. The Court concluded that these elements appear to be capable of demonstrating the existence of a genuine and sufficient connection between the appellant and the competent Member State.\(^{40}\)

Therefore, the Court ruled that Article 10(1) of Regulation 1408/71 precluded a condition of ordinary residence, while Article 21(1) TFEU precludes a Member State from making the award of an IBY benefit subject to a condition of past presence of the claimant in that State to the exclusion of any other element enabling the existence of a genuine link between the claimant and that Member State to be established, or to a condition of presence of the claimant in that State on the date on which the claim is made.\(^{41}\)

The outcome of this case does not seem unreasonable. It appears likely that Ms. Stewart will be awarded the benefit on the basis of her link with the UK. Although the Court indicated that the various elements (cited in paras. 97-101) constituted such a link, this did not form the operative part of the judgment and it did not specify which criteria specifically constituted a link. What happens in the future if, for example, some of the criteria no longer apply? It seems likely that the Upper Tribunal will have to consider the judgment and make more specific findings as to the basis for Ms. Stewart’s entitlement.

However, the basis for the Court’s approach is questionable. One might have some sympathy for the Court faced with the language of article 10 and its previous case law in being asked to rule that the residence clause was not excluded where residence constituted the sole connection with the social security system. However, if the Court did not wish to adopt the purposive approach adopted by the Advocate General, it could have held that export was

\(^{39}\) Again this rather ignores the fact that the UK was the competent state.

\(^{40}\) Paras. 97-102.

\(^{41}\) Operative part, my emphasis.
subject to the person concerned being linked to the national system. As noted above, Ms. Stewart indeed satisfied that requirement given that the UK was the competent state. However, the Court’s ruling that ‘past presence’ is not (necessarily) a residence condition is neither logical not consistent with its own case law. One might point out (in addition to the Advocate General’s comments quoted above) that in Swaddling the Court specifically ruled that ‘the length of residence in the Member State in which payment of the benefit at issue is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Article 10a of Regulation 1408/71’.

As to the alternative grounds constituting a genuine link, the Court highlighted three main factors: (i) links to the UK social security system; (ii) family relationships; and (iii) Ms. Stewart’s having ‘passed a significant part of her life’ in the UK. As to the latter, it seems unwise in principle to say that a residence rule cannot be applied but that an alternative link might be having ‘passed a significant part of one’s life’ in a country. The most convincing links appear – at first sight – to be Ms. Stewarts’s existing links to the UK social security scheme through payment of DLA and the fact that she was being awarded credited contributions (and, indeed, this should be a sufficient basis to award benefit in the instant case). However, when one looks further at the principles involved, both links are a rather fortuitous outcome of the factual circumstances and the details of UK law. DLA is paid under a transitional provision of Regulation 1408/71 (apparently as her receipt of the payment pre-dated the introduction of Regulation 1247/92). The granting of credited contributions arises from the detail of UK law which could easily be amended. So a person in a similar situation to Ms. Stewart might well not satisfy this particular link to the national system. Third, it would perhaps be preferable – given the emphasis on autonomy and independence in the UN Convention on the Rights of Persons with Disabilities – not to erect further derived rights of the basis of dependency. Nonetheless, this would appear to be the most enduring link which a person in the position of Ms Stewart has with the UK system.

42 The Court (at 73) explicitly accepted that such a rule ‘could be equivalent, in practice, to a habitual residence clause, if, in particular, such condition requires long periods of presence in the Member State concerned ...’

43 Case C-90/97, Swaddling, [1999] ECR I-1075. In that case, the UK authorities had required a period of at least eight weeks to elapse before a person could be considered to be habitually resident, but this was rejected by the Court.
In summary, the outcome of the individual case is not unreasonable, i.e. that a residence requirement cannot be applied and that Ms. Stewart’s links to the UK system justify payment of IBY. However, the Court’s approach is very questionable. It appears to have left in place the ‘past presence’ requirement, subject to a claimant being able to show an alternative genuine link. Of course, a ‘past presence’ requirement is much simpler than the very complicated issue of habitual residence but is precisely what many Member States understood they were not allowed to have (as a result of decisions like Swaddling).