REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
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Contents

I. Editorial

This HSI Report 3/2023 chronicles on the development of case law and legislation in the area of labour and social security law at European and international level in the period from July to September 2023.

Due to the court holidays in the summer, the number of reported proceedings before the CJEU is traditionally somewhat lower in the third quarter. In the judgement in the *Ethnikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou* case (C-404/22), the Court ruled on the application of the Consultation Directive 2002/14/EC to public service undertakings. Of the new cases brought before the CJEU that are now included in the list of pending cases, two have received heightened public attention: the action for annulment brought by Denmark and Sweden against the Minimum Wage Directive, and the preliminary ruling procedure against the creation of so-called "transformation areas" in Denmark, in which a particularly high proportion of the population of certain immigrant groups live.

In the proceedings before the ECtHR, Case No. 41047/19 – *Thanza v. Albania* concerns the burden of proof in the context of breaches of duty under labour law (here: corruption). Other cases are concerned for instance with the freedom of expression of judges (No. 26360/19 – *Manole v. Republic of Moldova*) and a public prosecutor who had an extramarital and allegedly conflicted relationship that was publicly reported on (No. 54588/13 – *Guliyev v. Azerbaijan*). In both cases, the persons concerned have defended themselves against dismissal under national law.

We hope you enjoy reading and welcome your feedback at hsi@boeckler.de.

The editors
Prof Dr Johanna Wenckebach, Prof Dr Martin Gruber-Risak and Prof Dr Daniel Hlava

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II. Proceedings before the CJEU

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1. Collective redundancy

Decisions

Judgment of the Court (Second Chamber) of 13 July 2023 – C-134/22 – G GmbH

Law: Art. 2(3)(2) Collective Redundancies Directive 98/59/EC

Keywords: Information and consultation – Employer's obligation to provide the competent authority with a copy of the information provided to the employee representatives – Consequences of failure to fulfil this obligation

Core statement: The obligation of the employer pursuant to Article 2(3)(2) of the Collective Redundancies Directive to provide the competent authority with a copy of parts of the written notification to the employee representatives does not protect the individual.

2. Equal treatment

Opinions

Opinion of Advocate General Richard de la Tour of 13 July 2023 – C-518/22 – *AP Assistenzprofis*

Law: Art. 2(5) Equal Treatment Framework Directive 2000/78/EC, Art. 26 European Charter of Fundamental Rights, Art. 19 UN Convention on the Rights of Persons with Disabilities

Keywords: Personal assistance for people with disabilities – Consideration of the wishes and needs of the person receiving assistance in the form of an age preference when choosing personal assistance – Age discrimination in the application process

Core statement: An age preference in the selection of a personal assistant for a person with a disability can be justified by the right to self-determination, even if this results in age discrimination against applicants.

Note: This procedure submitted by the German Federal Labour Court (BAG) deals with respect for the wishes and needs of persons with disabilities, potential age discrimination arising as a result and its possible justification.

In the original case, the defendant, which offers assistance services for people with disabilities, published a job advertisement seeking a female assistant "preferably between the ages of 18 and 30" for a 28-year-old student. The plaintiff, born in 1968, applied for this position and was rejected. In her complaint against this, she is demanding compensation on the grounds of age discrimination.

The plaintiff is of the opinion that a certain age is not relevant for the relationship of trust in the context of such an assistance service. The defendant contests this, arguing that the age preference in dispute is an important prerequisite for enabling the beneficiary of the service to participate on an equal footing in university life.

The legal background to this is Article 2(5) of the Equal Treatment Framework Directive, which excludes national provisions from the scope of the directive that are "necessary to protect the rights and freedoms of others". The BAG is now asking the CJEU whether the passage contained in Section 8(1) of Book IX of the German Social Code (SGB IX) – "When deciding on the [...] implementation of benefits for participation, the justified wishes of the beneficiaries shall be taken into account. In doing so, the personal life situation and age [...] of the person entitled to benefits shall also be taken into account" – constitutes such a regulation to protect the freedom of others.

In his Opinion, the Advocate General points out that personal assistance, by its very nature, extends far into the private and intimate sphere of the person receiving assistance. This circumstance justifies that, when choosing such assistance, the wishes expressed by that person should be given special consideration.

The present case concerns assistance with university studies. The aim of the assistance here is to enable equal participation in university life. Interaction with other students is an important aspect of this. Here, too, personal assistance must provide comprehensive support and thus represents an integral part of the university life of the person concerned. The age preference in question in the job advertisement is based on the understandable idea that a person of the same age "can better fulfil this part of the required personal assistance due to the psychological and social characteristics typical of this age group, in particular by [...] enabling better participation and integration of the person with disabilities in social life at the university" (para. 69) and thus strengthening the autonomy and participation of the person with disabilities in social life. This disputed right of choice as a manifestation of the right to self-determination of persons with disabilities can therefore be regarded as a "right of others worthy of protection" in accordance with Article 2(5) of the Directive. The relevant national regulations on which this right of choice is based would therefore be excluded from the scope of the Directive, which would allow unequal treatment in the application procedure.

The further provisions of the Directive referred to by the BAG (in particular Art. 4(1), essential occupational requirement) are not considered relevant by the Advocate General (paras. 73-97).

The present proceedings are situated in the area of conflict between the right of self-determination of people with disabilities and possible (age) discrimination brought about by the exercise of this right. The question arises as to whether discrimination could have been avoided if the defendant had based the job advertisement on the criterion of the "social proximity" of the assistant to the person receiving the assistance (in this case, the university environment) instead of the sensitive characteristic of "age". For it is precisely this desire for the assistant to be "socially close" to the reality of the life of the person receiving the assistance that is an expression of the need of the student with a disability that is worthy of protection and on which the age preference is based (see also the Advocate General in para. 69).

