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Disability pensions, property rights and legitimate expectations: *Bélané Nagy v. Hungary*

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Disability pensions, property rights and legitimate expectations: *Bélané Nagy v. Hungary*¹

This case note examines the recent judgment of the European Court of Human Rights in *Bélané Nagy v. Hungary* as an interesting example of the approach which the Court is taking to the termination (or reduction) of rights to social security benefits under Article 1 protocol 1 (P1-1) of the European Convention on Human Rights (ECHR).² In this case, although the applicant had lost her rights to a disability pension in 2010, the Court held that she had a continuing legitimate expectation to disability care. It further held that the fact that she did not qualify for a pension in 2012 under new rules was an unjustified interference with her property rights. It is argued that both aspects of the case are problematic. The note also looks at the Court's signalling out of disability pensions for stricter scrutiny in relation to 'retrospective' legislation and its approach to the use of international agreements to inform the interpretation of the ECHR.

The Facts

In short, Ms. Bélané Nagy surfed from reduced capacity to work (disability) and was awarded a disability pension in 2001.³ However, in December 2009, as a result of a change to the applicable methodology but apparently (according to the Court) without any substantial change in her health status, the level of her disability was reduced.⁴ As a result, she was no longer entitled to the disability payment which was terminated in February 2010. Her challenge to this decision before the labour court was rejected. She subsequently was reassessed at her own request but her level of disability still did not entitle her to a payment.

In January 2012, a new law on disability allowances entered into force.⁵ It introduced new qualification criteria. In particular, instead of the service period required by the former legislation, a disabled person must have at least 1,095 days covered by social security in the five years before her claim. Subsequently she submitted a new request for a disability allowance and was assessed as 50% disabled. This would have entitled her to a payment but she did not satisfy the 'coverage' requirement (or alternative methods of qualification). Accordingly her claim was refused and this was upheld by the labour court. She did not

¹ 53080/13, 10 February 2015 (Second Section).

² This provides that

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

³ The full details are set out at [6]-[17] of the judgment.

⁴ Of course, the assessment is not intended to measure her underlying health status but rather the 'loss of capacity to work due to health problems, physical or mental impairments'.

⁵ Act no. CXCI of 2011.

appeals further apparently because the Hungarian supreme court had rejected similar challenges to the disability law.

The Hungarian Constitutional Court

As summarised by the Court of Human Rights, the Hungarian constitutional court ruled on the new 2011 disability law.⁶ The jurisprudence of that court differentiated between allowances acquired by contribution to the social security scheme and social allowances which were not considered as 'purchased rights'. The former enjoyed property-like constitutional protection because of their inherent insurance element. However, the latter were only protected by guarantees flowing from the rule of law (i.e. protection of legitimate expectations). In the case-law of the Hungarian court, protection of legitimate expectations involved the requirement of due time for preparation.

In that decision the court commented on the status of disability benefits as follow:

30. ... Decision no. 321/B/1996 AB categorises disability pensions partly as an allowance prompting protection of property and partly as a social service provision. As stated in the decision, the law 'provides care under the constitutional principle of social security for individuals who before reaching the old age pension age have lost their ability to work by reason of disability or disability due to accident. ... Prior to reaching the official retirement age, the disability pension is a special benefit granted to individuals based on their disability. Upon reaching pensionable age, individuals who are ... incapable of work ... are not entitled to this special benefit, because on termination of their employment, they are eligible to receive an old age pension based on their age.'

31. Decision no. 1129/B/2008 AB states that disability pension falls under the category of personal retirement benefits, though their 'purchased right' element is only apparent inasmuch as 'its sum is greater after a longer length of service, or is equal or close to the old age pension. Otherwise the principle of solidarity is predominant, as the disabled individual, who would not be eligible for an old age pension based on his age or length of service, is able to receive pension benefits from the point at which disability is determined.' ...

32. In the Constitutional Court's interpretation, laws giving title to disability pensions do not constitute subjective constitutional rights, but are mixed social security and social service benefits, available – subject to set conditions – to individuals under the retirement age suffering from ill health, who, due to their disability, have a reduced capacity to work and are in need of financial assistance because of the loss of income.

