REPORT
ON EUROPEAN LABOUR AND SOCIAL SECURITY LAW

HSI
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Contents

I. Editorial

HSI Report 4/2023 chronicles the development of case law and legislation in labour and social security law at European and international level in the period from October to December 2023.

New in this issue is also the make-up of the editorial board: Prof. Dr. Johanna Wenckebach moved to IG Metall trade union at the beginning of the year, where she is now head of the legal department. We offer her our heartfelt thanks for her extremely dedicated work on the Report and we are delighted that she will remain associated with the series. Ernesto Klengel, who succeeds Johanna Wenckebach as scientific director of the Institute is the new Co-editor.

The fourth quarter of 2023 brought some notable decisions. The *Lufthansa CityLine* case (C-660/20) decided by the **CJEU** deals with the conflict between collective bargaining autonomy and protection against discrimination for part-time employees. According to the underlying collective labour agreement, flight personnel receive a bonus if they are on duty for more than a fixed number of flight hours.

There are also several other relevant proceedings before the CJEU to report on. The decision of the Court of Justice in the *AP Assistenzprofis* case (C-518/22) dealt with how the request of a person with a disability for an assistant of a certain age should be assessed in terms of discrimination law. The Grand Chamber ruled on a "headscarf ban" for administrative employees in the *Commune d'Ans* case (C-148/22).

On 14 December 2023, the **ECtHR** concluded a high-profile case on a special feature of German law, the ban on civil servant strikes (No. 59433/18 – *Humpert et al. v. Germany*). The GEW trade union has campaigned at various levels for the abolition of this special status. The Court of Justice has now accepted the German legal situation by a majority, taking into account among other things the fact that civil servants can influence their salary level by other means and that the sanctions imposed are rather modest. In further proceedings before the ECtHR, the Court ruled in a noteworthy judgment that victims of human trafficking are entitled to compensation that includes lost hypothetical earnings (No. 18269/18 – *Krachunova v. Bulgaria*). The lowering of the retirement age to different thresholds for women and men is discriminatory (No. 25226/18 – *Pajak et al. v. Poland*). Furthermore, several proceedings centred on the dismissal or transfer of judges or public prosecutors in possible violation of the rule of law (No. 66292/14 – *Pengezov v. Bulgaria*; No. 19371/22 – *Stoianoglo v. Republic of Moldova*).

Our warmest thanks go to Amélie Sutterer-Kipping for her skilful support in producing the English edition. We wish you a stimulating read and look forward to receiving your feedback at hsi@boeckler.de.

The editors
Prof Dr Martin Gruber-Risak, Prof Dr Daniel Hlava and Dr Ernesto Klengel

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II. Proceedings before the CJEU

Compiled and commented by

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Translated from German by Allison Felmy

1. Annual leave

Decisions

Judgment of the Court (First Chamber) of 9 November 2023 – Joined Cases C-271/22 to C-275/22 – *Keolis Agen*

Law: Art. 31(2) European Charter of Fundamental Rights, Art. 7(1) Working Time Directive 2003/88/EC

Keywords: Direct effect of the Working Time Directive between private individuals – Paid annual leave – Transfer of holiday entitlement – Lack of national rules on transfer period

Core statement: Article 31(2) European Charter of Fundamental Rights, concretised by Article 7 Working Time Directive, guarantees the right to paid annual leave regardless of whether the employer is private or public. It is up to the Member States to define the conditions for exercising and implementing the right to paid annual leave. Union law does not oblige them to regulate carry-over periods for holiday entitlements.

Note: Keolis Agen SARL is a private company that provides public transport services. Several of its employees had been ill for over a year and demanded either the granting of paid annual leave, which they were unable to take during their illness, or, in the event of termination of the employment relationship, compensation for leave. The employees approached Keolis Agen SARL with this claim within 15 months of the end of the reference period. The company rejected the claim, citing French labour law. The employees concerned filed a lawsuit. French law does not expressly regulate the transfer of leave entitlement in the event of long-term illness. The legal opinion of the courts of appeal diverged: a period of 15 months[1] (Agen Labour Court) or even unlimited transferability (Court of Cassation) was possible.

The CJEU's decision on the transfer of leave was again preceded by the dogmatic question of the direct third-party effect of Article 7(1) of the Working Time Directive, which the Court of Justice has consistently denied.[2] In the present case, however, the provision of public services could, according to the assumption of the referring court, allow the company to fall under the broadly understood concept of the "state".[3] Even if the CJEU makes no statement in this regard, this would be questionable if the company is not particularly close to the state.[4]

[1] CJEU of 22 November 2011 – C-214/10 – *KHS*.
[2] CJEU of 26 March 2015 – C-316/13 – *Fenoll*, para. 48.
[3] *Ruffert*, in: Calliess/Ruffert, EUV /AEUV, Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta, 6th ed. 2022 Art. 288 para. 60.
[4] CJEU of 12 July 1990 – C-188/89 – *Foster and others*, para. 20; of 5 February 2004 – C-157/02 – *Rieser Internationale Transporte*, para. 24 et seq.; of 12 December 2013 – C-425/12 – *Portgás*, para. 27 et seq.

However, this is irrelevant for the decision, as employees can invoke Article 31(2) of the European Charter of Fundamental Rights against both private and public employers.

The CJEU was asked to clarify the transitional periods under EU law in accordance with Article 7(1) of the Working Time Directive. It refused to do so, referring to the wording of the provision and previous case law,[5] according to which it is up to the Member States to determine the conditions for exercising and implementing the right to paid annual leave. This also includes the definition of transitional periods.[6] In the *KHS* decision, the Court of Justice ruled on the compatibility of a national, in this case collectively agreed, transitional period: A carry-over period of 15 months in the event of illness over several reference periods was permissible. However, this period is not prescribed by EU law, but merely represents *one* possible period that can be regarded as compliant with EU law. However, when exercising their room for manoeuvre, the Member States must ensure that the national time limits do not affect the entitlement to paid annual leave. In particular, the substance, the principle of proportionality and the pursuit of a legitimate aim (Art. 52(1) European Charter of Fundamental Rights) must be respected.

With regard to the facts of the case, the CJEU comes to the conclusion that it is compatible with Union law to uphold the claims of the plaintiff employees.

Judgment of the Court (Sixth Chamber) of 12 October 2023 – C-57/22 – *Ředitelství silnic a dálnic*

Law: Art. 7 Working Time Directive 2003/88/EC, Art. 31(2) European Charter of Fundamental Rights

Keywords: Entitlement to paid annual leave – Unlawfully dismissed and reinstated employee – Period between dismissal and resumption of employment

Core statement: If employees were only unable to work because they were unlawfully dismissed by their employer, they are entitled to pro rata leave for the period between dismissal and re-employment as a result of a court case.

Judgment of the Court (First Chamber) of 14 December 2023 – C-206/22 – *Sparkasse Südpfalz*

Law: Art. 7 Working Time Directive 2003/88/EC, Art. 31(2) European Charter of Fundamental Rights

Keywords: Protection of the health and safety of the worker – Organisation of working time – Entitlement to paid annual leave – SARS-Cov2 virus – Quarantine measure – Impossibility of transferring paid annual leave

Core statement: Employees who have been quarantined during their paid annual leave cannot carry over their annual leave to a later period.

Note: An employee took paid annual leave from 3 to 11 December 2020. Due to contact with a person who tested positive for COVID-19, the competent German authority placed the employee in quarantine during the same period. The employee then applied to his employer, Sparkasse, for permission to transfer these days of leave to a later period. After the Sparkasse refused, he turned to the competent labour court and claimed that this refusal was in breach of the Working Time Directive.

[5] CJEU of 22 September 2022 – C-120/21 – *LB*, para. 24 with further references.
[6] CJEU of 22 November 2011 – C-214/10 – *KHS*, para. 25 with further references.

The CJEU rejected the transfer of annual leave to a later date due to quarantine as a result of contact with a person who tested positive for COVID-19, thus confirming the view of the Sparkasse. The purpose of paid annual leave is to recuperate from work and to have a period of relaxation and leisure. Unlike illness, quarantine does not fundamentally prevent this. Therefore, the employer is not obliged to compensate for disadvantages that could result from an unforeseeable event such as quarantine. Nevertheless, Member States can adopt regulations that are more favourable to employees. For example, a reform of the Infection Protection Act (IfSG) in Germany from September 2022 stipulates that quarantine periods ordered by the authorities are not counted towards leave (Sec. 59(1) IfSG).

2. Collective redundancy

Decision

Judgment of the Court (Seventh Chamber) of 5 October 2023 – C-496/22 – *Brink's Cash Solutions*

Law: Art. 1(1)(1) lit. b and Art. 6 Collective Redundancies Directive 98/59/EC

Keywords: Procedure for informing and consulting employees in the event of collective redundancies – Lack of employee representation

Core statement: The Collective Redundancies Directive does not stipulate that the employees affected by an intended collective redundancy must be consulted individually if there is no employee representation in the company.

Note: The plaintiff in the Romanian proceedings invokes the invalidity of his dismissal because, in his opinion, an information and consultation procedure should have been carried out. This was not done because at the time of the dismissal there was no employee representative body that could have been consulted. Under Romanian law, the works council has no residual mandate in such cases. The Court of Justice accepted this legal situation: In companies without employee representation, there is also no need to carry out a consultation procedure with all employees. This result is highly questionable in light of the purpose of the provision, which also applies in the interests of individual employees.[7] However, the legal handling in Germany[8] in the absence of a works council can be upheld.

The circumstances of the present proceedings call for a position to be taken on abusive behaviour on the part of the employer. Employers could render the provisions of the Directive ineffective, in particular by evading co-determination in their companies. In the present case, the term of office of the employee representatives had expired only a few weeks before the dismissals and had not been extended. According to previous CJEU case law, the consultation procedure cannot simply be left unapplied if employers refuse to recognise an employee representative body that actually exists.[9] In this judgment, the Court emphasises that employees must not be prevented from establishing employee representation by external circumstances. States such as Germany, where there are no mandatory co-determination structures, must therefore take appropriate measures to ensure that such representations can realistically be formed.

[7] See in detail *Klengel*, in: jurisPR 1/2024, note 2.

[8] BAG of 13 February 2020 – 6 AZR 146/19 para. 62; *Becker*, in: Deinert/Wenckebach/Zwanziger, Handbuch Arbeitsrecht, 11th ed. 2023, § 82 marginal No. 16; *Moll*, in: Ascheid/Preis/Schmidt, Kündigungsrecht, 7th ed. 2024, § 17 KSchG marginal No. 85; *Spelge*, in: Franzen/Gallner/Oetker, Kommentar zum europäischen Arbeitsrecht, 5th ed. 2024, Art. 1 Directive 98/59/EC marginal No. 139.

[9] CJEU of 8 June 1994 – C-383/92 – *Commission v. UK*.

3. Data protection

Decisions

Judgment of the Court (First Chamber) of 26 October 2023 – C-307/22 – *FT*

Law: Art. 12(5), Art. 15(1) and (3); Art. 23(1) lit. i General Data Protection Regulation (EU) 2016/679 (GDPR)

Keywords: Patient file – Right to receive a first copy free of charge – Non-privacy-related motives for the request for information – Preparation of a civil action

Core statement: Patients are entitled to a first copy of their patient file, which must be made available to them free of charge and without justification.

Note: The facts underlying the CJEU's preliminary ruling – a patient requests a copy of his/her patient file from the doctor treating him/her for reasons unrelated to data protection – are a classic constellation that can also be transferred to other areas of law.[10] Here, the patient requested that his dentist hand over a copy of his patient file free of charge in order to check whether there were any civil medical liability claims against the doctor treating him. The treating dentist refused to provide the file free of charge with reference to Section 630g(2) of the Civil Code (BGB) and demanded reimbursement of costs. Both the district court and the regional court ruled in favour of the plaintiff, interpreting Section 630g BGB in accordance with EU law and affirming the right to information; the Federal Supreme Court (BGH) referred the matter to the CJEU in its ruling of 29 March 2022. [11]

The CJEU first emphasised that the provision of such a copy is an integral part of the right to the protection of personal data and also applies if the request is made for a purpose other than to take note of the processing and verify its lawfulness. Neither the wording of Article 12(5) GDPR nor that of Article 15(1) and (3) GDPR make the provision of a copy dependent on a statement of reasons.