New pending cases

Action brought on 10 August 2023 – C-519/23 – *European Commission v. Italian Republic*

Law: Art. 45 TFEU

Keywords: TFEU violation – Overt and covert discrimination on grounds of nationality – Lecturers – Application of a CJEU decision – Restoration of professional career – Payment of arrears

Reference for a preliminary ruling from the Verwaltungsgericht Karlsruhe (Germany) lodged on 24 April 2023 – 06 June 2023 – C-349/23 – *Zetschek*

Law: Sec. 48(2) of the German Judiciary Act, Art. 2(2)(a), Art. 6(1)(1) of the Equal Treatment Framework Directive 2000/78/EC

Keywords: Age discrimination – Prohibition of postponing the retirement of federal judges in contrast to other federal civil servants

Reference for a preliminary ruling from the Oberlandesgericht Köln (Germany) lodged on 4 July 2023 – C-408/23 – *Anwaltsnotarin*

Law: Art. 6(1) Equal Treatment Framework Directive 2000/78/EC, Art. 21 European Charter of Fundamental Rights

Keywords: Age discrimination – Prohibition of appointment as a notary public after the age of 60 despite vacancies – Risk of inadequate supply of notarial services

Reference for a preliminary ruling from the Verwaltungsgericht Gießen (Germany) lodged on 26 May 2023 – C-333/23 – *Habonov*

Law: Arts. 2, 3 and 6 Equal Treatment Framework Directive 2000/78/EC, Art. 19 TEU, Art. 47 European Charter of Fundamental Rights

Keywords: Judges' salaries in the state of Hessen – Deadlines for implementing European standards – Age-related salary groups

Reference for a preliminary ruling from the Tribunal Superior de Justicia de Madrid (Spain) lodged on 7 June 2023, received on 12 July 2023 – C-441/23 – *Omnitel Comunicaciones*

Law: Art. 3(1), 5(1) Temporary Agency Work Directive 2008/104/EC; Art. 15 Equal Treatment Directive 2006/54/EC

Keywords: Concept of temporary work – Maternity leave – Consequences of nullity of a dismissal – Joint and several liability

Note: Under Spanish law, temporary employment agencies require official authorisation. The highest Spanish court has referred questions to the CJEU in this regard.

1. Is a company that hires out workers without this authorisation nevertheless subject to the requirements of the Temporary Agency Work Directive? As the Directive does not make such a restriction, this question is not discussed in the German-language literature, as far as can be seen.[1]

2. Can temporary work be assumed when the employee, though working for another company (mainly from home), still has to prepare a monthly activity report for the contractual employer and the latter authorises special leave, annual leave and the employee's working hours?

[1] It is only considered that a transfer purpose should already exist at the time of hiring, for example *Forst*, in Schlachter/Heinig (fn. 2), § 16 para. 61. However, the amendment of the employment contract should be equivalent to hiring, which should regularly be the case due to the highly personal nature of the employment relationship; § 613 BGB.

3. Would the applicability of the Temporary Agency Work Directive result in the applicability of the equal pay principle pursuant to Article 5(1) of the Directive?

4. What are the consequences of the fact that the employee has a right to return to work after her maternity leave, but her contractual employer, for whom she worked, does not work for the client for whom she previously worked?

5. Would the applicability of the Temporary Agency Work Directive necessarily result in the joint and several liability of the lender and the hirer for the statutory claims arising from an invalid dismissal under EU law?[2]

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3. Fixed-term employment

New pending cases

Reference for a preliminary ruling from the Corte suprema di cassazione (Italy) lodged on 28 April 2023 – C-278/23 – *Biltena*

Law: Clause 5 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Granting of annual teaching contracts – Maximum total duration of fixed-term contracts and the maximum number of extensions – Lack of objective reasons – Compensation for damages

Reference for a preliminary ruling from the Tribunale di Lecce (Italy) lodged on 22 May 2023, received on 24 May 2023 – C-322/23 – *Lufoni*

Law: Clause 4 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC)

Keywords: Determination of duration of service period at the time of appointment as a civil servant – Different crediting of years

Reference for a preliminary ruling from the Tribunale Civile di Padova (Italy) lodged on 22 June 2023 – 13 July 2023 – C-439/23 – *Consiglio nazionale delle Ricerche*

Law: Clause 4 Framework Agreement on Fixed-Term Work (implemented by Directive 1999/70/EC) and Art. 21 European Charter of Fundamental Rights

Keywords: Temporal application of the Framework Agreement on Fixed-Term Work – No retroactive effect of Union law

Note: The referring court asks whether the Framework Agreement on Fixed-Term Work applies to employment relationships which were established before the entry into force of the Directive and which ended because the term of the contract expired; second, whether the Directive applies to fixed-term employment contracts which were established before the entry into force of Directive 1999/70/EC and which ended before the expiry of the deadline set for the Member States to transpose the Directive; third, whether the Directive applies to fixed-term

[2] On the question of whether Union law prescribes the fiction of an employment relationship as a sanction, see CJEU of 17 March 2022 – C-232/20 – *Daimler*, paras. 87 et seq. with comment by *Klengel*, in HSI Report 2/2022, p. 5 et seq.

employment relationships which were established after the entry into force of Directive 1999/70/EC and before the expiry of the transposition deadline, but which ended after the expiry of the transposition deadline.

In Italian case law, there are two opposing views on the question of the temporal scope of application of Clause 4 of the Framework Agreement. According to one view, the standard does not apply to fixed-term employment relationships that have ended before expiry of the implementation period. This view is based on the principles of legal certainty and non-retroactivity. The second, opposing, view is based on the rule of interpretation that has become established in the case-law of the Court of Justice,[3] according to which a new provision must be applied directly to the "future effects" of a situation which arose under the old provision, unless otherwise provided. According to the referring court, the rule of interpretation must be understood as meaning that Clause 4 of the Framework Agreement applies only to fixed-term employment relationships which arose in the period prior to the expiry of the transposition period and which have essentially continued thereafter, but not to fixed-term employment relationships which had run their full course prior to the expiry of the transposition period of the Directive.

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4. General matters

Decisions

Judgment of the Court (Seventh Chamber) of 6 July 2023 – C-404/22 – *Ethnikos Organismos Pistopoiisis Prosonton & Epangelmatikou Prosanatolismou*

Law: Art. 2(a), Art. 4(2)(b) Consultation Directive 2002/14/EC

Keywords: Information and consultation of employees – Scope of the Consultation Directive – Concept of "undertaking" – Legal person governed by private law in the public sector – Dismissal of employees from a managerial position

Core statements:

1. A legal person governed by private law acting as a person governed by public law and exercising public powers is subject to the Consultation Directive if it otherwise provides services for remuneration that are in competition with services provided by market participants.

2. The obligation to inform and consult employees does not apply to a change of position for a small number of employees appointed to managerial positions if this change is not likely to affect the employment situation, the employment structure and the likely development of employment in the company concerned or to threaten employment in general.