⁶ Decision no. 40/2012. (XII.6.) AB.

The Judgement

General principles

The Court first noted that the final domestic decision in relation to the loss of entitlement to the disability payment in 2010 was given in April 2011, more than six months prior to the date of the application. The Court was therefore precluded, under Article 35.1 of the Convention, from examining that claim.⁷

The Court recited the general principles of interpretation applying to P1-1 and noted that while that provision placed

no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme.

If, however, national law provided for the payment as of right of a welfare benefit – whether based on contributions or not – that legislation created a proprietary interest falling within the ambit of P1-1.⁸ The Court went on to make quite a leap from this general principle that welfare benefits fall within the scope of P1-1. It concluded that this principle

allows for a particular interpretation in the context of disability care, which is a welfare benefit of a special character. Since the making of contributions to a pension fund may, in certain circumstances, create a property right and such a right may be affected by the manner in which the fund is distributed,⁹ the Court considers that if the benefit, which had been granted on the basis of the legislation in force and which had been generated by the making of appropriate contributions to the scheme and the satisfaction of the requirements of the legislation in force during one's active employment, was removed – notably by a retrospective amendment to the contribution rules – such a measure will require a convincing justification for the purposes of Article 1 of Protocol No. 1, as long as the other key requirement, namely a deteriorated health status, is in place.

The Court noted that it had

accepted the possibility of reductions in social security entitlements in certain circumstances. In particular, the Court has noted the significance which the passage of time can have for the legal existence and character of social insurance benefits. This applies both to amendments to legislation, which may be adopted in response to societal changes and evolving views on the categories of persons who need social assistance, and also to the evolution of individual situations.¹⁰ However, where the amount of a benefit is reduced or discontinued, this may constitute interference with possessions which requires to be justified.¹¹

⁷ The Court rejected the State's argument that she had not exhausted her remedies ruling that in the particular circumstances of the case it was not necessary to apply to the Constitution court (at [27]-[30]).

⁸ At [37] citing *Stec v. the United Kingdom*, nos. 65731/01 and 65900/01, § 54, ECHR 2005-X.

⁹ *Kjartan Ásmundsson v. Iceland*, no. 60669/00, [39], ECHR 2004-IX.

¹⁰ *Wieczorek v. Poland*, 18176/05, [67], 8 December 2009, and further case-law cited therein.

¹¹ *Kjartan Ásmundsson* at [40]; and *Rasmussen v. Poland*, 38886/05, [71], 28 April 2009.

An assertable right to a benefit

The Court correctly concluded the disability payment fell within the scope of P1-1.¹² But again going further, a majority of the Court stated that

... being a special element of the pension system, the disability pension/allowance is nothing less than a security, guaranteed by virtue of societal solidarity, that where a person has made the requisite contributions to the scheme, for example by paying payroll burdens over a certain period of time, he or she should be entitled to an allowance, if a serious deterioration of health, resulting in inability to perform gainful activities, so requires.¹³

On the facts of this case, the majority concluded that

... the applicant had made such contributions to the social security scheme as were required during the time of her employment. The resultant legitimate expectation to receive disability care was recognised and honoured by the authorities when the contingency occurred, and she was granted a disability pension in 2001. She continued to enjoy that 'possession' until 2010. Her health situation appears to have remained materially unchanged throughout this and the ensuing period, and the various disability degrees attributed to this condition were only the consequence of successive changes in the methodology.