This decision not only has far-reaching significance for the understanding of the GDPR and the rights of patients in the EU, but also for employees who, for example, want to use their personal data – in this case working hours – to facilitate the enforcement of claims for overtime pay[12] or for insured persons who want to reclaim overpaid premiums due to premium adjustments.[13][14] To date, German courts have rejected such requests for information on the grounds that they are an abuse of law.[15] Although it will still be possible in future to refuse a request for information in the event of improper use, this will only be possible under the very strict conditions of the general principle of law.[16] For example, the determination of abusive behaviour requires the existence of an objective and a subjective

[10] *Fuhlrott*, NJW 2023, 3481, 3486.
[11] BGH of 29 March 2022 – VI ZR 1352/20.
[12] LAG Saxony of 17 February 2021 – 2 Sa 63/20, para. 8, 62.
[13] OLG Hamm of 15 November 2021 – I-20 U 269/21 ("If a plaintiff is also concerned with the interests protected by Art. 15(1) and (3) GDPR, additional purposes pursued may not preclude a claim. However, if the data protection interest is clearly not pursued at all or is only pretended, the delimitation difficulties assumed by the Cologne Court of Appeal do not exist. And the argument put forward by the Celle Court of Appeal that the reason for a request for information does not have to be disclosed in order to assert a claim for information is also not convincing if – as here – it is recognisable that the claim granted in Art. 15(1) and (3) GDPR is exercised exclusively for purposes that are not protected by the European legislature. The right of refusal in Art. 12(5), second sentence, lit. b) GDPR serves precisely to defend against such requests for information that are obviously not covered by the protective purpose of the regulation."
[14] See also *Peisker*, EuZW 2023, 1100, 1105; *Fuhlrott*, NJW 2023, 3481, 3486.
[15] OLG Nuremberg of 14 March 2022 – 8 U 2907/21.
[16] *Peisker*, EuZW 2023, 1100, 1105 with further references.

element of the offence.[17] On the one hand, an overall assessment of the objective circumstances must show that the objective of this regulation is not achieved despite formal compliance with the conditions laid down by the Union regulation. Secondly, it must be apparent from a number of objective indications that the main purpose of the actions in question is to obtain an unjustified advantage. This is because the prohibition of abuse does not apply if the actions in question can have an explanation other than simply obtaining an (unjustified) advantage.[18] The stipulations of the CJEU must now be taken into account. A failure to fulfil the purposes of Article 15 GDPR cannot yet be seen in the fact that the data subject later uses the data information for purposes other than those stated in Recital 63, first sentence.[19]

Judgment of the Court (Grand Chamber) of 5 December 2023 – C-807/21 – *Deutsche Wohnen*

Law: Art. 58(2) lit. i, Art. 83(1) to (6) GDPR

Keywords: Term "controller" – Remedial powers of the supervisory authorities – Imposition of fines on a legal person – Intentional or negligent infringements

Core statement: It is not in line with the GDPR if fines for data protection violations can only be imposed on natural persons. A fine may only be imposed if the company, as the responsible party, has intentionally or negligently committed an infringement pursuant to Article 83(4) to (6) GDPR.

Judgment of the Court (Third Chamber) of 21 December 2023 – C-667/21 – *Krankenversicherung Nordrhein*

Law: Art. 6(1), Art. 9, Art. 82(1) GDPR

Keywords: Assessment of fitness for work by the medical service – Assessment of employees – Processing of health data – Compensation for non-material damage – Compensatory function – Culpability

Core statements:

1. The statutory authorisation of data processing for medical services in accordance with Article 9(2) lit. h and 9(3) GDPR, Section 275(1) Social Code, Book V (SGB V) is also applicable if health data of the service's own employees is processed for the medical assessment.
2. Article 9(3) GDPR does not result in any additional requirements for the service's own employees. However, stricter data protection measures could exist under national law as long as the authorisation to process data can still be used in practice.
3. The data processing must fulfil both the specific requirements of Article 9 and the general requirements of Article 6 GDPR.
4. Compensation under Article 82 GDPR is purely compensatory and does not fulfil a deterrent or punitive function.
5. The liability of the person responsible presupposes culpability. This is presumed. Furthermore, the degree of culpability should not influence the amount of compensation.

[17] CJEU of 13 March 2014 – C-155/13 – *SICES and others*, para. 31
[18] CJEU of 28 July 2016 – C-423/15 – *Kratzer*, paras. 38 to 40 and the case law cited therein.
[19] For individual cases, see *Peisker*, Der datenschutzrechtliche Auskunftsanspruch, 2023, p. 525 et seq.

New pending case

Reference for a preliminary ruling from the Federal Supreme Court (Germany) of 26 September 2023, lodged on 7 November 2023 – C-655/23 – *Quirin Privatbank*

Law: Arts. 17, 18, 82 GDPR

Keywords: Application procedure – Disclosure of personal data – Claim for injunctive relief – Damage compensation – Mere negative feelings – "Dishonour"

Note: A company unlawfully forwarded a message intended for an applicant, in which it replied negatively to salary expectations, to a former colleague of the applicant. The applicant sued for injunctive relief against any further disclosure of data and for compensation for non-material damage. This consisted of negative feelings such as anger, concern about further offences, damage to reputation and disadvantages in the application process, which were largely related to the "defeat" in the salary negotiations. The appellate court stayed the proceedings and asked the CJEU for a preliminary ruling on the following questions:

> Does the right to erasure under Article 17 GDPR also include a right to injunctive relief if the data subject does not request erasure? Or does such a right to injunctive relief arise from another provision of the GDPR (e.g. Art. 18)?
>
> If the GDPR does not provide for a right to injunctive relief under EU law: Does Article 84 in conjunction with Article 79 GDPR open up the possibility of applying national law, according to which a civil injunctive relief claim against the controller(s) is possible (here: Sec. 1004(1), second sentence, in conjunction with Sec. 823(1) or (2) BGB)?[20]
>
> Does the right to injunctive relief under EU law (as under German law) only exist if there is a risk of repetition, and does the data protection breach that has already occurred suggest that there is a risk of repetition?

On the other hand, the BGH asks about the requirements and the assessment of reasonable compensation:

> Can mere negative feelings constitute non-material damage within the meaning of Article 82(1) GDPR?
>
> Is the degree of fault relevant for the assessment of the amount of damages (as under German law)[21]?

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[20] BGH of 15 September 2015 – VI ZR 175/14; of 17 July 2008 – I ZR 219/05.
[21] CJEU of 21 December 2023 – C-667/21 – *Krankenversicherung Nordrhein* (p. 8 in this Report).

4. Equal treatment

Decisions

Judgment of the Court (Grand Chamber) of 28 November 2023 – C-148/22 – *Commune d'Ans*

Law: Arts. 1-3 Equal Treatment Framework Directive 2000/78/EC

Keywords: Discrimination on grounds of religion or belief – Ban on ideological or religious signs at the workplace in the administration – Islamic headscarf

Core statement: A ban in a municipal administration on wearing visible signs of ideological or religious beliefs at the workplace can be justified with the aim of creating a completely neutral administrative environment.

Note: The Court builds on its previous case law on bans on religious signs in the workplace[22] and applies the principles in the administrative context.[23] It also accepts such bans for areas without direct contact with the public if the aim is to create a completely neutral administrative environment. In contrast to German courts, it is therefore irrelevant for the assessment under EU law whether such a ban is imposed in the private sector or the public sector.

The Court rightly treats the ban on large-scale signs as a ban on headscarves. This implies discrimination against Muslim women, although the Court does not specify this in concrete terms. The CJEU also subjects a ban on all religious and ideological signs, regardless of their size, to an equality test, as members of certain religions may also be particularly affected by such a ban. After choosing this convincing equality law approach, however, the Court stops halfway, because freedom of religion is in conceptual competition with protection against discrimination, the question being which to apply to an offence which falls under the scope of both. Otherwise, the general ban on all religious signs, even the smallest ones, which is highly restrictive in terms of freedom, becomes indirect discrimination, which is easier to justify.

Another of the Court's arguments also leads to a lowering of the level of protection: the Member States have a great deal of room for manoeuvre in assessing how to reconcile the fundamental rights interests concerned. Such room for manoeuvre ultimately means less weight for the Union-wide protection of fundamental rights.

The Court justifies this among other reasons by stating that the Equal Treatment Framework Directive only sets a framework within which the Member States can define their protection. However, freedom of religion is not protected under Union law in terms of a "framework", but is enshrined in the Charter of Fundamental Rights. Even the protection of discrimination and fundamental rights under EU law does not, strictly speaking, provide a framework, but ultimately a minimum level beyond which the Member States can go (Art. 8(1) Equal Treatment Framework Directive; Art. 53 European Charter of Fundamental Rights). Regrettably, the Court has set this minimum level of protection low in the present case: employees can be prohibited from wearing even the smallest religious signs, even in the back office. However, the German fundamental rights standard, which is higher in this regard,[24] can still be upheld.

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[22] CJEU of 15 July 2021 – joined Cases C-804/18, C-34/19 – *WABE and MH Müller Handel*, with annotation by *Seeland*, *HSI Report 3/2021*, p. 4 et seq. with further references to case law (in German).

[23] Thus already Advocate General Collins of 4 May 2023 – C-148/22 – *Commune d'Ans* with explanatory note in *HSI-Report 2/2023*, p. 27 (German edition).

[24] See most recently BVerfG of 2 February 2023 – 1 BvR 1661/21, but on the other hand BVerfG of 14 January 2020 – 2 BvR 1333/17 for legal trainees.

Judgment of the Court (Second Chamber) of 7 December 2023 – C-518/22 – *AP Assistenzprofis*

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

Keywords: Age discrimination – Personal assistance service for people with disabilities – Minimum and maximum age – Respect of wishes and freedom of choice – Participation and self-determined lifestyle

Core statement: When hiring a personal assistant, age requirements based on the exercise of the right of choice of the person with disabilities may be imposed if such a measure is necessary to protect rights and freedoms.

Note: Depending on their impairment, people with disabilities may be dependent on personal assistance services (Sec. 78 Social Code (SGB) IX). This is intended to enable them to participate equally in society and lead a self-determined life. They are entitled to a right to respect of their wishes and freedom of choice (Sec. 8 SGB IX in conjunction with Sec. 33 SGB I), which is intended to protect their self-determination and personal responsibility. But can this justify unequal treatment based on age?

The CJEU resolves this tension between the protection of individual freedoms and the fundamental right to equal treatment via the standard provided for this purpose by the EU legislature,[25] Article 2(5) of the Equal Treatment Framework Directive. This does not affect Member State measures (here: the right to respect of wishes and freedom of choice) that are necessary to protect the rights and freedoms of others. The principles of the Equal Treatment Framework Directive therefore do not apply in the present case insofar as the prohibition of discrimination on grounds of age pursuant to Articles 4 et seq. Equal Treatment Framework Directive does not find application. Therefore, when it comes to the protection of these special legal interests, the scope of the CJEU's review is limited to the necessity of the measure. The Member States therefore have considerable room for manoeuvre in their assessment.[26]

The CJEU interprets Article 2(5) Equal Treatment Framework Directive in the light of Article 19 UN CRPD and Article 26 EU CFR and recognises the desire for assistance at a certain age based on the right to self-determination, independent living and participation. Assistance services extend deep into the private and even intimate sphere and it can be expected that an assistant in the same age group will be able to integrate more easily into the personal, social and academic environment.

The CJEU does not attribute the possible age discrimination to the potential employer. It is based on the national regulation of the right of request and choice, the legal structure of which obliges employers to fulfil the expressed request in principle.[27] The state has a special responsibility to protect and ensure equality for people with disabilities. This is enshrined in the constitution – Article 3(3), second sentence of the Basic Law (GG) – and also includes opportunities for development and activity as well as disability-specific support measures.[28] Germany, like the EU, has expressly committed to protecting people with disabilities by

[25] This is the view of the CJEU of 7 November 2019 – C-396/18 – *Cafaro*, para. 41; of 12 January 2023 – C-356/21 – *TP*, para. 70.

[26] *Grünberger/Husemann*, in: Preis/Sagan, European Labour Law, 2nd ed. 2019, § 5 para. 5.196.

[27] The prerequisite is "legitimate wishes", which, however, refers to the service itself (e.g. effectiveness, efficiency). *Welti*, Forum D, discussion paper No. 19/2015, 17 June 2015.

[28] BVerfG of 8 October 1997 – 1 BvR 9/97; under EU law e.g. Art. 26 European Charter of Fundamental Rights, Arts. 5, 7(2) Equal Treatment Framework Directive.

ratifying the UN CRPD. Section 8 SGB IX in conjunction with Section 33 SGB I serves to concretise Article 3(3), second sentence GG and the UN CRPD. The respect of wishes and freedom of choice is of particular importance for the respect of human dignity and self-determination.[29] The application of the special justification in Article 2(5) of the Equal Treatment Framework Directive, which means that possible age discrimination is not subject to examination on the basis of the original justifications in accordance with Article 4 et seq. therefore seems justifiable. The application of Article 2(5) of the Equal Treatment Framework Directive also prioritises the civil liberties of people with disabilities.

Doctrinally, the CJEU again considers Article 2(5) of the Equal Treatment Framework Directive[30] to be a justification, not an exception.[31] It is important to note that Article 2(5) of the Equal Treatment Directive must be interpreted narrowly so as not to undermine the protection against discrimination (on other grounds).[32] Overall, the decision confirms that people with disabilities are particularly worthy of protection and strengthens their right to self-determination.

Judgment of the Court (Grand Chamber) of 21 December 2023 – C-680/21 – *Royal Antwerp Football Club*

Law: Art. 101(1) and (3), Art. 45 TFEU

Keywords: Discrimination on the basis of nationality – Competitive disadvantage – Minimum use of local youth players in professional football – Regulations of international and national sports federations

Core statement: In order to promote local youth players, UEFA and the national football associations stipulate that a minimum number of players have to have been trained in their own club or association. Such regulations violate EU competition law if they affect trade between Member States and cause an unjustified restriction of competition between clubs. Exceptions must be compellingly justified. Secondly, they are only compatible with the free movement of workers if they are first suitable for realising the objective of promoting young talent locally in a coherent and systematic manner and second comply with the principle of proportionality.