Note: The plaintiff employer has approximately 80 employees. It is defending itself against the imposition of a fine for failing to inform employee representatives in accordance with Greek law. The employer puts forward two arguments relevant under EU law:

1. Lack of status as an "undertaking" within the meaning of the Consultation Directive

The private-law employer has been assigned public tasks in the context of recognising the certification of educational institutions and the equivalence of diplomas. It also provides scientific and technical support for the relevant ministries in the areas of policy planning and

[3] CJEU of 10 June 2010 – C-395/08 and C-396/08 – *INPS*, para. 53; of 12 September 2013 – C-614/11 – *Kuso*, para. 25; of 14 July 1970 – C-68/69 – *Brock*, para. 7; of 10 July 1986 – C-270/84 – *Licata/WSA*; of 18 April 2002 – C-290/00 – *Duchon*, para. 21.

communication development. It also provides vocational guidance services of all types and forms and trains and develops managers in the sector.

According to Articles 4 and 3(1) Consultation Directive, Member States must provide for information and consultation rights in sizeable companies or organisations. Article 2(a) of the Consultation Directive defines the term "undertaking" to include any public or private undertaking carrying out an economic activity, whether or not for profit. The Court of Justice makes reference to decisions concerning other directives which interpret the term "economic activity" as covering any activity consisting in offering goods or services on a given market.[4]

The term is therefore to be understood broadly; ultimately it will be a question of whether a service is offered in return for payment. Even in the public sector, merely public activities are clearly not to be regarded as economic activities.[5] Nevertheless, the Court does not consider the activities carried out by the employer in the present case to be “a priori” economic activities. It is for the referring court to verify whether there is a market for the activities carried out. However, if this is confirmed, a legal entity under private law that both exercises public powers and acts in an economic capacity can also be regarded as an undertaking. Ultimately, in the context of the Consultation Directive, it is most likely a question of whether the entire entity is to be regarded as an undertaking. However, the CJEU does not consider assessing the specific facts of the case according to whether they fall within the scope of entrepreneurial activity (e.g. in the context of Section 14 BGB: "at the conclusion of the legal transaction"). The decision can be understood to mean that a small proportion of economic activity in relation to all activities of the legal entity is sufficient to justify classification as an undertaking. In a previous case, the CJEU had already considered it sufficient for the activities carried out to be "partially" economic.[6]

2. Application to a small number of employees in management positions

Article 4(2) of the Consultation Directive grants employees the right to information and consultation on "the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment".

The referring court assumes that the dismissal in the present case is not likely to have a negative impact on the employment situation in the company. The Court follows on from this. It states that the information duty is not already triggered in the case of purely individual employment relationships. Rather, this is only the case if "employment within an undertaking or business is generally threatened (...)." This is not evident in the case of the removal of three out of 80 employees from management positions.

The referring court will have to take this assessment into account, while having to take into consideration the possibility of national law to go beyond the requirements of the Directive.

Judgment of the Court (Second Chamber) of 13 July 2023 – C-765/21 – *Azienda Ospedale-Università di Padova*

Law: Art. 4 Regulation (EC) No. 507/2006 (conditional authorisation of medicinal products for human use falling within the scope of Regulation (EC) No. 726/2004); Regulation (EU) 2021/953 (EU digital COVID certificate), Arts. 3, 35, 41 European Charter of Fundamental Rights

[4] CJEU of 20 July 2017 – C-416/16, EU:C:2017:574 – *Piscarreta Ricardo*, para. 34.

[5] *Greiner*, in: Schlachter/Heinig, Europäisches Arbeits- und Sozialrecht, 2nd ed. 2021, § 21 para. 9, see CJEU of 11 November 2021 – C-948/19, EU:C:2021:906 – *Manpower Lit*, paras. 36 and 37; CJEU of 18.3.1997 – C-343/95 – *Diego Calí*; see also the comments on the Opinion in HSI-Report 1/2023, p. 26.

[6] See CJEU of 11 November 2021 – C-948/19, EU:C:2021:906 – *Manpower Lit*, paras. 45 et seq.

Keywords: Compulsory vaccination for healthcare workers – Suspension from duty for personnel refusing compulsory vaccination – Status of having recovered from an infection

Core statement: The request for a preliminary ruling submitted by the Tribunale ordinario di Padova (District Court, Padua, Italy) by decision of 7 December 2021 is inadmissible.

Note: This case deals with the issue of compulsory vaccination. The plaintiff has been employed by the University Hospital of Padua since 2017. In an order dated 16 September 2021, the hospital informed her that she would be placed on leave with immediate effect and without pay, as she had not completed her compulsory vaccination and therefore could not be assigned any further duties. The suspension would remain in force until she was vaccinated, otherwise until the conclusion of the national vaccination plan, and thus until 31 December 2021 at the latest. With her action brought against this order, the plaintiff applied to be reinstated in her work. She argues that there is no reason for the suspension either in the context of an employment relationship or in the context of a liberal profession, as she is naturally immunised against COVID, having recovered from an infection with the virus.

In its detailed reasoning, the CJEU rejects the request for an expedited procedure (as the information provided by the referring court was not sufficient for this; see paras. 24-28) and concludes that all seven questions referred are inadmissible. The inadmissibility, according to the CJEU, results from the great lack of precision in the request for a preliminary ruling submitted by the court (paras. 37, 44, 60), which does not fulfil the mandatory content requirements for such a request under Article 94 of the Rules of Procedure of the Court of Justice.

Thus, the legal background in the EU to the question of how to deal with the refusal of compulsory vaccinations and the resulting sanctions under labour law remains unclear for the time being.

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5. Minimum wages

New pending cases

Action for annulment brought on 18 January 2023 – C-19/23 – *Kingdom of Denmark v. European Parliament and Council of the European Union*

Law: Minimum Wage Directive 2022/2041, Art. 153(5) TFEU

Keywords: Determination of wage levels in the Member States – Right of association – Infringement of the principle of the conferral of powers[7]

Note: The Minimum Wage Directive 2022/2041 obliges the Member States to promote collective bargaining after the transposition deadline of 15 November 2024 and, if the Member State has a statutory minimum wage, to comply with certain procedural provisions for setting it. For example, certain criteria must be taken into account when the level of the minimum wage is set, which must generally take place every two years. The enforcement of the minimum wage requirement must also be accompanied by corresponding regulations when awarding contracts.

[7] *Franzen,* EuZA 2023, 361.

Despite the rather lenient wording of the Directive, some authors in the German-speaking literature, in addition to the governments of Denmark and Sweden, do not agree with the regulation.[8] The latter have therefore filed an action for annulment against the regulation.[9] In legal terms, they argue that the EU lacks regulatory competence. The Minimum Wage Directive concerns pay and the right of association – both of which are excluded from the Union's competence to regulate social policy under Article 153(5) TFEU – and therefore violates the principle of the conferral of powers under Article 5(3) TEU. Furthermore, the Directive should have been adopted unanimously in accordance with Article 153(1) lit. f, 153(2)(3) TFEU (e.g. collective defence of interests), but instead only Article 153(1) lit. b TFEU ("working conditions") was used and the majority principle applied.