The Court concluded that her 'legitimate expectation to receive disability care' continued after 2010 and was 'well demonstrated by the fact that she, as a person who had satisfied the requirement of contributions, was subject to ensuing periodic reviews'.¹⁴

The Court noted that Article 57.1(b) of the ILO Convention on Social Security (which had not been ratified by Hungary or the majority of the Council of Europe Member States) provides that invalidity benefit shall be secured to

a person protected who has completed a qualifying period of three years of contribution and in respect of whom, while he was of working age, the prescribed yearly average number of contributions has been paid.¹⁵

In the circumstances, the Court, therefore, concluded that

... once meeting the administrative requirement of the disability pension scheme as in force at the first material point in time (that is, in 2001), the applicant obtained, for the purposes of Article 1 of Protocol No. 1, a formal recognition of her legitimate expectation to receive a disability pension/allowance as and when her medical condition would so necessitate. This expectation originates in the law in force during her employment and at the time of the original acquisition of disability pension rights. Given the statutory provisions on eligibility, this recognised legitimate

¹² At [43]. Though the Court's statement that 'disability pension/allowance is an assertable right to a welfare benefit' is meaningless.

¹³ At [43].

¹⁴ At [45]. As noted above, it appears that these reviews were requested by the applicant.

¹⁵ At [46]

expectation is of a nature more concrete than a mere hope as it was based on legal provisions.¹⁶

The Court went on to rule that this legitimate expectation and the proprietary interests could not be considered extinguished by the fact that, due to a new assessment methodology, the applicant's disability level was reduced in December 2009, apparently without material change in her condition. It held that

For the Court, the crux of the matter is that during her employment, the applicant had contributed to the social security system as was required by the law, which fact alone prompted the social solidarity-based obligation on the State's side to provide disability care, should a contingency occur. By granting disability pension in 2001, the authorities implicitly recognised that she satisfied the relevant criteria. Between 2001 and 2010 the applicant enjoyed the resultant possession of disability pension, and when her disability was considered less serious, this possession was replaced with the recognised legitimate expectation of continued care, should the circumstances again so require.

The Court added that, irrespective of the loss of the pension in 2010, it was therefore of the view that 'the expectation of the applicant, as a contributor to the social security scheme who once satisfied the condition of eligibility, is legitimate and continuous in its legal nature'.¹⁷

Interference with a property right

The Court held that the applicant's property rights had been interfered with in 2012 when 'she was denied disability care on the strength of insufficient contributions made in the past, although her medical condition was again deemed sufficiently impaired.'¹⁸ It was clear that the interference was prescribed by law and the Court accepted that the law pursued the legitimate aim of the society's economic well-being.¹⁹ However, turning to proportionality, the Court held that the margin of appreciation allowed to the State could not

go as far as depriving this entitlement, once granted, of its very essence. Moreover, the requirements of the rule of law must be observed, and a retrospective disregard of acquired rights and legitimate expectations, as is the case with social security contributions, must be avoided when passing measures of social reforms.

As to whether the applicant's legitimate expectation to receive disability care involved a right not to have the eligibility conditions changed, the Court noted, by analogy, the Ethical guidelines of the WHO's document on International Classification of Functioning, Disability and Health (ICF) which stated that

¹⁶ At [

¹⁷ At [48].

¹⁸ At [49].

¹⁹ At [50]-[51].

ICF, and all information derived from its use, should not be employed to deny established rights or otherwise restrict legitimate entitlements to benefits for individuals or groups.²⁰

The Court held that the rule of law, which is one of the fundamental principles of a democratic society and is inherent in all the Articles of the ECHR, obliges a State 'to secure, on the basis of societal solidarity, a certain income for those whose working capacity fell below the statutorily set level, provided that they have made sufficient contributions to the scheme'.²¹

Finally, the Court noted that in terms of proportionality it was noteworthy that the applicant had been

totally divested of her pension/allowance, due to a new condition of eligibility instead of being obliged to endure a reasonable reduction, commensurate with the proportion of her accumulated social security cover²²

Accordingly the Court found that the applicant had been made to bear an excessive and disproportionate individual burden in violation of P1-1.

Discussion

There are a number of interesting features of this case. Firstly the Court singled out disability pensions for stricter scrutiny in relation to 'retrospective' legislation.²³ Second, the Court adopted a novel approach to legitimate expectation in recognising a property right. Third, the Court found there to be a breach of P1-1 on the facts of the case. Finally, the Court relied on the ILO Convention on Social Security and the Ethical guidelines of the WHO's document on International Classification of Functioning, Disability and Health. We comment on each of these issues.