Opinion

Opinion of Advocate General Rantos of 16 November 2023 – Joined Cases C-184/22 and C-185/22 – *KfH Kuratorium für Dialyse und Nierentransplantation*

Law: Art. 2(1), Art. 4 first sentence Equal Treatment Directive 2006/54/EC, Clause 4 No. 1 Framework Agreement on Fixed-Term Work (implemented by Directive 97/81/EC), Art. 157(1) TFEU

Keywords: Overtime pay – Collective bargaining agreement – Discrimination against part-time employees – Indirect discrimination against women – Statistical findings

Core statement: In order to establish that an apparently neutral national provision discriminates against persons of one sex compared to persons of the other sex, the national

[29] *Fuchs,* in Fuchs/Ritz/Rosenow, Kommentar zum Recht behinderter Menschen, 7th ed. 2021, § 8 SGB IX, marginal No. 4.
[30] CJEU of 12 January 2010 – C-341/08 – *Petersen*; of 13 September 2011 – C-447/09 – *Prigge*.
[31] Critical *Mohr*, in: Franzen/Gallner/Oetker, Kommentar zum Europäischen Arbeitsrecht, 5th ed. 2024, Art. 2 Directive 2003/78/EC para. 10.
[32] CJEU of 12 January 2010 – C-341/08 – *Petersen*, para. 60; *Preis/Reuter*, in Preis/Sagan, Europäisches Arbeitsrecht, 2nd ed. 2019, § 6 para. 6.15.

court must examine all relevant elements of a qualitative nature. With regard to the statistical data, the overrepresentation of women in the disadvantaged group is important.

Note: In 2022, 18.5% of the working population in the EU worked part-time, a total of 37.5 million people.[33] It is therefore hardly surprising that alleged discrimination against part-time workers is regularly the subject of requests for preliminary rulings.[34] In a similar case concerning the *Lufthansa CityLine* case,[35] the Advocate General's opinion has now been published.

The case concerns collective agreements that stipulate that the employer is only obliged to pay an overtime bonus or to grant corresponding time off as compensation credited to the working time account if the employee performs work in excess of the standard working hours for a full-time employee. In the legal dispute pending before the 8th Chamber of the Federal Labour Court (BAG), the plaintiff is a part-time care provider. In addition to overtime bonuses and a corresponding time credit, she is also seeking compensation in accordance with Section 15 of the General Act on Equal Treatment (AGG). She claims to be disadvantaged as a part-time employee due to her gender because the defendant predominantly employs women as part-time employees. Women are predominantly represented in the group of part-time employees as well as in the group of full-time employees in the defendant's company.[36] With its request for a preliminary ruling, the BAG now wanted to know whether indirect discrimination and thus also a claim under Section 15(2) AGG is to be affirmed if women are also predominantly represented in the group of beneficiaries – the full-time employees.

The Advocate General "in accordance with the wishes of the Court of Justice" addresses this question exclusively. He finds that, with regard to the statistical data, it must be examined whether there is a significantly higher proportion of persons of a particular sex in the group of workers who are disadvantaged by this national provision, without it also being necessary for the group of workers not covered by this provision to include a significantly higher proportion of persons of the other sex. In other words, it is sufficient to prove that women are disproportionately employed as part-time employees, even if they also form the majority in the group of full-time employees.

New pending cases

Reference for a preliminary ruling from the Juzgado de lo Social nº 3 de Barcelona (Spain) of 18 September 2023, lodged on 21 September 2023 – C-584/23 – *Alcampo and Others*.

Law: Art. 4 Equal Treatment Directive for Social Security 79/7/EEC, Art. 5 Equal Treatment Directive for Employment and Occupation 2006/54/EC

Keywords: Accident at work – Disability pension – Assessment basis for part-time work due to caring for a child – Equal treatment of men and women

Note: The referring court raises a question of principle: is it contrary to the prohibition of indirect discrimination on grounds of sex if the amount of the pension is reduced because the applicant reduced her working hours more than two years previously in order to fulfil caring duties, which predominantly affects women? The original case considers the application of a

[33] Available at: Unfreiwillig Teilzeitbeschäftigte in der EU - Statistisches Bundesamt (destatis.de). On the actual consequences of part-time employment, see *Deinert/Maksimek/Sutterer-Kipping*, Die Rechtspolitik des Sozial- und Arbeitsrechts, HSI-Schriftenreihe Vol. 30, p. 56 et seq.

[34] BAG of 11 November 2020 – 10 AZR 185/20 (A) (CJEU of 19 October 2023 – C-660/20 – *Lufthansa CityLine*); BAG of 28 October 2021 – 8 AZR 370/20 (A) (CJEU of 10 March 2022 – C-184/22 – *KfH Kuratorium für Dialyse und Nierentransplantation*).

[35] See note by *Kocher*, HSI Report 4/2023, p. 5 (German edition).

[36] For a comprehensive explanation of the request for a preliminary ruling, see HSI Report 2/2022, p. 11.

provision according to which the first two years in which caring duties are performed are taken into account with the full working hours. Does this preclude indirect discrimination?

Reference for a preliminary ruling from the Juzgado de lo Social n.º 3 de Pamplona (Spain) from 21 September 2023, lodged on 6 October 2023 – C-623/23 – *Melbán*

Law: Arts. 1 and 4 Equal Treatment Directive for Social Security 79/7/EEC

Keywords: Equal treatment of men and women in the field of social security – Granting of an allowance on the grounds of parenthood to all female pensioners – Direct discrimination

Note: According to a provision of Spanish pension law, mothers are entitled to a supplement to contribution-based retirement and disability pensions. Fathers, on the other hand, can only claim these allowances if they fulfil other conditions such as certain non-contributory periods or lower contributions in the period immediately after the birth. The referring Spanish court is asking about possible discrimination against men. If this should be affirmed, the question also arises as to the consequences of the statutory provision according to which the allowance can only be granted to one of the two parents. Would the disadvantaged men then be entitled to the full allowance and would this result in the women's allowance being cancelled, even though they fulfil the eligibility requirements?

Reference for a preliminary ruling from the Tribunal Superior de Justicia de Madrid (Spain) of 13 September 2023, lodged on 12 October 2023 – C-626/23 – *Sergamo*

Law: Arts. 1 and 4 Equal Treatment Directive 79/7/EEC

Keywords: Equal treatment of men and women in the field of social security – Granting of an allowance on the grounds of parenthood to all female pensioners – Direct discrimination

Note: See above reference for a preliminary ruling in Case C-623/23 – *Melbán*.

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5. Fixed-term employment

Decision

Judgment of the Court (First Chamber) of 30 November 2023 – C-270/22 – *Ministero dell'Istruzione and INPS*

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

Keywords: Teachers in the public sector – Permanent appointment – Determination of length of service – Non-consideration of fixed-term periods of service

Core statement: It violates the principle of equal treatment if periods of service completed under fixed-term employment contracts are wholly or partially disregarded when deciding whether to grant permanent civil servant status.

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6. General matters

Decision

Judgment of the Court (First Chamber) of 30 November 2023 – C-173/22 P – *MG v. EIB*

Law: Arts. 20, 41(2) European Charter of Fundamental Rights; Staff Regulations of the European Investment Bank (EIB)

Keywords: Administrative provisions applicable to EIB staff – Remuneration – Family allowance for separated parents – Right to be heard – Equal treatment – Principle of proportionality

Core statements:

1. EIB staff members must be given the opportunity to comment in good time before a decision affecting their employment is taken.

2. The decision as to which of the parents can claim a family allowance must be made taking into account the circumstances of the specific case, such as the question of which parent is responsible for covering the child's basic needs and to what extent. Administrative provisions to the contrary are unlawful.

Note: This case illustrates that the working conditions of employees of supranational EU institutions operate within a comparatively unregulated framework. The EU Charter of Fundamental Rights is decisive. In addition, there are administrative regulations that the organisations themselves define and interpret. The labour law of the state concerned or collective agreements do not apply.

In the present case, the Court found a violation of the European Charter of Fundamental Rights. The applicant claimed a child allowance in addition to his remuneration, but was rejected by the EIB. In the specific case, the EIB had not heard the complainant and had therefore violated his right to be heard. In addition, the administrative provisions at issue violated the principles of equal treatment and proportionality.

Opinions

Opinion of Advocate General Campos Sánchez-Bordona of 16 November 2023 – C-627/22 – *Finanzamt Köln Süd*

Law: Arts. 7 and 15 of the EC-Switzerland Agreement on the Free Movement of Persons in conjunction with Art. 9(2) of Annex I to the EC-Switzerland Agreement on the Free Movement of Persons

Keywords: Entitlement to income tax assessment – Residence in Switzerland – No residence in the EU/EEA area – Freedom of movement – Unequal treatment

Core statement: The German regulation according to which only employees resident in the EU or an EEA state can apply for income tax assessment, thus denying employees resident in Switzerland this opportunity, is unjustified discrimination.

Opinion of Advocate General Rantos of 30 November 2023 – C-540/22 – *Staatssecretaris van Justitie en Veiligheid*

Law: Arts. 56 and 57 TFEU

Keywords: Posting of third-country nationals to other EU countries – Obligation to obtain a residence permit in the country where the service is provided – Restriction of the freedom to provide services – Fees for applying for a residence permit

Core statement: If a service provider posts workers who are third-country nationals to another Member State for more than 90 days within a 180-day period, that Member State may require the workers to obtain an individual residence permit. Its period of validity may be limited to that of the residence permit issued in the first Member State, but in any case to two years.

Note: The posting of employees from third countries is subject to the Posted Workers Directive, but harbours particular risks for the employees concerned due to their precarious residence situation, lack of knowledge about their own status and language barriers.[37] The requirements under residence law, such as a registration obligation or a residence permit, which a state may impose on employees without violating the freedom to provide services, are the subject of these proceedings.[38] In principle, freedom of movement guarantees a "derived" right of residence. In the opinion of the Advocate General, the right of residence in the host state can be synchronised with that in the state of origin in the case of postings and a separate residence permit can be required in the host state after two years, not least because such postings are no longer regarded as temporary under social security law and the employees then have access to the labour market in the host state.

Opinion of Advocate General De La Tour of 7 December 2023 – C-706/22 – *Group Works Council*

Law: Art. 11 Directive (EC) No. 2001/86/EC on the SE Statute

Keywords: Co-determination in the European Company (SE) – Mandatory negotiation procedure – SE founded and registered without employees – No obligation to subsequently open the negotiation procedure – Misuse of the legal form of the SE in order to avoid co-determination

Core statement: In a holding SE established by participating non-employee companies without prior negotiations on employee involvement, negotiations do not have to be conducted solely because this holding SE exercises control over subsidiaries that employ workers in one or more Member States.

Note: Directive 2001/86/EC supplementing the Statute for an SE with regard to employee involvement prescribes a negotiation procedure on the future participation structures, which must be carried out before the company is founded. However, if only companies that do not employ any employees are involved in the formation of the SE, such a negotiation procedure cannot be carried out. According to case law, an SE founded without a negotiation procedure and therefore without co-determination should be registrable.[39]

The subject of the present main proceedings was such an SE established under British law without codetermination (hereinafter: "O Holding SE"). This SE played a central role in the corporate reorganisation of a holding company under German law, as a result of which it was

[37] For an overview of the status, see Bogoeski/Rasnača (eds.), Report on the social security rights of short-term third-country national migrant workers, Brussels 2023.

[38] In principle, for example, already CJEU of 21 October 2004 – C-445/03 – *Commission v. Luxembourg*; of 9 August 1994 – C-43/93 – *Vander Elst*.

[39] On the admissibility of so-called shelf companies OLG Düsseldorf of 30 March 2009 – I-3 Wx 248/08.

no longer subject to co-determination. On the day after its formation, the SE was used as a holding company for a company whose supervisory board was subject to codetermination on a one-third parity basis. Following the conversion of this subsidiary GmbH into a limited partnership KG (hereinafter: "O KG"), all companies ceased to be subject to co-determination.

The Group Works Council of O KG has now applied for the establishment of a special negotiating body in order to subsequently carry out the SE involvement procedure at O Holding SE. It was unsuccessful at first and second instance, as Section 4(2) of the Act on Employee Participation in an SE (SEBG) only provides for such a procedure when the SE is founded. The Federal Labour Court has now referred the question to the CJEU as to whether the implementation of a subsequent negotiation procedure is mandatory under EU law, as an analogous application of the provisions on the formation of the special negotiating body at a later date could then be considered.

The Advocate General points out that the "before and after principle" applies with regard to employee involvement in the formation of an SE, i.e. the level of employee involvement should be maintained. He analyses the legislative history of the Directive in detail and concludes that a negotiation procedure can only be carried out when the company is founded, while explicitly conceding that the lack of such employee representation "may be viewed as a lacuna by advocates of the system for the involvement, and in particular the participation, of employees".