However, the concerns under the law governing competence about safeguarding social standards through European minimum wages have in fact been adequately reflected in the text and regulatory content of the Minimum Wage Directive (see Recital 19). The Minimum Wage Directive does not lay down any requirements for a specific determination of pay. The mere obligation to adopt a legal framework for collective bargaining and an action plan in order to increase collective bargaining coverage and to be able to exercise the right to collective bargaining for wage setting (Art. 4 Minimum Wage Directive) also fully preserves the competence of the Member States to regulate the "right of association" within the meaning of Article 153(5) TFEU. Furthermore, as the Directive deals with minimum social standards, Article 153(1)(b) TFEU is the correct authorisation basis for the entire legal act.[10]

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6. Professional qualification

Opinions

Opinion of Advocate General Pikmäe delivered on 14 September 2023 – C-75/22 – *European Commission v. Czech Republic*

Law: Art. 3(1) lit. g and h, Art. 45(2) Professional Qualifications Directive 2005/36/EC and 2013/55/EU

Keywords: Failure of a Member State to fulfil obligations – Recognition of professional qualifications – Aptitude test – Determination of the status of “migrant under supervision” of an “applicant wishing to prepare for the aptitude test”

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[8] For example, *Klumpp*, EuZA 2021, 284 (on the Commission draft); *Thüsing/Hütter-Brungs*, NZA 2021, 170 (Commission draft); *Vogt*, EuZA 2023, 50 et seq.; in contrast, *Eichenhofer*, AuR 2021, 148 et seq. affirms compatibility with Union law; on the relevant aspects of Union law, see *Sagan/Witschen/Schneider*, ZESAR 2021, 103 et seq.

[9] See *Franzen*, EuZA 2023, 361.

[10] *Eichenhofer*, AuR 2021, 148, 155.

7. Social security

Decisions

Judgment of the Court (Second Chamber) of 14 September 2023 – C113/22 – *TGSS*

Law: Art. 6 Directive 79/7/EEC (equal treatment of men and women in social security matters)

Keywords: National legislation providing for the right to a pension supplement only for women – Double discrimination on grounds of sex where a scheme continues to be applied by the administration notwithstanding the preliminary ruling of the Court of Justice – Extent of compensation

Core statement: Mothers of two or more biological or adopted children who have to go to court to obtain a contributory pension for permanent disability in Spain are entitled to additional compensation. An administrative practice that consists of systematically refusing to grant this allowance to fathers as well, thereby disregarding the consequences resulting from a 2019 judgment[11] in which the CJEU had already ruled that the granting of this allowance exclusively to mothers is discriminatory, results in double discrimination for these fathers. Due to not being granted this pension allowance, only fathers are forced to assert their claim in court, which means that they have to wait longer and incur additional costs. Consequently, national courts must not limit themselves to retroactively awarding fathers the right to the disputed pension supplement. The compensation must take into account the expenses incurred by fathers, including legal costs and lawyers' fees.

New pending cases

Reference for a preliminary ruling from the Østre Landsret – Nordhavn (Denmark) lodged on 30 June 2023, received on 6 July 2023 – C-417/23 – *Slagelse Almennyttige Boligselskab Afdeling Schackenborgvænge*

Law: Art. 2(2)(a) and (b) Racial Equality Directive 2000/43/EC

Keywords: Social housing – Concept of "ethnic origin" or "belonging to an ethnic group" – Development plans to reduce social housing – Residential area in which more than 50% of the residents are "immigrants and their descendants from non-Western countries" – Direct or indirect discrimination

Note: This reference for a preliminary ruling is based on the question whether the Danish legislation underlying the "development plans for the reduction of social housing for families in so-called 'transformation areas'"[12] (formerly "hard ghetto areas") constitutes discrimination on grounds of ethnic origin in breach of the Danish Lov om etnisk ligebehandling (Ethnic Equality Act) and the Directive 2000/43/EC on which it is based.

In the original proceedings (which consist of many combined individual proceedings), the respective tenancy agreements of the plaintiffs were terminated. According to the responsible housing association, SAB, the criteria on which the terminations were based related in part to the income situation of the tenants and to criminal offences committed in the respective household. The plaintiffs, on the other hand, are of the opinion that the national laws and development plans that enable the terminations, which pursue the official goal of "eliminating

[11] CJEU of 12 December 2019 – C-450/18 – *WA*.

[12] This is the wording in the German version of the request for a preliminary ruling.

ghettos" are actually aimed at removing residents with a non-Western background. This objective is contrary to EU law, so that the cancellation discriminates against them directly or at least indirectly on the basis of their ethnic origin in accordance with Article 2(2)(a) of the Racial Equality Directive.

The proceedings are part of a highly emotional debate in which the ruling Social Democrats are attempting by means of a repressive housing policy to deal with integration failures. With this referral procedure, the CJEU has the opportunity to help the Racial Equality Directive 2000/43/EC to become effective in practice.

Reference for a preliminary ruling from the Ustavni sud Republike Hrvatske (Croatia) lodged on 28 April 2023 – C-277/23 – *Ministarstvo financija*

Law: Art. 18(7), Art. 67 Coordination Regulation (EC) No. 883/2004, Arts. 18, 20, 21 TFEU

Keywords: Increase in the basic tax-free allowance for a dependent child in the context of income tax – Support above the planned fixed income limit in the context of "Erasmus+" – Student mobility

Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria) lodged on 25 May 2023 – C-329/23 – *Sozialversicherungsanstalt*

Law: Coordination Regulation (EC) No. 883/2004, Enforcement Regulation (EC) No. 987/2009

Keywords: EU citizen who is simultaneously gainfully employed in an EU Member State, in an EEA EFTA State (Liechtenstein) and in Switzerland – EU law standards on the determination of the applicable law in the area of social security – Concept of "predominant situation"

Reference for a preliminary ruling from the Sozialgericht Detmold (Germany) lodged on 22 June 2023, received on 29 June 2023 – C-397/23 – *Jobcenter Arbeitplus Bielefeld*

Law: Sec. 7(1) German Social Code (SGB), Book II, Sec. 23(3) German Social Code (SGB), Book XII, Sec. 28(1) first sentence No. 3 Residence Act in conjunction with Art. 6 German Basic Law and Art. 8 ECHR

Keywords: Right of residence as a prerequisite for social benefits – Residence permit in the context of personal care – Foreign parent of a minor unmarried citizen – Habitual residence in Germany