Disability pensions and a higher level of scrutiny

It is not clear that the Court has previously recognised the need for 'a convincing justification' in the case of retrospective amendment to disability pensions, at least where the person's health status does not alter.²⁴ The Grand Chamber may have *de facto* applied such an approach in *Kjartan Ásmundsson* but it did not specifically single out disability

²⁰ ICF, annex 6 (10). It is not clear from the judgement whether the ICF was used in the system of assessment.

²¹ At [53]. The Court did not advert to the fact that in this case the applicant did not qualify precisely because she had *not* made sufficient contributions. It also added 'that, as matter of the rule of law, the principle *impossibilium nulla obligatio est* is of particular relevance in the present case where the applicant was *ex post* reproached for not having made in the past sufficient contributions as determined by the new legislation – a condition she could not possibly meet at that point in time'.

²² At [55].

²³ It is arguable whether the 2011 Act was 'retrospective' except in the sense that it referred to a person's previous work record. This is inevitable in any legislation which amends the 'contribution' requirements unless it applies only to new entrants to the labour force.

²⁴ One assumes that this is intended to involve a higher level of justification than that normally accepted by the Court.

pensions. Indeed the Court has, in practice, required convincing justification in a number of cases involving pensions and disability-type payments including carers. The Court has also increasingly recognised disability as a status and one which requires weighty reasons for justification.²⁵ This is clearly correct in the context of disabled persons. It is less clear that there is a reason to single out disability *payments* (given their very wide scope) for stricter scrutiny. One might, for example, suggest that safety net payments – where by definition a persons is solely dependent on the income – are more in need of careful scrutiny. It will be interesting to see how this develops over time and whether other chambers follow this approach.

Legitimate expectation

Arguably the weakest aspect of the ruling was the Court's approach was in relation to legitimate expectation. Three members of the Court dissented on this point and their arguments are convincing.²⁶ The issue basically arose because the claim concerning Ms. Béláné Nagy's initial loss of benefits was out of time. Accordingly she had no property right to a disability pension in 2012 and there could be no interference with her (non-existent) rights. Therefore, the majority of the Court stretched the rules to create a legitimate expectation after 2010 so that it could assess the interference with this property right in 2012. Although the majority quoted the usual mantra that P1-1 does not create a right to property, this is precisely what the majority allowed to happen. As the dissenters pointed out the majority 'expanded the scope of the right to property under the Convention in a manner that is flatly inconsistent with this Court's case-law and the object and purpose of [P1-1]'.²⁷

The Court has ruled that

a claim of an unjustified interference with a right in the field of welfare rights will not be considered to fall under Article 1 of Protocol No. 1 if the applicant cannot demonstrate, as *an absolute threshold issue*, that he or she had, at the time of the interference, an 'assertable right' under domestic law.²⁸

The dissent pointed out that the applicant had lost the right under domestic law to a pension in 2010 and had no such right in 2012. They criticised the majority's introduction of a 'legitimate expectation to receive a disability pension/allowance as and when her medical condition would so necessitate' as involving 'a completely novel understanding' of the concept of legitimate expectations under P1-1.

²⁵ *Glor v Switzerland*, 13444/04, 30 April 2009 (Article 14); *Alajos Kiss v. Hungary*, 38832/06, 20 May 2010 at [42] (primarily an Article 3 case though Article 14 was also argued). See also the Grand Chamber ruling in *Stanev v Bulgaria*, 36760/06, 17 January 2012..

²⁶ Joint dissenting opinion of Judges Keller, Spano and Kjølbros (Dissent).

²⁷ Dissent at [1]

²⁸ At [6] citing cases such as *Richardson v. the United Kingdom* 26252/08, 10 April 2012, See also *Purice v Romania*, 20511/04, 14 June 2011 at [21]: '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.'