This suggests that the Advocate General also addresses the avoidance of abusive arrangements. He does so, albeit with far less detail in his reasoning. On the one hand, he refers to the Group of Experts "SE", which considers retrospective negotiation a suitable means to sanction misuse. It cites Article 11 of the SE Directive, which leaves room for a national provision according to which a subsequent involvement procedure can be carried out in cases of misuse, whereby a "mere presumption of misuse could be established if changes occurred shortly (say, within a year) after the SE was registered". In the AG's opinion, however, the relocation of the registered office or the termination of co-determination in a company cannot alone constitute misuse without calling into question the effectiveness of the Regulation and the Directive.

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7. Part-time employment

Decision

Judgment of the Court (First Chamber) of 19 October 2023 – C-660/20 – *Lufthansa CityLine*

Law: Clause 4 No. 1 of the Framework Agreement on Fixed-Term Work (implemented by Directive 97/81/EC)

Keywords: Discrimination against part-time employees – Pro rata temporis principle – Increased remuneration for additional flight duty hours over a fixed monthly limit – Identical limit for full-time and part-time pilots

Core statement: A collective agreement provision that makes the payment of additional remuneration for part-time workers and comparable full-time workers uniformly contingent on the same number of working hours being exceeded constitutes "less favourable" treatment of part-time employees. It is inadmissible if there is no objective justification for it.

Note: The CJEU has now clarified that Lufthansa discriminates unfairly against its part-time pilots by requiring them to work the same number of flying hours as their full-time colleagues for additional pay. Such unequal treatment could only be justified by an objective reason. Although the CJEU rightly emphasised that it was not competent to assess the facts and apply the standards of EU law to an individual case under Art. 267 TFEU[40], it nevertheless expressed several concerns regarding the compensation for the special workload as a justification. In the specific case, the objective does not formulate a "genuine need"; in any case, the collective bargaining regulation does not pursue its objectives in a consistent and comprehensible manner. For example, the assumption that the additional remuneration could achieve the objectives was not based on objectively determined values or scientific findings, nor on general empirical values, e.g. on the effects of the monthly accumulation of flying hours. The second objective (incentives for the employer to avoid "excessive work") would probably also be pursued more coherently by individualised trigger limits in accordance with the employment contract with regard to part-time pilots, as the airlines currently only pay the additional remuneration above the trigger limit for the working hours of full-time employees. Following the CJEU's detailed explanation of the factual justification, the Chamber of the Federal Labour Court (BAG) will be left with "nothing more than subsumption" - to use Kocher's words[41].

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8. Social security

Decisions

Judgment of the Court (Seventh Chamber) of 12 October 2023 – C-45/22 – *Service fédéral des Pensions*

Law: Art. 55(1)(a) Coordination Regulation (EC) No. 883/2004

Keywords: Method of calculation of survivor's pension – Overlapping of pensions from different Member States – National double benefit provisions – Concept of amounts taken into account

Core statement: National double benefit provisions for benefits of different types can provide for the calculation that either the total amount of income or the portion exceeding the cumulative limit is divided by the number of benefits.

Judgment of the Court (Second Chamber) of 16 November 2023 – C-422/22 – *Zakład Ubezpieczeń Społecznych Oddział w Toruniu*

Law: Arts. 5, 6 and 16 Implementing Regulation (EC) No. 987/2009

Keywords: Migrant workers – Applicable legislation – A1 certificate – Incorrect information – Revocation ex officio – Failure to conduct dialogue and mediation procedure – Lawfulness

Core statement: A1 certificates may be revoked ex officio. If the issuing institution which is not competent revokes an A1 certificate on its own authority, it is not obliged to initiate the dialogue and conciliation procedure with the competent institution of another Member State in order to determine the applicable national legislation.

[40] CJEU of 10 March 2022 – C-519/20 – Landkreis Gifhorn, para. 47; CJEU of 3 July 2019 – C-242/18 – UniCredit Leasing, para. 48; CJEU of 2 July 2015 – C-209/14 – NLB Leasing, para. 25; CJEU 6 of September 2011 – C-163/10 – Patriciello, para. 22..

[41] See note by Kocher, HSI Report 4/2023, p. 5 (German edition).

Notes: Circumstances and modalities of (planned) activities can change quickly, for example due to weather conditions during construction projects. For cross-border workers, this often leads to the incorrectness of the information on which the A1 certificate is based and thus to the need for a new decision and possibly a change of jurisdiction. This was the case here: The Polish Social Insurance Institution (ZUS) reviewed the information provided by a self-employed migrant worker on its own motion and found that it had become incorrect. This meant that France, not Poland, was responsible. Consequently, the ZUS revoked the A1 certificate it had issued. However, prior to the revocation, the ZUS failed to conduct a dialogue and mediation procedure (Art. 5(2)-(4) Implementing Regulation) with the French institution. The question was whether this procedure violated EU law.

The CJEU states at the outset that the procedure for the revocation of A1 certificates must be assessed solely in accordance with Article 5 of the Implementing Regulation, which regulates the legal effect of documents and supporting evidence issued in another Member State. These are binding for the institutions of the other Member States as long as they are not revoked or declared invalid by the issuing Member State. Contrary to the opinion of the Polish court, the provisions on the dialogue and conciliation procedure in accordance with Articles 6 and 16 of the Implementing Regulation, according to which legal provisions can be provisionally applied and benefits granted in the event of differences of opinion,[42] are not relevant.

The CJEU has already dealt with the revocation of A1 certificates on several occasions.[43] However, ex officio revocation was new. In order to determine whether this also falls within the scope of Article 5 of the Implementing Regulation, the CJEU referred not only to the wording but also to its case law on the legal nature of the A1 certificate:[44] it has a strict binding effect on the institutions and courts of the other Member States. When issuing the certificate, the competent institution of the state of origin must make a proper assessment of the facts and ensure that they are correct. The basis for this is the principle of sincere cooperation and mutual trust (Art. 4(3) TEU) between the Member States.[45] With this judgment, however, the CJEU confirms and substantiates the special responsibility of the issuing institutions: their duty of assessment and verification is comprehensive and relates to the entire period in which they perform their duties. The issuing institution is therefore also authorised to revoke the certificate ex officio.

A dialogue and conciliation procedure is not required. Such a procedure is provided for in the event of differences of opinion on the interpretation and application of the Coordination Regulation between the institutions in order to settle them (Art. 76(3) in conjunction with Art. 72(a) Coordination Regulation) (paras. 40 et seq.). However, a dispute is not required in the case of ex officio revocation. However, the CJEU emphasises the obligation of both institutions and the persons concerned to cooperate closely and exchange information (Art. 76(4) Coordination Regulation) (para. 55).

The CJEU's result is consistent and follows on from previous case law, according to which the right of coordination and the procedures are based on the principle of sincere cooperation and disputes are to be resolved collaboratively, but checks are to be carried out by the issuing institutions. With this decision, the Court emphasises the importance of

[42] In order to close gaps in social security when revoking A1 certificates, the Polish legal opinion is that an analogous application of Art. 6 Implementing Regulation may be possible. See *Lach*, ZESAR 2023, 158 and para. 23 of this judgment.

[43] CJEU of 30 March 2000 – C-178/97 – *Banks*; CJEU of 6 September 2018 – C-527/16 – *Alpenrind and others,* para. 60, see *Hlava*, in HSI Newsletter 3/2018, p. 3 et seq.

[44] Decisions on E 101 certificates can be referred to (see *Fuchs/Janda*, EuSozR-Spiegel*,* Art. 76 Regulation (EC) No. 883/2004 para. 25; *Klein,* SRa-SH 2015, 76).

[45] CJEU of 10 February 2000 – C-202/97 – *FTS*, para. 51 f.; of 26 January 2006 – C-2/05 – *Herbosch Kiere,* para. 22; of 6 February 2018 – C-359/16 – *Altun and Others*, para. 37, 40, 42.

independent reviews by the issuing institutions. These checks are particularly important with regard to the binding effect of the A1 certificate. On the one hand, the host state has no or only very limited means to express doubts about the decision or to carry out checks. On the other hand, the dialogue and conciliation procedure is lengthy, ineffective and unreliable in practice. [46]

This case provides an opportunity to highlight the need for improvements in the coordination of social security systems, not only to promote mobility, but above all to prevent social dumping, misuse and inadequate protection. Real progress would be achieved with a digital and cross-border exchange of data – especially between social security authorities – and thus with more effective cooperation between Member States.[47]

However, the revocation may result in the persons concerned being excluded from the original social security system and not being included in the competent one, for example because the time limit under national law has expired.[48] Article 5 of the Coordination Regulation does not regulate the fate of the individual claim. Another typical problem for the coverage of migrant workers is that their contracts and postings have already been concluded and they may have returned to their home country by the time such changes occur.[49] However, non-protection would be incompatible with the objectives of EU law, as the CJEU rightly emphasises (para. 50).

Judgment of the Court (Seventh Chamber) of 16 November 2023 – C-415/22 – *Acerta and others.*

Law: Art. 14 of the Protocol (No. 7) on the Privileges and Immunities of the European Union, Art. 72 of the Staff Regulations of Officials of the European Union

Keywords: Union civil servants – Self-employment in retirement – Compulsory affiliation to the social security system of the EU institutions – Obligation to contribute to social security in the state of employment

Core statement: EU civil servants who were in the service of the EU until retirement and are self-employed in retirement shall not be subject to compulsory membership of a Member State's social security system.

Judgment of the Court (Sixth Chamber) of 16 November 2023 – C-360/22 – *Commission v. Netherlands*

Law: Art. 45 TFEU, Art. 28 EEA Agreement

Keywords: Transfer of pension capital to another Member State – Pension as part of the employment relationship – Conditions for tax exemption – Freedom of movement for workers

Core statement: Dutch law imposes special requirements on the transfer of Dutch pension rights built up via employers (so-called "second pillar") to another Member State. Accordingly, the regulations of the other Member State, the pension insurance institutions or the employees concerned must fulfil certain conditions in order for the transfer not to be taxed. As a result, the Netherlands is in breach of the free movement of workers.

[46] *Klein*, SR Sonderheft 2015, 76; confirming this, *Kärcher/Walser*, Grenzüberschreitender Austausch von Sozialversicherungsdaten, p. 34.
[47] *Kärcher/Walser*, Grenzüberschreitender Austausch von Sozialversicherungsdaten, 2023.
[48] Fn. 38.
[49] *Kärcher/Walser*, Grenzüberschreitender Austausch von Sozialversicherungsdaten, p. 33, on the cancellation procedure in the event of differences of opinion.

Judgment of the Court (Sixth Chamber) of 16 November 2023 – C-459/22 – *Commission v. Netherlands*

Law: Art. 45 TFEU

Keywords: Transfer of pension capital to another Member State – Pension as part of the employment relationship – Tax exemption – Freedom of movement for workers

Core statement: See above reference for a preliminary ruling in Case C-360/22 – *Commission v. Netherlands*.

Order of the Court (Seventh Chamber) of 23 November 2023 – C-628/22 – *Ministère public and others*

Law: Art. 13(1)(b)(i) Coordination Regulation (EC) No. 883/2004, Art. 5 Implementing Regulation (EC) No. 987/2009

Keywords Social security of migrant workers – Binding effect of the A1 certificate – Legal proceedings – Fraudulently obtained A1 certificate – Evidential value of a Community road transport operator licence

Core statement: The answers to the request for a preliminary ruling are contained in the decision of 2 March 2023, *DRV Intertrans*.[50]

Judgment of the Court (Grand Chamber) of 21 December 2023 – C-488/21 – *Chief Appeals Officer and others.*

Law: Art. 7(2) Free Movement Regulation (EU) No. 492/2011, Art. 45 TFEU, Art. 2 lits. a and d, Art. 7(1) lits. a and d, Art. 14(2) Union Citizens Directive 2004/38/EC

Keywords: Right of residence in other Member States – Relatives in the direct ascending line – Condition for granting maintenance – Right of residence despite receipt of social assistance – Unreasonable burden on the social assistance system – Equal treatment

Core statement: Irish law makes the lawfulness of residence for relatives in the direct ascending line (here the mother) of EU citizens contingent on the fact that they are granted maintenance and, among other things, do not make unreasonable demands on the social benefits system. At the same time, they are entitled to Irish social benefits, but in practice there is a catch:[51] The actual receipt of the social benefit would lead to the loss of the right of residence because the required dependency would be lost and at the same time an unreasonable burden would be placed on the social assistance system. The CJEU clarifies that relatives in the ascending line must be granted the same access to the social assistance system as Irish citizens and that the withdrawal of the right of residence would be contrary to EU law.

[50] See HSI Report 1/2023, p. 16.
[51] In more detail: HSI Report 1/2023, p.17 f.

Opinion

Opinion of Advocate General Emiliou of 5 October 2023 – C-283/21 – *Deutsche Rentenversicherung Bund*

Law: Art. 44(2) Implementing Regulation (EC) No. 987/2009, Art. 21 TFEU

Keywords: Invalidity benefits – Child-raising periods completed in other Member States – Double counting – Only credited periods, no contribution periods prior to child-raising – Sufficient link – Conditions

Core statement: Child-raising periods in another Member State are to be taken into account when calculating the pension if, on the one hand, insurance periods were completed in the competent state before the child was raised and, on the other hand, this Member State was the last one in which such periods were completed before the change of residence. Insurance periods are defined as equivalent and non-contributory periods, also under national law. If child-raising periods have already been taken into account in the other Member State when calculating the specific type of pension, this entitlement does not apply.