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8. Working Time

New pending cases

Reference for a preliminary ruling from the Cour de cassation (France) of 7 June 2023 – submitted on 9 June 2023 – C-367/23 – *Artémis Security*

Law: Art. 9(1) lit. a Working Time Directive 2003/88/EC

Keywords: Free health examination of night workers – Proof of causality between failure to examine and disadvantage suffered as an additional prerequisite for compensation

Note: The present case concerns the health examination of night workers. Article 9(1)(a) of the Working Time Directive requires that the state of health of night workers be examined free of charge before they start work and regularly thereafter. The referring court wishes to know whether a national provision is compatible with EU law if it makes an employee's entitlement to compensation for breach of the protective provision of enhanced medical monitoring during night work additionally dependent on proof of a specific disadvantage. Previously, the CJEU had already ruled in the *Fuß* case of 14 October 2010[13] that exceeding the maximum average weekly working time in Article 6 of the Working Time Directive constitutes a breach of this provision, without it being necessary to prove the existence of a specific disadvantage. In other words, is Article 9(1)(a) of the Working Time Directive to be interpreted as meaning that the mere finding that the health examination was not carried out gives rise to a claim for compensation?

Reference for a preliminary ruling from the Okrazhen sad Smolyan (Bulgaria) of 12 July 2023 – submitted on 13 July 2023 – C-435/23 – *Glavna direktsia Granichna politsia*

Law: Art. 12 lit. a Working Time Directive 2003/88/EC, Arts. 20, 31 European Charter of Fundamental Rights

Keywords: Night work – Shift work – Private and public sector – Tasks of maintaining public order and protecting the population

Note: While private sector workers in Bulgaria receive a pay supplement for their night work, police officers and firefighters working shifts are only entitled to benefits (such as additional days of paid leave) that are also granted to non-night workers in the same public sector. The benefits are not granted to them because they work at night, but because of their special duties as guardians of public order and protection of the population. The benefits are unrelated to the nature of the night work. The referring court therefore wishes to know whether such unequal treatment is related to a legally permissible objective when a group of workers is disadvantaged both in relation to another group of workers in the same public sector and in relation to workers in the private sector.

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[13] CJEU of 14 October 2010 – C-243/09 – *Fuß*, para. 53.

III. Proceedings before the ECtHR

Compiled and commented by Karsten Jessolat, DGB Rechtsschutz GmbH, Gewerkschaftliches Centrum für Revision und Europäisches Recht, Kassel

1. Ban on discrimination

New pending cases (notified to the respective government)

No. 36325/22 – *Ortega Ortega v. Spain* (5th Section) – lodged on 12 July 2022 – communicated on 13 July 2023

Law: Art. 8 ECHR (right to respect for private and family life); Art. 14 ECHR (prohibition of discrimination); Art. 6 ECHR (right to a fair trial)

Keywords: Wage discrimination on grounds of sex – Dismissal for equal pay claim – Disclosure of pay documents to a labour court

Note: The complainant, who was employed by a private company, sued her employer for alleged wage discrimination and submitted documents to prove her claim, which showed that the wages of male employees performing the same work tasks were higher than hers. The labour court upheld the claim and found wage discrimination on grounds of sex. The employer was ordered to adjust the complainant's pay in line with that of male employees. The employer's appeal against this decision was unsuccessful. While the legal proceedings were still pending, the employer terminated the employment relationship with the complainant. The employer argued that the complainant had betrayed a secret by passing on information about the salaries of the employer's employees to the labour court and thus to third parties. The plaintiff brought an action for unfair dismissal against this, arguing that the dismissal was solely in retaliation for the complainant's complaint of wage discrimination. The action was unsuccessful in all instances. The reason given was that it was not possible to establish a connection between the termination of the employment relationship and the previous discrimination complaint. The complaint alleges a violation of Article 14 ECHR and Article 6 ECHR.

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2. Freedom of expression

Decisions

Judgment (2nd Section) of 18 July 2023 – No. 26360/19 – *Manole v. Republic of Moldova*

Law: Art. 10 ECHR (freedom of expression)

Keywords: Dismissal from judicial service – Removal from service as the only possible sanction – Violation of the principle of proportionality

Core statement: A national provision according to which a breach of duty can only be punished by removal from the service, regardless of the significance of the offence, violates the principle of proportionality, since it is not possible to impose a sanction appropriate to the conduct complained of.

Note: The complainant has been a judge since 1990 and most recently worked in this capacity at the *Chişinău* Court of Appeal. She has been honoured several times by the Supreme Judicial Council (CSM) for her professional merits. From 2011 to 2015, she was an elected member of the Board of Directors of the Association of Judges of the Republic of Moldova and has spoken out several times in recent years on issues of public interest, such as the independence of the judiciary in the Republic of Moldova. In June 2017, the Court of Appeal of Chişinău, *with the* participation of the complainant, had to rule on an application for an extension of the deadline in proceedings brought by the Speaker of the Parliament of the Republic of Moldova, who had filed a lawsuit against a television broadcaster to revoke a previous, allegedly untrue allegation. The appellant expressed a dissenting opinion to the decision of the court of appeal, which she communicated to a journalist of the television station before the appeal judgement was published. The CSM initiated disciplinary proceedings based on these facts and filed a request with the President of the Republic of Moldova to dismiss the complainant from her position as a judge. The President granted this request in July 2017. According to the law in force at the time, judges are not permitted to disclose information about pending cases to media representatives. A violation of the prohibitions imposed on judges can only be penalised by dismissal from the judiciary. An appeal against the President's decision before the Supreme Court was dismissed as unfounded.

The complaint alleges a violation of Article 10 ECHR, as dismissal from judicial service for disclosing information to the press constitutes an unlawful and disproportionate interference with the right to freedom of expression.

The Court recognises that a state is entitled to impose a duty of confidentiality on its employees, who, like all citizens, are subject to the protection of Article 10 ECHR,[14] on the basis of their status.[15] The Court must therefore examine, taking into account the circumstances of the individual case, whether an appropriate balance has been struck between the individual's right to freedom of expression and the legitimate interest of a democratic state in the confidentiality of its employees. The special position of state employees must not be disregarded in this context, so that the national authorities have a margin of discretion when assessing proportionality.[16] As guarantors of justice, members of the judiciary must enjoy the trust of citizens, so they are under a particular obligation to exercise discretion.[17] On the other hand, the duty of discretion must not lead to judges being prohibited from speaking out on social issues of public interest.[18] To the extent that the CSM's discretion was limited by the domestic regulation, according to which the only the disciplinary measure that could could be imposed on the complainant was dismissal from service, the law pursued a legitimate purpose. However, the only sanction provided for, the dismissal of the complainant after 18 years of successful service as a judge, violates the principle of proportionality, as it was inappropriate in view of the significance of the breach of duty. Since the domestic authorities in the present case did not apply the Court's case law on Article 10 ECHR and the sanction imposed does not appear necessary in a democratic society, a violation of Article 10 ECHR is given. The Court ordered the defendant government to pay the applicant €4,500 as compensation for the non-material damage and to reimburse her costs and expenses in the amount of €5,000.