The dissent accepted that the concept of ‘possessions’ under P1-1 is not limited to ‘existing possessions’, but may also cover claims in respect of which the applicant can argue that she has at least a reasonable and ‘legitimate expectation’ of obtaining effective enjoyment of a property right. However, for such a ‘legitimate expectation’ to arise, that expectation must be based on some normative legal source at domestic level. In this case the Hungarian courts had clearly ruled that she had no such right either in 2010 or in 2012. Therefore, the dissent concluded that it was

self-evident that in 2012, two years after she lost her domestic right to the disability pension, the applicant could not possibly have had a legitimate expectation under Article 1 of Protocol No. 1 of retaining an autonomous right that was non-existent within the confines of the right to property under the Convention.²⁹

Although the majority appeared to be influenced by the notion that the applicant contributed to the disability pension scheme during her employment, the dissent pointed out that there was no evidence that

the contributory scheme in question was in the form of compulsory contributions, for example to a pension fund or a social insurance scheme, that created a *direct link between the level of contributions and the benefits awarded*.³⁰

Therefore, the applicant had no claim to a particular fund of contributions. In conclusion, the dissent criticised the majority’s attempt to get around the fact that the initial claim was out of time by

inventing a substantive right to a disability pension under the Convention, where none exists, with unforeseen consequences for the social security and welfare systems of the 47 member States of the Council of Europe.³¹

Interference with a property right

The Court has shown an increasing tendency to find that there has been a breach of P1-1 where a State amends legislation to reduce prospective entitlement to benefits. The main origin of this line of case law is *Kjartan Ásmundsson*. In that case, the applicant had suffered a serious work accident in 1978. He had subsequently been assessed as 100% disabled in relation to his *previous* job which made him eligible for a disability pension. However, he had been continuously employed in other work since the accident. In 1992, the relevant legislation was amended and the basis for the assessment of disability altered so that it was now based not on the ability to perform previous work but work *in general*. As a result of a subsequent review of pension, 16% of pensioners had their benefit payment discontinued entirely while others had their benefits reduced by various amounts. The applicant was one of those whose benefits were entirely terminated. He complained that this was in violation of P1-1.

The Court was struck by the fact that the applicant belonged to what it saw as a small group of pensioners whose pensions, unlike those of any other group, were discontinued

²⁹ At [11]

³⁰ At [12]. In fact it is not clear that the scheme was contributory at all although this may be the case.

³¹ At [14].

altogether. It argued that the legitimate concerns about the fund's financial difficulties were hard to reconcile with the fact that the vast majority of the disability pensioners continued to receive benefits at the same level as before, and that only a small minority had to bear 'the most drastic measures of all', i.e. the loss of pension. The Court argued that this differential treatment suggested that the measure was unjustified for the purposes of Article 14, which consideration, it said, must carry great weight in the assessment of the proportionality issue. The Court went on to say that the 'discriminatory character' of the interference was compounded by the fact that had affected the applicant in a particularly concrete and harsh manner in that it totally deprived him of the disability pension he had been receiving for nearly 20 years. The Courts took the view that the applicant could validly plead an individual legitimate expectation that his disability would continue to be addressed on the basis of his incapacity to perform his previous job.³² The Court noted that although the applicant was still considered 25% incapacitated for work in general, he was deprived of the entirety of his disability pension entitlements (which at that time constituted no less than one third of his gross monthly income). Given this background the Court found that the applicant was made bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the state in the area of social legislation, could not be justified by the legitimate community interests relied on by the authorities. The Court stated that it would have been otherwise had the applicant been obliged to endure 'a reasonable and commensurate reduction rather than the total deprivation of his entitlements'.³³

This approach has been followed by the Court in a number of recent cases.³⁴ In a range of other cases, the Court has found no breach of P1-1.³⁵ However, unlike under Article 14 where the Court is comparing how one group is treated with a comparator group, in these cases the Court is in effect substituting its own view of what is proportionate for the view of the national legislature. And it is less than clear what principles the Court is applying. It would appear that the Court is more likely to consider P1-1 to have been breached

- a) where the person has been in receipt of pension rather than where entitlement has yet to accrue,³⁶
- b) where a person's benefit is abolished or heavily reduced rather than when any reduction is more limited,³⁷ and

³² Though, it is not entirely clear why somebody who has been in employment for 20 years while in receipt of a full disability pension should be considered to have acquired a 'legitimate expectation' that the situation would not change.