Note: In this case, the calculation of a disability pension by the German Pension Insurance Agency (DRV Bund) is in dispute. Once again,[52] the issue is the consideration of child-raising periods completed in another Member State (here: the Netherlands). Before moving to the Netherlands and after returning to Germany, the claimant completed an apprenticeship or was marginally employed and therefore did not pay any pension insurance contributions. Neither she nor her husband were gainfully employed in the Netherlands. As the Netherlands recognises a basic old-age pension for people living or working there, the claimant was already entitled to a pension there. The DRV Bund refused to take the foreign child-raising periods into account, as there was no (self-employed) gainful employment immediately prior to the child-raising (Sec. 56(1) and (3) SGB VI). It brought an action on the basis of Article 44(2) Implementing Regulation.

The Court of Appeal (LSG North Rhine-Westphalia) cited the previous CJEU case law[53] and the criterion of the "sufficient connection" between the child-raising periods in the Netherlands and the German social security system derived from the freedom of movement, Article 21 TFEU. The decisive factor is whether periods of education, which are non-contributory under German law but relevant under pension law (Secs. 54(1), No. 2, 54(4), 58(1), first sentence, No. 4 SGB VI), can also establish such a link. Prior to this, however, it is questionable whether and how it affects the fact that the Dutch pension, in contrast to the German pension, is based solely on the fact that the applicant lived in the Netherlands.[54]

In the opinion of the Advocate General, it only matters whether child-raising periods are relevant under national law in terms of pension law. However, it is irrelevant whether these periods are counted as "periods of insurance" or "periods of residence", as the definition of "child-raising period" (Art. 44(1) Implementing Regulation) is to be construed broadly. He further points out that otherwise double-counting and unequal treatment could occur. While finding that the examination of this is a matter for the referring court (para. 44 et seq.), he reasons that a distinction must be made according to the type of pension. Contrary to the opinion of the German government, it is not important that the periods are taken into account for any pension (e.g. due to old age or invalidity). It is always a question of the specific type of pension in question (para. 49).

[52] CJEU of 23 November 2000 – C-135/99 – *Elsen*; of 7 February 2002 – C-28/00 – *Kauer*; of 19 July 2012 – C-522/10 – *Reichel-Albert*; of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt*.

[53] CJEU of 23 November 2000 – C-135/99 – *Elsen*; of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt*.

[54] *Hebrant*, Sozialrecht Aktuell, Sonderheft 2022, 187; LSG Rheinland-Pfalz of 14 December 2022 – L 4 R 187/21, marginal No. 45, rejecting the consideration of child-raising periods in the Netherlands.

The Advocate General also uses this preliminary ruling procedure to specify the "sufficient connection" criterion. The first condition is that the person must have an insurance period in the competent state *before* (but not necessarily after)[55] the child-raising period. The second condition is that the competent Member State must have been the last one in which insurance periods were completed before the child-raising period (paras. 68-72).[56]

Furthermore, the Advocate General states that non-contributory periods should also be regarded as relevant periods of insurance. According to the definition of "periods of insurance" (Art. 1(t) Coordination Regulation), periods treated as such under national law may also be included.[57] Subject to the examination of the calculation of the Dutch basic old-age pension, he thus comes to the conclusion that the child-raising periods must be taken into account (paras. 76-77). The outcome of the proceedings remains to be seen. What is the CJEU's position on the conditions laid down, some of which deviate from its case law? How will it influence the rather restrictive[58] German case law and application?[59]

New pending cases

Preliminary ruling of the Finanzgericht Bremen (Germany), lodged on 25 January 2023 – Case C-36/23 – *Familienkasse Sachsen*

Law: Art. 68 Coordination Regulation 883/2004

Keywords: Family benefits – Fulfilment of substantive conditions for entitlement in both Member States – Failure to apply in one Member State – Recovery – Grounds for family benefits – Binding effect of information from the authorities

Note: The claimant is employed in Germany. His child and his wife live in Poland without being gainfully employed there. He was granted the German child benefit. Since July 2019, children under the age of 18 have been entitled to a child benefit in Poland that is not dependent on income. However, the child's mother failed to apply for the benefit and no benefit was paid. The competent family benefits office in Saxony carried out a review on the occasion of the new Polish regulation and was informed by the Polish authorities that the mother of the child was insured in Poland (social insurance for farmers). As a result, the family benefits office assumed that the mother was gainfully employed, which meant that the Polish child benefit would take precedence over the German child benefit (Art. 68(1)(b)(i) Coordination Regulation). It rescinded the previously assessed German child benefit in the amount of the Polish entitlement and demanded repayment of the overpaid amount from the claimant. The latter filed a lawsuit and explained that the insurance of the child's mother resulted from the inherited ownership of agricultural land, but that she was not active as a farmer.

The facts of the case raise questions for the Bremen Fiscal Court regarding the legality of the repayment request, which must be viewed in the light of a difference of legal opinion between

[55] A.A. CJEU of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt;* see also LSG Rheinland-Pfalz of 14 December 2022 – L 4 R 187/21, para. 60.

[56] A possible disadvantage due to the application of national law (this concerns compatibility with Art. 21 TFEU) or exclusive employment in only one Member State (the competent one) is not relevant to the decision. A.A., however, CJEU. of 19 July 2012 – C-522/10 – *Reichel-Albert*; of 7 July 2022 – C-576/20 – *Pensionsversicherungsanstalt*.

[57] According to BSG of 10 January 2018 – B 5 R 168/16 B, (marginal) employment not subject to insurance must also be taken into account.

[58] *Dankelmann*, in: Kreikebohm/Roßbach, SGB VI, § 56 Rn. 21 et seq.; *Gürtner*, beck-online Grosskommentar zum SGB, § 56 SGB VI Rn. 45; LSG Hessen of 14 July 2015 – L 2 R 236/14; BSG of 11 May 2011 – B 5 R 22/10 R; BSG of 29 September 2016 – B 13 E 24/16 BH and subsequently BVerfG of 6 March 2017 – 1 BvR 2740/16; BSG of 25 January 1994 – 4 RA 3/93.

[59] An appeal is pending at the BSG (case reference: B 5 R 2/23 R) against the judgment of the LSG Rhineland-Palatinate of 14 December 2022 – L 4 R 187/21, according to which periods of school education cannot be a connecting factor for a "sufficient connection" due to a lack of contributions.

the Federal Fiscal Court (BFH) and the CJEU.[60] It could be found unlawful due to the German child benefit being subsequently partially reclaimed on sole grounds of a substantive claim in another Member State but without the child benefit actually having been paid out there. This means that the claimant only receives the difference between German and Polish child benefit.

If a demand for repayment is permissible, a possible competition between entitlements must also be resolved. According to Article 68(1) of the Coordination Regulation, the order of priority of entitlements is determined by the reasons for granting child benefit, i.e. triggered by employment, pension or place of residence. It is unclear whether these reasons are determined by national or Union law.

Reference for a preliminary ruling from the Cour d'appel de Liège (Belgium), lodged on 10 July 2023 – C-421/23 – *ONSS*

Law: Art. 76(6) Coordination Regulation 883/2004

Keywords: A1 certificates – Forgery – Fraudulent conduct – Dialogue and mediation procedures

Note: The referring court is essentially seeking to resolve the following questions:

1. Is the Coordination Regulation applicable if the A1 certificates presented are forged and do not originate from the competent authority of the issuing state, even though social security contributions have been paid to the latter?
2. Must the dialogue and conciliation procedure pursuant to Article 76(6) Coordination Regulation be carried out before it is clarified whether the conditions for the existence of fraud are met?
3. Can an A1 certificate be disregarded following fraudulent conduct by the employer even if the dialogue and conciliation procedure was not carried out?

Reference for a preliminary ruling from the Înalta Curte de Casație și Justiție (Romania) of 27 March 2023, lodged on 1 August 2023 – C-489/23 – *Casa Județeană de Asigurări de Sănătate Mureș and Others*

Law: Arts. 49 and 56 TFEU, Art. 7(7) Patient Mobility Directive 2011/24/EU, Art. 22(1) lit. c Coordination Regulation (EEC) No. 1408/71

Keywords: Healthcare services in other EU countries – Assumption of costs – Documents from private doctors – Lack of authorisation – Limitation of the reimbursement amount

Note: Planned medical treatment can be carried out in another EU country and covered by health insurance in the home country. Insured persons must obtain authorisation from their health insurance fund in advance. According to Romanian law, authorisation requires both an expert opinion from doctors working in the public health insurance system and a referral certificate issued by them. The referring court therefore asks whether expert opinions and referral certificates from doctors in the private healthcare system must also be accepted. If prior authorisation is refused, it is also unclear whether the amount to be reimbursed may be limited to the amount of the costs that would be charged in the home country.

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[60] The CJEU has ruled on both the predecessor Regulation (EEC) No. 1408/71 and the Coordination Regulation that it is the actual payment that counts (4 July 1990 – C-117/89 – *Kracht;* 14 October 2010 – C-16/09 – *Schwemmer*; 22 October 2015 – C-378/14 – *Trapkowski*). The BFH, on the other hand, based its assessment on the existence of a substantive legal claim (9 December 2020 – III E 73/18).

9. Transfer of business

Decision

Judgment of the Court (Fourth Chamber) of 16 November 2023 – Joined Cases C-583/21 to C-586/21 – *NC*

Law: Art. 1(1) Transfer of Undertakings Directive 2001/23/EC

Keywords: Term “transfer of business” – Transfer of a notarial practice – Seniority

Core statement: If a notary replaces the former holder of a notary's office with responsibility for a specific district, carries out the same activity in the same premises with the same material facilities and takes over both the roll of deeds and a substantial part of the staff, the provisions of the Transfer of Undertakings Directive apply, provided that the identity of the notarial practice is retained.

Note: According to the CJEU, the transfer of a notary's office to a successor can be categorised as a transfer of business. The fact that notaries carry out public-sector activities does not preclude the categorisation as an economic activity within the meaning of Article 1(1) lit. c of the Transfer of Undertakings Directive. The decisive factor for the question of whether a transfer has taken place is that the transferring entity, the notarial practice, retains its identity. A contract between the transferor and transferee is not necessary, so that the succession in post can also fulfil the requirements.[61] Under Spanish law, the new notary continues the notarial practice. Whether a transfer can be assumed on the basis of such a transfer must be determined by taking into account all the circumstances of the individual case, whereby the criteria developed in case law must be applied. What is relevant here is that, under Spanish law, the entire notarial practice is to be regarded as a "public institution", in which human labour is of particular importance.

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10. Working Time

New pending case

Request for a preliminary ruling from the Tribunal Superior de Justicia del País Vasco (Spain) of 20 June 2023, lodged on 5 July 2023 – C-531/23 – *Loredas*

Law: Arts. 3, 5 Working Time Directive 2003/88/EC, Art. 31(2) European Charter of Fundamental Rights

Keywords: Equal treatment in employment and occupation – Working time recording – Special rules for domestic workers

Note: The CJEU's decision in the *CCOO* case[62] on the recording of working time originated in a collective action brought by the Spanish trade union against the branch of the Deutsche Bank.[63] Although the Spanish legislature reacted immediately after Advocate General Pitruzella's opinion in January 2019 and introduced an obligation for employers to record working time (Art. 34(9), Art. 35(5) Workers’ Statute (ET)), there are still special rules for

[61] CJEU of 16 February 2023 – C-675/21 -- *Strong Charon*, with explanatory notes in HSI Report 1/2023, p. 19-20.
[62] CJEU of 14 May 2019 – C-55/18 – *CCOO* m. Note *Lörcher*, HSI Newsletter 2/2019, p. 4 et seq.
[63] In more detail on the implementation of the CJEU's decision in the CCOO case *Ulber*, Die Vorgaben des EuGH zur Arbeitszeiterfassung, HSI-Schriftenreihe Band 32.

domestic workers.[64] Employers in the domestic sector are exempt from the obligation to record working hours.

By its first question, the referring court asks whether such a special arrangement for domestic workers is contrary to the Working Time Directive and to the case law of the CJEU in the *CCOO* case, according to which an accessible, objective and reliable determination of the number of daily and weekly working hours is essential for assessing, first, whether the maximum weekly working time has been observed and, second, whether the minimum daily or weekly rest period requirements have been complied with. Furthermore, from the point of view of the referring court, it must be taken into account that the group concerned consists almost exclusively of women. Against this background, the question is whether such a rule, which on its face appears neutral, indirectly discriminates against the plaintiff employee on the basis of her gender.

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[64] *Riegel*, RdA 2021, 152; for more on the legal consequences of the BAG's time recording decision, see *Bayreuther*, NZA 2023, 193.

III. Proceedings before the ECtHR

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1. Ban on discrimination

Decision

Judgment (First Section) of 24/10/2023 – No. 25226/18 – *Pająk and others v. Poland*

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

Keywords: Different reduction in retirement age for men and women – No judicial review option – Impact on career and pension amount

Core statement: Progress towards achieving gender equality is an important goal of the member states of the Council of Europe, so that only very weighty arguments can justify the compatibility of unequal treatment with the ECHR.