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[14] ECtHR of 26 September 1990 – No. 17851/91 – *Vogt v. Germany*.
[15] ECtHR of 12 February 2008 – No. 14277/04 – *Guja v. Republic of Moldova*.
[16] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v Hungary*.
[17] ECtHR of 5 February 2009 – No. 22330/05 – *Olujić v. Croatia*; ECtHR of 13 November 2008 – Nos. 64119/00 and 76292/01 – *Kayasu v. Turkey*.
[18] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v Hungary*.

New pending cases (notified to the respective government)

No 17655/19 – *Chinita Rodrigues v. Portugal* (4th Section) – lodged on 6 March 2019 – communicated on 29 August 2023

Law: Art. 10 ECHR (freedom of expression)

Keywords: Disciplinary order against a judge – Criticism of an annulled decision of the court of appeal

Note: The complainant is a judge at a court of first instance. In 2015, she acquitted a defendant of the offences with which he was charged. The court of appeal overturned the decision and referred the case back to the lower court for a new decision. The complainant again acquitted the accused and stated in the reasons for the decision that she did not agree with the decision of the court of appeal. Disciplinary proceedings were then initiated against her, which ended with a warning to the complainant. Appeals lodged against this were unsuccessful. The complainant alleges a violation of Article 10 ECHR and points out in particular that the complaints in the judgement of the court of first instance were not defamatory. The Court of Justice will have to examine the question of whether the disciplinary measure on account of the comments in the reasoning of the judgement[19] interfered with the right to freedom of expression and whether the interference was necessary in a democratic society.[20]

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3. Procedural law

Decisions

Judgment (2nd Section) of 18 July 2023 – No. 15152/18 – *Paslavičius v. Lithuania*

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Obligation to bear the employer's legal costs – Hiring of an external lawyer by a municipality – No violation of the right to equality of arms

Core statement: Although the imposition of considerable financial burdens in connection with court proceedings may constitute a restriction of the right of access to a court guaranteed by Article 6 ECHR, this requires the presentation of specific circumstances in individual cases.

Note: The complainant was employed as a legal specialist in the legal department of the municipality of *Trakai.* Following a reorganisation of the legal department, he was dismissed at the end of 2016 on the grounds that a position had been eliminated. The complainant brought an action against the dismissal before the administrative court. In addition, disciplinary proceedings were pending against him, in which he was reprimanded. In both proceedings, in which the municipality was represented by external counsel, the actions were dismissed in all instances and the complainant was ordered to pay the costs of the court proceedings. The complainant appealed against the respective cost orders, arguing that the municipality had its own law staff, which would have made the appointment of an external lawyer superfluous. In addition, he had been affected by unemployment after his dismissal, meaning that he was not

[19] ECtHR of 6 DECEMBER 2022 – No. 2463/12 – *Mnatsakanyan v. Armenia*.

[20] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v Hungary*; ECtHR of 28 October 1999 – No. 28396/95 – *Wille v Liechtenstein*; ECtHR of 26 February 2009 – No. 29492/05 – *Kudeshkina v Russia*; ECtHR of 23 April 2015 – No. 29369/10 – *Morice v France*.

in a financial position to reimburse the requested legal costs. As part of the cost assessment procedure, the court reduced the legal costs to a minimum on the basis of reasonableness considerations. The courts took the opposing view, however, that the municipality was not obliged to refrain from hiring an external lawyer in view of the fact that it employed its own lawyers. The appeals lodged by the complainant against the cost decisions were unsuccessful.

The complaint alleges a violation of Article 6 ECHR. The complainant asserts that he is prevented from exercising his right of access to a court by the obligation to pay the legal costs of his former employer. In addition, the requirement of equality of arms arising from the right to a fair trial is violated if the former employer was authorised to hire an external lawyer, although it had the possibility of entrusting the proceedings to its own salaried lawyers.

According to the case law of the Court of Justice, it follows from the right to a fair trial and the associated right of access to a court[21] that the parties to the proceedings must not be deprived of the opportunity to present their case to the court and must have equality of arms in relation to the respective opposing party.[22] The assessment of legal costs against the losing party may constitute a restriction of the right of access to a court if it imposes a significant financial burden on the party concerned. Such a restriction must pursue a legitimate aim and be proportionate.[23]

In the light of the above, the Court does not consider the complainant's right of access to a court to have been violated in the present case. In particular, due to his professional qualification as a lawyer in charge of disciplinary proceedings, it could not be established that he would not have been able to conduct the proceedings before the administrative court himself without being represented by a lawyer. It must also be taken into account that the municipality of Trakai is a small municipality and that a conflict of interest could arise if a lawyer employed by it were to represent the municipality in court proceedings against a former employee. The Court rejects the complainant's objection that he was not in a position to bear the legal costs of his former employer due to his unemployment on the grounds that the costs had already been minimised in the cost assessment procedure in the context of reasonableness considerations. In addition, he had the option to take advantage of legal aid. Taking into account all the circumstances of the individual case, the Court unanimously concludes that the complainant's right of access to a court was not restricted and that there was therefore no violation of Article 6 ECHR.

New pending cases (notified to the respective government)

No. 59262/15 – *Benli and Others v. Turkey* (2nd Section) – communicated on 13 September 2023

Law: Art. 6 ECHR (right to a fair trial)

Keywords: Personnel decision of the "High Council of Judges and Prosecutors" – Contestability of the measure – Access to a court

Note: The seven complainants are judges and prosecutors and are employed in the administration of the Ministry of Justice. Following a decision by the High Council of Judges and Public Prosecutors (HSK), they were transferred to different judicial districts. The transfer resulted in a reduction in their salaries. Under domestic law, the decision of the HSK cannot be contested. The complainants argue on the basis of Article 6 ECHR that they have no access to a court due to the non-appealability of the decision and that the HSK lacks independence and impartiality.