³³ At para 35

³⁴ See, for example, *Lakićević v Montenegro and Serbia*, 27458/06, 37205/06, 37207/06 and 33604/07, 13 December 2011.

³⁵ See, for example, *Šulcs v Latvia*, 42923/10, 6 December 2011; *Arras v Italy*, 17972/07, 14 February 2012; *Torri v Italy*, 11838/07 and 12302/07, 24 January 2012.

³⁶ Indeed, in the latter case, the Court is likely to find that there is no property right as in *Richardson*.

³⁷ Compare *Maggio and Stefanetti v. Italy*, 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, 15 April 2014 (also the Second Section of the Court). Although as discussed by the dissent in the latter case the correct approach to assessing such reductions remains unclear.

c) where administrative error has contributed to payment of benefit.³⁸

It is otherwise difficult to discern the principles which the Court applies. It might be helpful for social security claimants (and indeed States) if the Court was to define clearly the circumstances in which an interference with a social security property right was considered to be in breach of P1-1. However, the current situation tends rather towards palm tree justice than any clear protection of human rights.

International agreements

Finally, in this case the Court relied on (or at least referenced) the ILO Social Security Convention and the WHO International Classification of Functioning, Disability and Health. In *Demir* the Grand Chamber of the Court stated that

The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values.³⁹

In *Demir* this meant that the Court had regard to the European Social Charter (even though the specific provisions had not been ratified by Turkey).⁴⁰ This approach has been increasingly adopted by the Court in other areas of law.

There are, however, a number of issues about its application in this case which are of some concern. First, not only has the ILO Convention not been adopted by Hungary but it has not been adopted by a majority of the Council of Europe States. One might expect some basic minimum level of adhesion by European States before the Court should rely on an international law.⁴¹ Second, one might expect that the provision should be an 'international law' in some sense of the term which, of course the ICF is not. Third, even assuming the relevant provisions meant what the Court appears to have thought they meant, they did not really clarify the context of P1-1. Unlike in *Demir* where the provisions of the International Covenant on Civil and Political Rights were directly relevant to the interpretation of Article 11 of the ECHR, in this case the Court simply used the ILO and WHO documents as rhetorical supports for its conclusionary reasoning. Finally, one might note that the ILO Convention in reality provides no support to the Court. The provision cited stated that a pension should be provided to a person who had paid 'the prescribed yearly average number of contributions'. In fact the Hungarian law required a total number of contributions (or days covered) rather than a yearly average but the point was that Ms. B el an e Nagy had not reached the relevant minimum required. In the case of the ICF, she clearly did not have an established right to pension or a 'legitimate entitlement' under national law.

³⁸ *Moskal v Poland*, 10373/05, 15 September 2009.

³⁹ *Demir and Baykara v. Turkey*, 34503/97, 12 November 2008. See also *Opuz v Turkey* (2010) 50 EHRR 28.

⁴⁰ See also *Weller v Hungary*, 44399/05, 31 March 2009 in which Judge Tulkens (in a 'concurring' judgement) suggested that Article 14 should be construed in the light of Article 12.4 of the European Social Charter, which provides that domestic law cannot reserve social security rights to their own nationals (although this was strictly *obiter*).

⁴¹ The Court in *Demir* refers to 'the practice of European States reflecting their common values' and to 'common ground in modern societies' at [86].

Conclusion

The outcome in this case may well be welcomed by disability activists. However, it is arguably yet another example of hard cases making bad law. While it might be helpful for both social security claimants and administrations if the Court was to define clearly the circumstances in which an interference with a social security property right was considered to be in breach of P1-1, the current jurisprudence of the Court contributes more to confusion and lack of clarity.