Note: The four complainants were judges at various courts in Poland. They reached the age of 60 on 7 March 2016, 18 January 2017, 13 December 2013 and 2 April 2015, respectively. On 1 October 2017, statutory provisions came into force under which the retirement age for judges was reduced from 67, for men to 65 and for women to 60. The complainants' applications for continued employment were rejected by the Minister of Justice and, in one case, by the National Judicial Council (NJC). Appeals against these decisions were not permitted under Polish law.

The complainants (all women) are of the opinion that they were denied the opportunity to access a court, as the decision of the state authorities to refuse to extend their period of service was unappealable due to legal provisions. Furthermore, they consider their early retirement to be discrimination in the workplace on grounds of sex. Furthermore, the measure resulted in a reduction in pay and a reduction in pension, which constitutes an unjustified intrusion into the private sphere.[65]

Restrictions may be placed on the right of access to the courts so long as they pursue a legitimate aim.[66] However, this principle is disregarded if decisions of the Minister of Justice or the NJC cannot be challenged at all by domestic legal remedies. The CJEU gives the judiciary a prominent position among the organs of state in a democratic society, which makes it necessary to safeguard the independence of the judiciary.[67] Therefore, domestic law must not deprive judges of the necessary guarantees in matters that directly affect their

[65] See ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen and Others v. Finland*; ECtHR of 15 March 2022 – No. 43572/8 – *Grzęda v. Poland*; ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*; ECtHR of 6 November 2018 – Nos. 503 91/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá v. Portugal*; ECtHR of 1 December 2020 – No. 26374/18 – *Guðmundur Andri Ástráðsson v. Iceland*.

[66] ECtHR of 23 June 2016 – No. 20261/12 – *Baka v. Hungary*.

[67] ECtHR of 6 November 2018 – Nos. 50391/13, 57728/13 and 74041/13 – *Ramos Nunes de Carvalho e Sá v. Portugal*.

independence.[68] There must be serious reasons to justify the decision not to use option of judicial review of state decisions in an exceptional case.[69]

As regards the issue of discrimination affecting men and women due to the difference in the retirement age, the Court refers to the case law of the CJEU,[70] which has found that the relevant Polish legislation violates European standards of equal treatment.

The Court therefore found by five votes to two that there was a violation of Article 6 ECHR and of Article 14 ECHR in conjunction with Article 8 ECHR in all cases. The Polish government was ordered to pay compensation in the amount of €26,000 to three of the complainants and €20,000 to the fourth complainant.

In a dissenting opinion, Judges Wojtyczek and Paczolay take the view that the judiciary must be protected from interference by the executive power. However, in the present case, they see no evidence of a violation of Article 6 ECHR in the applicants' being denied access to the courts with regard to the decision of the Minister of Justice, taking into account domestic practice. The dissenting judges agree with the majority of the Court that the contested legislation constitutes unequal treatment of the complainants. However, in their opinion, this does not lead to a violation of Article 8 ECHR.

New proceedings (notified to the respective government)

No. 19191/19 – *Cafiero v. Italy* (First Section) – lodged on 1 April 2019 – communicated on 27 November 2023

Law: Art. 14 ECHR (prohibition of discrimination) in conjunction with Art. 8 ECHR (right to respect for private and family life)

Keywords: Parental leave only for the father of the child – Discrimination on grounds of sex

Note: The complainant is a civil servant and works as a road police officer. An application for parental leave was rejected on the grounds that, according to the law, working fathers are only entitled to parental leave if they have sole custody of the child, if the mother waives her right to parental leave or if the mother is deceased or seriously ill. As the complainant's wife was a housewife, the national authorities took the view that the complainant was not entitled to parental leave.

The Court refers to its previous case law with regard to the violation asserted here of Article 14 ECHR in conjunction with Article 8 ECHR on grounds of discrimination on grounds of sex.[71]

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[68] ECtHR of 15 March 2022 – No. 43572/8 – *Grzęda v. Poland*.
[69] ECtHR of 9 March 2021 – No. 1571/07 – *Bilgen v. Turkey*.
[70] CJEU of 5 November 2019 – C-192/18 – *Commission v. Poland*.
[71] ECHR of 22 March 2012 – No. 30078/06 – *Konstantin Markin v. Russia*; ECtHR of 2 October 2012 – No. 33411/05 – *Hulea v. Romania*; ECtHR of 28 March 2017 – No. 39600/13 – *Farchica v. Italy*.

2. Ban on forced labour

Decision

Judgment (Third Section) of 28 November 2023 – No. 18269/18 – *Krachunova v. Bulgaria*

Law: Art. 4 ECHR (prohibition of slavery and forced labour); Art. 13 ECHR (right to effective remedy)

Keywords: Loss of earnings from forced prostitution – Positive obligation under Art. 4 ECHR – Rejection of the claim for compensation

Core statement: In order to guarantee its safeguards, Article 4 ECHR must be interpreted in such a way that it imposes a positive obligation on the contracting states to grant victims of human trafficking the possibility of compensation for loss of earnings.

Note: The complainant worked as a forced prostitute in 2012 and 2013. After her pimp was arrested by the police in 2013 and convicted of human trafficking, she demanded compensation from him for the loss of income from prostitution that she had previously been deprived of. The Sofia District Court dismissed the complainant's action on the grounds that the claims were based on immoral and therefore void legal transactions. Appeals against this were unsuccessful in all instances.

Her complaint alleges a violation of Article 4 ECHR and Article 13 ECHR on the grounds that the complainant had no legal means of claiming compensation from the pimp for the income from prostitution withheld from her. In this regard, the Court clarifies that the issues raised in the complaint must be dealt with solely from the point of view of Article 4 ECHR.[72] The complaints under Article 13 ECHR only constitute a reformulation of the complaints from the substantive provision.[73]

The Court finds that Article 4 ECHR is applicable to the facts of the present case, as all three elements of the international definition of trafficking in human beings under Article 3(a) of the Palermo Protocol[74] are met in the case of the complainant. According to this, the recruitment, transportation, transfer, harbouring or receipt of persons by threat or use of force must be directed towards trafficking in human beings or prostitution with regard to the "act", the "means" and its "purpose". The Court has consistently held that Article 4 ECHR imposes a positive obligation on contracting states to establish a legal framework prohibiting and penalising trafficking in human beings, to take operational measures to protect victims or potential victims of trafficking and to investigate cases of potential trafficking.[75] Therefore, the Court's jurisprudence has so far focussed on ex post reactions, namely trafficking investigations and penalties.

The present case was the first time that the Court dealt with the question of whether Article 4 ECHR gives rise to a positive obligation on the part of the contracting states to allow victims of human trafficking to claim compensation for loss of earnings. In a recent decision,[76] the

[72] ECtHR of 11 October 2012 – No. 67724/09 – *C.N. and V. v. France*; ECtHR of 13 November 2012 – No. 4239/08 – *C.N. v. United Kingdom*; ECtHR of 18 July 2019 – No. 40311/10 – *T. I. and Others v. Greece*; ECtHR of 25 June 2020 – No. 60561/14 – *S. M. v. Croatia*.

[73] ECtHR of 10 May 2011 – No. 48009/08 – *Mosley v. United Kingdom*.

[74] United Nations General Assembly Resolution 55/25 of 15 November 2000, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime.

[75] ECtHR of 26 July 2000 – No. 73316/01 – *Siliadin v. France*; ECtHR of 7 January 2010 – No. 25965/04 – *Rantsev v. Cyprus and Russia*; ECtHR of 25 June 2020 – No. 60561/14 – *S. M. v. Croatia*.

[76] ECtHR of 16 February 2021 – Nos. 77587/12 and 74603/12 – *V.C.L. and A.N. v. United Kingdom*.

Court emphasised the need to protect victims of human trafficking in retrospect from the point of view of their recovery and reintegration into society. It is precisely from this point of view that the possibility for victims to claim compensation for loss of earnings is a means of granting them "restitutio in integrum" by fully compensating the damage suffered. Compensation would go a long way towards preserving their dignity, supporting their recovery and reducing the risk of re-trafficking. It would also prevent traffickers from enjoying the fruits of their offences. Therefore, Article 4 of the ECHR must be interpreted as imposing a positive obligation on contracting states to provide victims of trafficking with the opportunity to claim compensation for loss of earnings. The Bulgarian courts violated this positive obligation when they rejected the claims on the grounds that the applicant had obtained the income in an immoral manner. The Court therefore unanimously recognised a violation of Article 4 ECHR and awarded the complainant compensation in the amount of €6,000.

In Germany, the legal status of prostitutes is regulated as a service by the Prostitution Act,[77] which came into force on 1 January 2002. According to this law, agreements on sexual acts can give rise to enforceable claims for payment. In addition, prostitutes are entitled to be included in the statutory health, unemployment and pension insurance schemes. Until 2001, contracts for sexual services were considered immoral within the meaning of Section 138(1) of the German Civil Code (BGB) and therefore void. A legal claim to payment of remuneration was therefore excluded. Before the law came into force, the Berlin Administrative Court[78] no longer considered prostitution to be immoral, as the state's obligation to protect human dignity (Art. 1(1), second sentence, of the German Basic Law) may not be misused to protect individuals from themselves by interfering with their individual self-determination. The CJEU[79] had previously made it clear that prostitution is an economic activity that forms part of the economic life of the community within the meaning of Article 2 of the EC Treaty.[80]

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3. Freedom of association

Decision

Judgment (Grand Chamber) of 14 December 2023 – Nos. 59433/18, 59477/18, 59481/18 and 59494/18 – *Humpert and Others v. Germany*

Law: Art. 11 ECHR (freedom of assembly and association); Art. 14 ECHR (prohibition of discrimination); Art. 6 ECHR (right to a fair trial)

Keywords: Ban on strikes by German civil servants – Disciplinary measures against civil servant teachers – Guaranteeing the right to education as a legitimate goal

Core statement: The question of whether an essential element of trade union freedom is impaired by a strike ban must be answered in a context-specific manner, taking into account the entirety of all state measures, and not by considering the strike ban in isolation.

Note: The four complainants are civil servant teachers in different federal states (Länder). As members of the Education and Science Union (GEW), they took part in union-organised strikes in 2009 and 2010, which also included public demonstrations. The background to

[77] Act regulating the legal relationships of prostitutes (ProstG).
[78] Berlin Administrative Court, 1 December 2000 – 35 A 570.99, NJW 2001, 983-989.
[79] CJEU of 20 November 2001 – C-268/99 – *Staatssecretaris van Justitie*.
[80] Treaty establishing the European Economic Community as amended on 25 March 1957.

these actions was the protest against the extension of working hours and the deterioration of working conditions for teachers. The complainants presumed they had a right to strike based on the case law of the EctHR,[81] according to which the status of civil servant alone cannot justify a ban on strike action, but only applies to employees of the sovereign state administration, which does not include teachers.

The respective employers then imposed disciplinary measures on the complainants in the form of either reprimands or fines on grounds that a ban on strikes for civil servants could be derived from Article 33(5) of the Basic Law and that the teachers had accordingly been absent from work without authorisation.

The appeals and lawsuits filed against this were unsuccessful before the administrative courts. In its grounds for judgment, the Federal Administrative Court[82] pointed out that the status-related prohibition of strikes under Article 33(5) of the Basic Law and its function-related guarantee under Article 11 of the ECHR were incompatible in terms of content with regard to civil servants who are employed outside the genuine sovereign administration. However, it deemed it the task of the legislature to resolve this conflict and to achieve a balance by means of practical concordance.

The Federal Constitutional Court,[83] in contrast, took the view that the ban on strikes for civil servants did not violate Article 9(3) of the Basic Law, as Article 33(5) of the Basic Law guarantees the existence of the civil service, which, in addition to the civil servant's duty of loyalty, also includes the principle of alimentation, so that there is no room for collective measures to conclude collective agreements for civil servants. It further found the ban on strikes for civil servants in Germany to be line with the principle of the Basic Law being compatible with international law and, in particular, with the guarantees of the European Convention on Human Rights. Similarly, taking into account the case law of the EctHR,[84] it found no conflict between German law and Article 11 ECHR.

With their complaints, the applicants allege a violation of Article 11 ECHR and Article 14 ECHR, as the disciplinary measures violate the general ban on strikes for civil servants, which is not prescribed by law, and put them at a disadvantage compared to contractually employed teachers.

The Court emphasises that trade union freedom is not an independent right, but a specific aspect of freedom of association under Article 11 ECHR. Previous case law has developed various elements of trade union freedom, such as the right to form and to join trade unions, and the unions' right to be heard in order to protect the interests of their members. This results in particular in the right to collective bargaining with the employer.[85] Until now, it has been left open whether a ban on strikes affects an essential element of trade union freedom under Article 11 ECHR.[86] According to the Court, this question must be answered in a context-specific manner and cannot be answered by considering the ban on strikes in isolation. Rather, the entirety of state measures granted to trade unions to enforce the interests of their members must be taken into account. Other aspects relating to the structure of industrial relations, such as the question of whether working conditions in the system in question are determined by collective bargaining, may also be relevant. The Court considers the interference complained of to be prescribed by law due to the case law of the Federal Constitutional Court on Article 33(5) of the Basic Law and the relevant civil service laws. It

[81] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 6 November 2009 – No. 68959/01 – *Enerji Yapı-Yol Sen v. Turkey.*

[82] BVerwG 27 February 2014 – 2 C 1.13.