[21] ECtHR of 5 April 2018 – No. 40162/12 – *Zubac v. Croatia*.
[22] ECtHR of 30 March 2010 – No. 39013/04 – *Handölsdalen Sami Village and Others v Sweden*; ECtHR of 22 April 2021 – No. 27903/15 – *Zustović v Croatia*.
[23] ECtHR of 18 July 2013 – No. 28963/10 – *Klauz v. Croatia*; ECtHR of 22 April 2021 – No. 27903/15 – *Zustović v. Croatia*.

The Court of Justice has already had to rule in various decisions[24] on the question of whether the HSC fulfils the requirements of a court within the meaning of Article 6 ECHR.

No. 12075/22 – *Jashi v. Georgia* (5th section) – lodged on 22 February 2022 – communicated on 11 July 2023

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life)

Keywords: Enforcement of a favourable judgment in an unfair dismissal case – Indirect review of the judgment in enforcement proceedings

Note: The complainant, a university professor, had brought a successful action against dismissal from her professorship. As part of the enforcement of the final judgement, the content of this judgement was reviewed, with the result that it was not enforced. The complainant alleges a violation of Article 6 ECHR and Article 8 ECHR.

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4. Protection of privacy

Decisions

Judgment (1st Section) of 6 July 2023 – No. 54588/13 – *Guliyev v. Azerbaijan*

Law: Art. 8 ECHR (right to respect for private and family life)

Keywords: Dismissal of a public prosecutor – Depiction of a relationship dispute in public media – Violation of code of ethics

Core statement: In order to justify a disciplinary measure, a violation of a code of ethics must be substantiated on the basis of national law and must specify which legal regulations have been violated.

Note: The complainant had been a public prosecutor at the General Prosecutor's Office in *Baku* since 2006. A relationship dispute with his former partner (the two lived together but were not married), was the subject of a criminal investigation, as a result of which charges were brought against the partner and another person for attempted assault and threatening behaviour. Both were found guilty as charged and sentenced to pay a fine in 2009. While the criminal proceedings were still ongoing, the complainant's former partner published defamatory allegations in a daily newspaper printed in Baku. An action for defamation brought against this led to the daily newspaper being ordered to retract the statements it had published based on the allegations made by the complainant's partner. In addition, the complainant's partner lodged a complaint with the complainant's employer. As part of these proceedings, the complainant was initially given an official warning in August 2009 and asked to settle the dispute with his partner and warned otherwise to expect disciplinary action. In May 2010, the complainant was dismissed from service on the basis of a disciplinary order issued by the Public Prosecutor General. The reason given was that the complainant had violated the code of ethics for public prosecutors by living with a woman without intending to marry her, which led to disputes between the partners that culminated in criminal proceedings and complaints against the complainant and were the subject of public reporting.

[24] ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*.

The complainant brought an action before the administrative court against his dismissal from the service and applied for reinstatement as a public prosecutor. The court dismissed the action and ruled that the disciplinary order was lawful. An appeal against the decision was unsuccessful, as was the complainant's appeal on points of law against the judgment of the court of appeal.

The complainant alleges a violation of Article 8 ECHR due to his dismissal from the civil service. He claims the dismissal is unlawful within the meaning of national law, as it lacks a legal basis. In addition, the domestic courts failed to take into account the judgements handed down in the criminal proceedings and in the defamation proceedings when deciding on the disciplinary order.

The Court initially assumes the applicability of Article 8 ECHR and thus the admissibility of the complaint. Even if no general right to employment or free choice of profession can be derived from Article 8 ECHR, the term "private life" does not fundamentally exclude professional activity.[25] Private life concerns the individual's right to enter into and develop relationships with other people, including professional or business relationships.[26] The dismissal of the complainant from the civil service is closely linked to his relationship and personal conflict with his former partner and therefore to his private life. The measure is the most severe disciplinary measure possible and has consequences for his further professional development.

Since neither the disciplinary order nor the subsequent decisions of the domestic courts indicate which norm of the Code of Ethics the complainant is alleged to have violated, there is no legal basis for the interference under Article 8 ECHR, according to which the right to respect for private life may only be interfered with if the interference is provided for by law. Moreover, the government has not shown that the complainant committed acts that are prohibited by law in the dispute with his former partner. The domestic courts also fail to recognise that the complainant was not the protagonist in the relationship conflict, but the victim.

The Court therefore unanimously assumes that the dismissal of the complainant was unlawful, with the consequence that the interference in his private life was not provided for by law within the meaning of Article 8 ECHR. As a result, he suffered non-material damage that cannot be compensated for by the finding of a violation alone. The defendant government was therefore ordered to pay compensation in the amount of € 7,000.

With the exception of Section 39 of the Judiciary Act (DriG), there are no provisions in Germany that specifically regulate the off-duty behaviour of judges. Only the voluntary behavioural guidelines for judges of the Federal Constitutional Court[27] contain more detailed information on this. The case law of the ECtHR is a guideline for the interpretation of Section 39 DRiG or a lege ferenda.

Judgment (3rd Section) of 4 July 2023 – No. 41047/19 – *Thanza v. Albania*

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life)

Keywords: Dismissal from judicial service – State review procedure to combat corruption in the judiciary – Legality of the review procedure

Core statement: As disciplinary proceedings can have serious consequences for the individual concerned, it is essential that the decision to take disciplinary action be adequately justified, taking into account valid evidence and other relevant considerations.

[25] ECHR of 12 June 2014 – No. 56030/07 – *Fernández Martínez v Spain*; ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v Romania*; ECtHR of 27 June 2017 – No. 50446/09 – *Jankauskas v Lithuania (No. 2)*.

[26] ECtHR of 7 August 1996 – No. 21794/93 – *C. v Belgium*; ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v Ukraine*.

[27] Conduct guidelines for judges of the Federal Constitutional Court.

Note: The complaint concerns the legality of the procedure under the law on the re-evaluation of judges and public prosecutors (Vetting Act), which was enacted by the Albanian legislature in 2014 to combat corruption.[28] Based on this regulation, all judges and public prosecutors and their family members were to be checked as regards their financial circumstances, possible links to organised crime and their professional competence.

The complainant was a judge at a district court starting in 1992 and later its president. He was a member of the Constitutional Court of Albania from 2009 to 2013 and a judge at the Supreme Court from 2013 until his removal from office. As part of the hearing conducted by an independent commission (IQC) in 2017, he made a declaration about his financial circumstances. At the beginning of 2016, an investigation was opened against him for abuse of office in connection with suspected corruption, but was discontinued after six months as the existence of a criminal offence could not be established. The complainant failed to refer to these proceedings during the hearing. After completing the investigation, the IQC came to the conclusion that, although the complainant's financial circumstances did not give rise to any suspicion of corruption, the investigation proceedings initiated against him on suspicion of corruption indicated certain "criminal tendencies", which justified his dismissal from the judiciary. The concealment of the proceedings was also sufficient for dismissal from office. The appeal against the dismissal order before the Appeals Chamber of the IQC was unsuccessful.