[83] BVerfG 12 June 2018 – 2 BvR 1738/12.

[84] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 6 November 2009 – No. 68959/01 – *Enerji Yapı-Yol Sen v. Turkey*.

[85] ECtHR of 16 June 2015 – No. 46551/06 – *Manole and "Romanian Farmers Direct" v. Romania*;.

[86] ECtHR of 8 April 2014 – No. 31045/10 – *National Union of Rail, Maritime and Transport Workers v. United Kingdom*.

also considers it necessary in a democratic society. Weighing up various competing legal interests, in particular the right to a functioning education system guaranteed by Article 2 of Protocol No. 1, the Court came to the conclusion that the ban on strikes by civil servant teachers was proportionate. A large number of different national institutional protective measures enable civil servants to effectively defend their professional interests. It is also significant that the disciplinary measures imposed on the complainants were not very severe. The Court therefore ruled by 16 votes to one that the measures complained of did not violate Article 11 ECHR. Insofar as the complaints were based on Article 14 ECHR and Article 6 ECHR, they were declared inadmissible.

In his separate concurring opinion, Judge Ravarani criticises the reasoning of the majority of the Court of Justice. However, he finds the right which he claims is granted to teachers to choose between civil servant and employee status alone justifies the ban on strikes for civil servant teachers.

Judge Serghides agrees with the view of the complainants that civil servants can only be denied the right to collective bargaining and related industrial action if they are acting in a sovereign capacity. Article 11 ECHR may not be restricted for civil servants who do not work in a sovereign capacity, as the Court has previously ruled.[87]

New proceedings (notified to the respective government)

No. 50763/22 – *Ercan and others v. Turkey* (Second Section) – lodged on 10 October 2022 – communicated on 21 November 2023

Law: Art. 10 ECHR (freedom of expression); Art. 11 ECHR (freedom of assembly and association)

Keywords: Disciplinary measures against teachers – Participation in trade union demonstration

Note: The complainants, who are teachers at state educational institutions and members of the trade union *Eğitim ve Bilim Emekçileri Sendikası* (Education and Science Workers' Union), were disciplined for holding a lesson in their native language on International Mother Language Day (21 February) by decision of the union. They claim that the sanction violates both Article 10 ECHR and Article 11 ECHR.[88]

No. 55549/20 – *Karadağ and Others v. Turkey* (Second Section) – lodged on 27 October 2020 – communicated on 27 November 2023

Law: Art. 10 ECHR (freedom of expression), Art. 11 ECHR (freedom of assembly and association)

Keywords: Disciplinary measures against judges – Participation in a trade union solidarity event

Note: The ten complainants are judges or public prosecutors and members of the judges' union. They took part in an event at the premises of the daily newspaper *Cumhuriyet.* The newspaper had been the subject of violent reactions and threats after it had printed some of the cartoons previously published in the satirical weekly *Charlie Hebdo,* which resulted in a deadly terrorist attack. *Cumhuriyet* also published several articles expressing disapproval of the attack. Various other trade unions and organisations attended the event at the

[87] ECtHR of 12 November 2008 – No. 34503/97 – *Demir and Baykara v. Turkey*; ECtHR of 6 November 2009 – No. 68959/01 – *Enerji Yapı-Yol Sen v. Turkey.*

[88] ECtHR of 19 June 2018 – No. 20233/06 – *Kula v. Turkey*.

Cumhuriyet offices. One of the complainants gave a speech in which he pointed out the suppression of the press by the judiciary and stated that this situation was unacceptable in a democratic constitutional state and that his organisations supported freedom of the press. The complainants were reprimanded as a disciplinary measure for their participation in the event, and domestic legal remedies against this reprimand were unsuccessful.

Relying on Articles 10 and 11 ECHR, the applicants claim that the disciplinary sanction imposed on them for their activities as members of the judges' union constitutes a violation of their freedom of expression, assembly and association. In its questions to the parties, the Court refers to the principles of its previous case law.[89]

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4. Procedural law

Decision

Judgment (Second Section) of 24/10/2023 – No. 19371/22 – *Stoianoglo v. Republic of Moldova*

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

Keywords: Dismissal of a public prosecutor – Initiation of criminal investigation proceedings – Removal from office by operation of law

Core statement: According to Article 6 ECHR, states must provide procedural safeguards to ensure that the termination of an employment relationship under certain conditions by operation of law is not applied arbitrarily.

Note: The complainant was appointed Prosecutor General in November 2019 for a term of seven years. In October 2021, a criminal investigation was initiated against him for bribery, falsification of documents and abuse of office. Under domestic law, he was dismissed from office by operation of law following the initiation of criminal proceedings. An action brought against this was rejected as inadmissible. In the opinion of the court, the removal from office did not constitute a measure directed against the complainant on the basis of an individual decision, but was an inevitable consequence of the statutory order. Further appeals against this decision were unsuccessful.

The complainant considers that he was denied access to a court because it was impossible for him to challenge his removal from office.

The Court considers Article 6 ECHR to be applicable to the present case and refers to the principles established in its case law[90] in this regard. Accordingly, the civil component of Article 6 ECHR is applicable to cases concerning measures of removal from office of judges in the context of disciplinary proceedings.[91] With regard to the merits of the complaint, the Court points out that there must be domestic procedural guarantees that protect the person concerned from the arbitrary application of legal provisions that provide for automatic removal from office under certain conditions. In any case, the lack of judicial review of a

[89] ECtHR of 23 June 2016 – No. 20261/012 – *Baka v. Hungary*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*; ECtHR of 6 June 2023 – No. 63029/19 – *Sarısu Pehlivan v. Turkey*; ECtHR of 24 March 2015 – No. 36807/07 – İsmail *Sezer v. Turkey*.

[90] ECtHR of 15 March 2022 – No. 43572/8 – *Grzęda v. Poland*; ECtHR of 9 March 2021 – No. 76521/12 – *Eminağaoğlu v. Turkey*.

[91] ECtHR of 23 May 2017 – No. 33392/12 – *Paluda v. Slovakia*; ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan v. Romania*; ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland*.

legally ordered removal from office of an Prosecutor General is not justified on objective grounds.[92] The fear that the suspended public prosecutor could influence the criminal proceedings brought against him does not justify denying the person concerned access to a court.[93] The Court unanimously recognised a violation of Article 6 ECHR and awarded the complainant compensation in the amount of €3,600.

(In)admissibility decisions

Decision (First Section) of 21 November 2023 – No. 25240/20 – *Gyulumyan and Others v. Armenia*

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life); Art. 1 Protocol No. 1 (protection of property)

Keywords: Termination of the term of office of judges – Constitutional amendment – Lack of judicial review

Core statement: The special status of a judge may, in individual cases, justify the exclusion of access to a court with regard to disputes concerning the exercise of his or her office.

Note: The four complainants were judges of the Armenian Constitutional Court. They were appointed for life, which meant that they were to hold office until they reached retirement age. Due to a constitutional reform that came into force in 2015, which limited the term of office of constitutional judges to twelve years, their office was terminated with immediate effect, as they had already been in office for more than twelve years at the time of the constitutional amendment.

The complainants allege a violation of both Article 6 ECHR and Article 8 ECHR, as they had no access to a court to have the constitutionally prescribed subsequent termination of their term of office reviewed as to its effectiveness. Furthermore, the termination of their term of office was arbitrary, which interfered with their right to respect for private life.

In the Court's view, Article 6 ECHR is applicable in the present case, since the question of whether the applicants are entitled to serve their full term of office is a right that may be the subject of a dispute before domestic courts. Even if there is no right under the ECHR to hold public office in connection with the administration of justice, such a right may exist at national level.[94] According to the case law of the Court of Justice,[95] in cases such as the present one, it must be examined whether access was excluded under national law and whether this exclusion was justified. For this assessment, the Court refers in particular to the opinion of the Venice Commission of the European Commission.[96] According to this, the introduction of a non-renewable term of office of twelve years for constitutional judges is "fully in line" with European practice. The Court agrees with this assessment and comes to the conclusion that, taking into account the very specific circumstances of the individual case at hand, the exclusion of access to a court was justified, especially since the constitutional amendment was not directed against the person of the complainants.

Insofar as complainants assert a violation of the right to respect for their private life, there is a lack of actual evidence as to what adverse effects the limitation of the term of office is said to have had on their private life. In particular, neither a significant reduction in income nor any

[92] ECtHR of 5 May 2020 – No. 3594/19 – *Kövesi v. Romania*.
[93] ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan v. Romania*.
[94] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.
[95] ECtHR of 19 April 2007 – No. 63235/00 – *Vilho Eskelinen and Others v. Finland*.
[96] Venice Commission of 22 June 2020 on legal issues related to the draft constitutional amendments concerning the term of office of the judges of the Armenian Constitutional Court.

social effects that the termination of the term of office could have had have been substantiated.

The Court counters the further asserted violation of Article 1 of Protocol No. 1 by pointing out that the protection of this provision does not extend to the right to the acquisition of property and therefore does not extend to future income.[97]

For these reasons, the Court unanimously declared the appeal inadmissible.

New proceedings (notified to the respective government)

No. 13455/23 – *Yalçin v. Turkey* (Second Section) – lodged on 1 March 2023 – communicated on 27 November 2023

Law: Art. 6 ECHR (right to a fair trial); Art. 1 Protocol No. 1 (protection of property); Art. 13 (right to an effective remedy)

Keywords: Compensation claim against the employer – Legally binding title – Impossibility of enforcement

Note: The complainant had obtained a legally binding title against his former employer for payment of compensation due to an accident at work. The employer's assets were placed under official control, with a statutory provision prohibiting enforcement against the assets.

The Court has already ruled on the question of whether an applicant was denied access to a court within the meaning of Article 6 ECHR and deprived of his protected property within the meaning of Article 1 of Protocol No. 1 by the prohibition of enforcement, in various decisions, to which it refers.[98]

No. 33439/22 – *Oğuz v. Turkey* (Second Section) – lodged on 3 June 2022 – communicated on 22 November 2023

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

Keywords: Compensation due to an accident at work – Failure to meet a deadline – Determination of health impairment – Provision of medical documents

Note: The complaint concerns the question of whether access to a court within the meaning of Article 6 ECHR is prevented by the dismissal of an action for failure to comply with a statutory time limit. The complainant had asserted claims for damages in connection with an accident at work against her employer in court. The failure to meet the deadline was due to the delayed determination of the health impairments by medical reports. In this respect, the main question is whether the reasoning of the domestic courts was sufficient with regard to the dismissal of the claim within the meaning of Article 6 ECHR.[99]

[97] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland*.

[98] ECtHR of 4 June 2013 – No. 25747/09 – *Çakır and Others v. Turkey*; ECtHR of 28 November 2006 – No. 40765/02 – *Apostol v. Georgia*; ECtHR of 11 January 2001 – No. 21463/93 – *Lunari v. Italy*; ECtHR of 28 July 1999 – No. 22774/93 – *Immobiliare Saffi v. Italy*.

[99] ECtHR of 11 July 2017 – No. 19867/12 - *Moreira Ferreira v. Portugal (No. 2)*; ECtHR of 23 November 2021 – No. 36098/19 – *Tarvydas v. Lithuania*; ECtHR of 17 September 2013 – No. 59601/09 – *Eşim v. Turkey*; ECtHR of 30 October 2018 – No. 22677/10 – *Kurşun v. Turkey*.

No. 43334/18 and 41920/19 – *Tsanov and Kovachev v. Bulgaria* (Third Section) – lodged on 31 August 2018 and 31 July 2019 – communicated on 31 October 2023

Law: Art. 6 ECHR (right to a fair trial); Art. 13 ECHR (right to an effective remedy)

Keywords: Termination of employment – Revocation of a security certificate – Access to a court

Note: The complainants were dismissed from the Ministry of Defence and the State Agency for National Security (SANS) because they were no longer granted security clearance for access to classified information. Criminal proceedings had been initiated against the first complainant, meaning that he was considered unreliable. He was dismissed in 2016 by the decision of a state commission. The Supreme Administrative Court dismissed an appeal against this on the grounds that the commission's decision could not be reviewed. The second complainant had his security authorisation revoked on grounds that he was unsuitable based on a psychological report. Here too, the Supreme Administrative Court did not consider itself in a position to review the commission's decision.

With these proceedings, the Court will continue its case law on the question of whether the Supreme Administrative Court's refusal to review the state commission's decision violates the complainants' right of access to a court within the meaning of Article 6 ECHR.[100]

No. 9786/23 – *Załuski v. Poland* (1st section) – lodged on 16 February 2023 – communicated on 3 October 2023

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

Keywords: Early retirement – Amount of pension – Failure of the employer to take a decision – Access to a court

Note: Following an accident suffered in 2017, the complainant, a public prosecutor, was permanently unfit for duty, which was confirmed several times by the occupational physicians treating him. After the complainant's employer had unsuccessfully applied for the complainant's early retirement in 2018, 2019 and 2021, he submitted such an application himself in December 2021, but no decision was ever made. During his incapacity for work, the complainant received 80% of his salary as pension payments in the first year and 50% thereafter. From the date of his early retirement, he would have received 75% of his salary as a pension. Against this background, he claims that he would have received higher pension benefits if a decision had been made on his application for early retirement.

The complainant therefore alleges a violation of Article 6 ECHR, as he was denied access to a court due to the failure to decide on his application.

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[100] ECtHR of 21 July 2016 – No. 57148/08 – *Myriana Petrova v. Bulgaria*; ECtHR of 16 April 2013 – No. 40908/05 – *Fazliyski v. Bulgaria*; ECtHR of 19 July 2018 – No. 43503/08 – *Aleksandar Sabev v. Bulgaria*.

5. Protection of privacy

Decisions

Judgment (4th section) of 5 December 2023 – No. 70267/17 – *Ţîmpău v. Romania*

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

Keywords: Termination of employment at a public school – Revocation of teaching licence by the Orthodox Church – Autonomy of the Church

Core statement: If professional activity is based on a religious doctrine, the employer may require employees to prove their loyalty to the religion in question through their entire way of life, in particular through public statements.

Note: The complainant was employed for 20 years as a lay teacher of Orthodox religion at a public secondary school in Câmpulung Moldovenesc*.* In February 2015, a commission composed of two theology professors and the school inspector for religious education certified the complainant's outstanding teaching ability. In May 2015, the Archbishop of Suceava and Rădăuţi informed the school inspectorate that the complainant's licence to teach Orthodox religion in public schools had been withdrawn. The decision was based on the fact that she had failed to conduct her lessons professionally, to integrate herself and to prove that she was a true preacher of the word of God. In addition, her behaviour in dealing with parents, pupils and other teachers had caused dissatisfaction. As a result of the Archbishop's decision, the school terminated the employment relationship with the complainant.

The appeals against both the Archbishop's decision and the dismissal were unsuccessful in all instances. The application against the Archbishop's decision was rejected as inadmissible, as according to the case law of the national constitutional court, disciplinary decisions of the Orthodox Church can only be reviewed by church courts. The application for a declaration that the dismissal was invalid was rejected as unfounded. The accusation made against the complainant was related to the subject of religion she taught, meaning that the national labour laws were not applicable to the case at hand.

The complainant alleges a violation of both Article 6 ECHR and Article 8 ECHR. She believes that the refusal of the domestic courts to review the legality of the Archbishop's decision violated her right of access to a court. Furthermore, her right to respect for private life was violated by the termination of her employment and the consequences of her dismissal.

The complaint based on Article 6 ECHR was declared inadmissible pursuant to Article 35(3)(a) ECHR. The Court is of the opinion that a decision on the question of whether the secular courts have jurisdiction over disputes in religious disciplinary matters concerns a substantive right for which there is no legal basis under national law and which therefore cannot be the subject of a dispute before national courts. Therefore, the civil law part of Article 6 ECHR is not applicable to the present case.[101]

With regard to the violation of Article 8 ECHR, the Court first refers to its case law,[102] according to which the term "private life" must be interpreted broadly and also extends to professional activity. Applying the resulting principles, the Court finds in the present case that the implementation of a church's decision to withdraw authorisation to teach religion

[101] ECtHR of 14 September 2017 – No. 56665/09 – *Károly Nagy v. Hungary*.

[102] ECtHR of 23/09/2010 – No. 1620/03 – *Schüth v. Germany*; ECtHR of 16/12/1992 – No. 13710/88 – *Niemietz v. Germany*; ECtHR of 28/05/2009 – No. 26713/05 – *Bigaeva v. Greece*; ECtHR of 9 January 2013 – No. 21722/11 – *Oleksandr Volkov v. Ukraine*; ECtHR of 12 June 2014 – No. 56030/07 – *Fernández Martínez v. Spain*; ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.

constitutes an interference with the applicant's private life. This involved the loss of her job, which deprived her of the opportunity to earn a living.[103] However, when considering whether such an interference is necessary in a democratic society, the national courts must take into account all relevant factors and weigh the relevant interests against each other. Insofar as the courts recognise in particular the fact that the complainant teaches Orthodox religion and is therefore subject to an increased duty of loyalty to the Orthodox Church, these conclusions are not objected to by the Court. The complainant should have been aware of these particularities when she took up her position. The Court therefore unanimously found no violation of Article 8 ECHR.

Judgment (3rd section) of 10 October 2023 – No. 66292/14 – *Pengezov v. Bulgaria*

Law: Art. 6 ECHR (right to a fair trial); Art. 8 ECHR (right to respect for private and family life) – Art. 1 Protocol No. 1 (protection of property)

Keywords: Criminal proceedings against a judge – Provisional suspension – Cessation of remuneration – Income not assets worthy of protection

Core statement: The state authorities must be granted a considerable margin of discretion with regard to the necessity of an interference with the right to respect for private life. However, they must take particular account of the severity of the impact of the interference on the private and professional life of the person concerned.

Note: The complainant is a judge at the Sofia Court of Appeal. He was president of this court from 2009 to 2014. Prior to that, he was president of the Military Court of Appeal in Sofia from 2004 to 2009. In 2011, he was fined by the tax authority for a breach of legislation concerning the award of public contracts. The public prosecutor's office initiated criminal proceedings against the complainant in 2014. These ended in 2020 with an acquittal. During the criminal proceedings, the complainant was suspended from his position as a judge by a decision of the Supreme Judicial Council (CSM) and the payment of his salary was discontinued. The appeal against the suspension was dismissed in all instances. The Supreme Administrative Court justified its decision by stating that the suspension of a judge in the event of criminal proceedings against him is provided for by law and that the criminal allegations are examined as part of the criminal proceedings.

The complaint alleges a violation of Article 6 ECHR on the grounds that the CSM is not an independent and impartial court. He also claims that the Supreme Administrative Court did not carry out a comprehensive judicial review of the suspension decision and furthermore that the suspension meant both damage to the complainant's reputation and a considerable loss of income, which constituted an interference with his right to respect for private life within the meaning of Article 8 ECHR.

The Court considers the complaint of a violation of Article 6 ECHR to be admissible. The provision is applicable to disputes between civil servants or judges and their employers,[104] which also concerns disciplinary proceedings pending against this group of persons.[105] The Court had previously ruled that the scope of review of the Supreme Administrative Court of Bulgaria with regard to decisions of the CSM meets the requirements of Article 6 ECHR.[106] In the present case, however, the Court found that the Supreme Administrative Court did not

[103] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 15 December 2020 – No. 33399/18 – *Pişkin v. Turkey*.
[104] ECtHR of 15 March 2022 – No. 43572/18 – *Grzęda v. Poland*.
[105] ECtHR of 20 October 2020 – No. 36889/18 – *Camelia Bogdan v. Romania*; ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland*.
[106] ECtHR of 26 October 2021 – No. 72437/11 – *Donev v. Bulgaria*; ECtHR of 19 October 2021 – No. 40072/13 – *Miroslava Todorova v. Bulgaria*; ECtHR of 15 September 2015 – No. 43800/12 – *Tsanova-Gecheva v. Bulgaria*.

take into account the fact that the applicant was not granted the right to be heard in the proceedings before the CSM, that the CSM made its decision by secret ballot and that the reasons for the decision were not sufficiently clear. The Court considers this to be a violation of Article 6 ECHR.

With regard to the applicability of Article 8 ECHR, the Court assumes, with reference to its case law,[107] that this is also applicable in working and professional life. The suspension was based on a sufficient domestic legal basis. When assessing whether it is necessary in a democratic society, national authorities and courts have a margin of discretion in their judgment. However, the Court must review whether these decisions are compatible with the ECHR.[108] In the complainant's case, however, the domestic courts failed to take into account the fact that the suspension, during which he received no pay and was unable to pursue any other professional activity, had a serious impact on his private and professional life for two-and-a-half years. Moreover, the measure was not limited in time from the outset and the complainant had no opportunity to have the decision reviewed by an independent court. Taking all the circumstances into account, the Court found a violation of Article 8 ECHR.

Finally, insofar as a violation of Article 1 of Protocol No. 1 is asserted, the Court points out that the protection of the provision does not extend to the right to the acquisition of property and therefore does not extend to future income. The complaint based on this was therefore clearly unfounded.[109]

As a result, the Court unanimously found a violation of Article 6 ECHR and Article 8 ECHR and awarded the complainant compensation in the amount of €4,500.

In a concurring separate opinion, Judge Arnardóttir and Judge Pavli emphasised the particular hardship that the suspension must have meant for the complainant, as the national legislation made no reference to a maximum duration of the measure, which meant a state of considerable uncertainty.

New proceedings (notified to the respective government)

No. 15138/23 – *Laurent v. Luxembourg* (5th section) – lodged on 3 April 2023 – communicated 23 November 2023

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

Keywords: Termination of employment – Private use of a computer provided for business purposes – Protection of the secrecy of correspondence

Note: The proceedings concern the dismissal of the complainant by her employer for the private use of a computer provided for work purposes. She had used it to exchange private messages via a messaging service. The Labour Court held that the dismissal was invalid as private life also extends to the workplace and includes the protection of the secrecy of correspondence. The Court of Appeal overturned the decision on the grounds that the complainant had not differentiated between private and business use when using the computer, as she had not set up separate password accounts. The Court of Appeal dismissed the further appeal.

[107] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*.
[108] ECtHR of 19 October 2010 – No. 20999/04 – *Özpınar v. Turkey*; ECtHR of 15 December 2020 – No. 33399/18 – *Pişkin v. Turkey*; ECtHR of 9 February 2021 – No. 15227/19 – *Xhoxhaj v. Albania*.
[109] ECtHR of 25 September 2018 – No. 76639/11 – *Denisov v. Ukraine*; ECtHR of 6 October 2022 – No. 35599/20 – *Juszczyszyn v. Poland*.

The Court will examine whether the state courts and authorities have complied with their positive obligation under Article 8 ECHR to protect the applicant's right to respect for her private life and correspondence.[110]

No. 18235/22 – *Hinić v. Croatia* (2nd section) – lodged on 5 April 2022 – communicated on 18 October 2023

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

Keywords: Withdrawal of a licence to work as a private bodyguard – Work ban

Note: The complainant was employed as a private bodyguard and had a licence from the Ministry of the Interior for this activity. As a result of criminal proceedings initiated against him for slight bodily harm, his licence to work as a bodyguard was revoked in 2018. The criminal proceedings were concluded in 2021 with the acquittal of the complainant. The challenge to the revocation of the authorisation to work as a bodyguard was unsuccessful before the administrative courts, as was a constitutional complaint.

The question here is whether the withdrawal of the professional licence disproportionately impaired the complainant's right to work and thus violated Article 8 ECHR.

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6. Social security

(In)admissibility decision

Decision (1st section) of 21 November 2023 – No. 59963/21 – *Zanola v. Italy*

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

Keywords: Refusal of a survivor's pension – Same-sex relationship – Discrimination – Exhaustion of legal remedies

Core statement: The legal recognition of same-sex couples is an area of evolving rights where public authorities and courts have a wide margin of appreciation that should be proportionate to societal consensus.

Note: The complainant lived with his same-sex partner from 1976 until the latter's death on 14 June 2015, without having been married to him. The complainant applied to the National Social Security Fund for a survivor's pension. This was rejected on the grounds that the complainant had not been married to the deceased and could therefore not be considered a "surviving spouse" within the meaning of the statutory provision. It was only in 2016, i.e. after the complainant's application for a survivor's pension, that the law was amended to allow unmarried same-sex couples to claim the pension. The appeals lodged against the decision were unsuccessful in all instances.

The complainant is of the opinion that the denial of social benefits violates his right to respect for family life in accordance with Article 8 ECHR. Furthermore, he considers himself to be discriminated against in comparison to married couples of different sexes.

[110] ECtHR of 5 September 2017 – No. 61496/08 – *Bărbulescu v. Romania*.

The Court emphasises that the present case is only about the lack of recognition of a survivor's pension for same-sex couples, but not about the legal recognition and thus the core protection of the complainant in a same-sex relationship. Domestic law has taken this protection into account by extending the granting of a survivor's pension to married same-sex couples since 2010. The Italian government has thus exercised its discretion with regard to the legal recognition of same-sex couples without any objections. Insofar as this regulation was also extended to unmarried same-sex couples in 2016, the complainant had no legitimate expectation at the time of the application with regard to the provision that would apply in his favour in the future.

Since the complainant had not alleged a violation of the prohibition of discrimination in the proceedings before domestic courts, the domestic remedies were not exhausted in this respect, so that the complaint had to be rejected pursuant to Article 35(1) ECHR.[111]

For these reasons, the Court declared the complaint inadmissible.

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[111] ECtHR of 9 July 2015 – No. 42219/07 – *Gherghina v. Romania*; ECtHR of 26 May 2020 – No. 3704/13 – *Kemal Çetin v. Turkey*; ECtHR of 1 June 2023 – No. 24827/14 – *Fu Quan, s.r.o. v. Czech Republic*.