Citing Articles 6 and 8 ECHR, the complainant alleges that before the IQC there was no fair and public hearing before an independent and impartial court and that he was prevented from exercising his profession by his removal from the bench.

The Court first of all refers to its previous case law on the legality of proceedings under the Vetting Act[29]. The application of these principles may result in the person concerned in disciplinary proceedings having to refute the factual findings of a court or authority in the judicial proceedings. A resulting reversal of the burden of proof is not per se arbitrary within the meaning of Article 6 ECHR. It is not for the Court of Justice to assess the relevance of the evidence, its probative value and the burden of proof, as this task falls to the domestic courts.[30] However, as regards the complainant's failure to disclose the investigation proceedings initiated against him on suspicion of corruption and subsequently discontinued, the Court finds that he was not given a reasonable opportunity to contradict the IQC's findings in this regard and to put forward his arguments. Insofar as it is incumbent on the complainant to prove his innocence according to the statutory provisions, the Court considers the regulation to be too formalistic, especially since the criminal investigation proceedings have already established that no criminal offence has been committed. This applies in particular because disciplinary proceedings can have considerable consequences for the professional and private life of the person concerned.

The Court therefore found a violation of Article 6 ECHR by six votes to one and awarded the applicant compensation in the amount of €3,500 for the non-material damage. Judge Serghides, who had already issued a dissenting opinion in the case of *Xhoxhaj v. Albania*,[31] added a dissenting opinion to the decision in accordance with Article 74(2) of the ECtHR's Rules of Procedure, which was not substantiated in detail.

Judgment (5th Section) of 13 July 2023 – No. 47052/18 – *Golovin v. Ukraine*

Law: Art. 8 ECHR (right to respect for private and family life); Art. 6 ECHR (right to a fair trial)

[28] Cf. ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v Albania;* see HSI Report 1-2021, V. 4.
[29] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania,* see HSI Report 1-2021, V. 4.
[30] ECtHR of 21 January 1999 – No. 30544/96 – *García Ruiz v. Spain*; ECtHR of 7 June 2012 – No. 38433/09 – *Centro Europa 7 S.r.l. and Di Stefano v. Italy*; ECtHR of 23 October 2018 – No. 39804/06 – *Lady S.R.L. v. Republic of Moldova*.
[31] ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania,* see HSI Report 1-2021, V. 4.

Keywords: Dismissal of a constitutional judge – Participation in judgements in favour of the previous government – Requirements for a court

Core statement: An error of law made in good faith must be distinguished from a judicial error made in bad faith, so that the involvement of a judge in politically controversial judicial decisions cannot in itself and without the existence of corresponding factual circumstances justify disciplinary responsibility.

Note: The Court's decision is based on the same facts as in the *Ovcharenko and Kolos* proceedings.[32] The Court ruled on the complaint in accordance with the principles established in that decision and also found a violation of Article 8 ECHR and Article 6 ECHR in this case.

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[32] ECtHR of 12 January 2023 – Nos. 27276/15 and 33692/15 – *Ovcharenko and Kolos v. Ukraine*, see HSI Report 1/2023, V. 4.

5. Protection of property

New pending cases (notified to the respective government)

No. 30207/18 – *Farretti v Italy* (1st section) – lodged on 13 June 2018 – communicated on 10 July 2023

Law: Art. 1 Protocol No. 1 (protection of property)

Keywords: Reduction of pension – Consideration of increased cost of living – Subsequent interference with property

Note: The complainant was an employee of the municipality of Campione d'Italia, an Italian enclave on Swiss territory. He retired on 31 December 1982 and since then has received an "integrative allowance", an increased pension due to the higher cost of living in the municipality located in Switzerland. As a result of regulations issued between 2003 and 2007, the complainant's pension was reduced, which was justified on budgetary grounds. The complainant alleges disproportionate interference with his property rights, as his retirement benefits were reduced by a total of around 50%. The question here is whether the national regulations on the granting of retirement benefits fall within the scope of Article 1 Protocol No. 1 and whether their subsequent reduction constitutes an excessive burden on the complainant.[33]

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6. Social security

(In)admissibility decisions

Decision (2nd Section) of 4 July 2023 – No. 38692/16 – *Blazheski and Blazheska v. North Macedonia*

Law: Art. 5 Protocol No. 7 (equal rights of spouses)

Keywords: Social assistance for dependent child – Only mothers entitled to apply – Citizenship as a prerequisite for application

Core statement: The prerequisite for the applicability of Article 5 Protocol No. 7 is the private law nature of the claim with regard to the equal rights of spouses.

Note: The complainants are a married couple who are responsible for the upkeep of three children. The children acquired the citizenship of North Macedonia by birth. The mother of the children and complainant was previously an Albanian citizen and married the father of the children and complainant, who is a citizen of the Republic of North Macedonia, in 2007. She became a citizen of North Macedonia in 2012. In 2011, she received social assistance for the third child. In 2012, the social welfare office cancelled the benefits and justified its decision by stating that, according to national law, only mothers can apply for social welfare for their children. A further requirement is that they must have been permanently resident in the country for at least three years at the time of application and have been a citizen of North Macedonia during this period. It is undisputed that the complainant did not fulfil this requirement. An appeal

[33] ECtHR of 13 December 2016 – No. 53080/13 – *Béláné Nagy v. Hungary*.

against the negative decision was unsuccessful, as was a constitutional complaint lodged against the legal provisions. The Constitutional Court pointed out that the purpose of the national regulation was to support mothers regardless of their marital status.

In their complaint, the complainants claim that domestic law violates Article 5 Protocol No. 7. The denial of social assistance due to the complainant's lack of citizenship and the complainant's inability to apply for social assistance as a father leads to unequal treatment of mothers and fathers.

The explanatory report of the Council of Europe on Protocol No. 7 of 22 November 1984[34] stipulates that the equal rights of spouses among themselves and in their relations with their children must be guaranteed insofar as the rights and obligations are of a private law nature. Article 5 Protocol No. 7 does not apply to other areas of law such as administrative, tax, criminal, social, ecclesiastical or labour law. Accordingly, the applicability of Article 5 Protocol No. 7 depends on whether the claim for social benefits asserted by the applicants was of a private law nature. The Court finds this not to be the case and declares the complaint inadmissible pursuant to Article 35(3) lit. a and Article 35(4) ECHR.

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[34] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.