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Overview of recent cases before the European Court of Human Rights (October 2022 – December 2022)[1]

Abstract

In this reporting procedure (October 2022 – December 2022) two cases before the European Court of Human Rights (hereinafter: ECtHR) will be presented.[2] They both concern discrimination on grounds of sex. The first case is Beeler v. Switzerland (appl. no. 78630/12), which deals with the termination of a survivor's pension for widowers when the youngest child reaches adulthood. Such termination does not occur for widows. The ECtHR had to review whether the difference in treatment on the basis of sex violates the prohibition of discrimination in Article 14 ECHR, read in conjunction with the right to family life in Article 8 ECHR. Moraru and Marin v. Romania (appl. no. 53282/18 and 31428/20) is the second case that will be discussed. In this case, the employment agreements of the applicants were terminated automatically once they reached the retirement age for women, which was lower than for men. Also in this case, the Court had to review whether there was a violation of the prohibition of discrimination of sex albeit on the basis of Article 1 of Protocol no. 12.

Keywords: prohibition of discrimination, equal treatment, discrimination based on sex, narrow margin of appreciation, survivor's pension, termination of survivor's pension for widowers when youngest child reached adulthood while widows continued to receive a survivor's pension, scope of application of Article 8 ECHR, notion of ambit, social security benefit, blanket rule on automatic termination of employment agreement when the retirement is reached, different retirement age between men and women

Termination of a survivor's pension for widowers when the youngest child reaches adulthood: Beeler v. Switzerland[3]

In the case at hand, the applicant is a widower who had been bringing his children up alone since his wife's death. He lost his entitlement to a widower's pension when his youngest child reached adulthood, while the corresponding pension remained payable to widows with children of the same age (para. 3). The applicant argued that the Swiss legislation violated Article 14 ECHR, read in conjunction with Article 8 ECHR (para. 31). The discussion below concerns the decision of the Grand Chamber of 11 October 2022. Two years earlier, a chamber of the Third Section of the ECtHR declared the complaint admissible and found a violation of Article 14 ECHR, read in conjunction with Article 8 ECHR (para. 5). The Swiss government asked that the case be referred to the Grand Chamber of the ECtHR (hereinafter referred to as ECtHR) (para. 6).

The ECtHR first discussed the admissibility of the case. Due to the non-autonomous nature of Article 14 ECHR, the Court went on to review whether the termination of the applicant's survivor's pension fell within the ambit of Article 8 ECHR (para. 47). As Switzerland did not ratify Article 1 Additional Protocol ECHR (hereinafter: AP), the applicant could not rely on the ECtHR's case law concerning social security benefits under this provision. The Court summarized its current case law on Article 8 ECHR, and acknowledged that it has not always been consistent (para. 60 and further) and sets out the approach to be followed henceforth (para. 66 and further).

The ECtHR clarified that all financial benefits generally have a certain effect on the way in which the family life of the person concerned is managed, although the fact alone is not sufficient to bring them within the ambit of Article 8 ECHR. Otherwise all welfare benefits would fall within the scope of application; an approach that is deemed excessive according to the ECtHR (para. 67). In that sense, the Court stated that it can no longer simply accept either a legal presumption to the effect that in providing the benefit in question, the State is displaying its support and respect for family life or a hypothetical causal link whereby it ascertains whether the grant of a particular benefit is liable to affect the way in which family life is organised (para. 69).

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[2] The cases where selected on the basis of their relevance for social security (defined in a broader manner), also taking into account procedural elements arising out of the rights in the ECHR.

[3] ECtHR, appl. no. 78630/12, Beeler v. Switzerland, 11 October 2022.

The ECtHR stated that it will apply the approach used in Markin v. Russia[4] as the main reference point in future cases (para. 70): for Article 14 ECHR read in conjunction with Article 8 ECHR to be applicable the subject matter of the alleged disadvantage must constitute one of the modalities of exercising the right to respect for family life as guaranteed by Article 8 ECHR, in the sense that the measures seek to promote family life and necessarily affect the way in which it is organised. A range of factors are relevant for determining the nature of the benefit in question and they should be examined as a whole. These will include, in particular: the aim of the benefit, as determined by the Court in light of the legislation concerned; the criteria for awarding, calculating and terminating the benefit as set forth in the relevant statutory provisions; the effect on the way in which family life is organised, as envisaged by the legislation, and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period in which the benefit is paid (para. 72).

The ECtHR applied the principles set out above to the case at hand. The Court considered firstly the aim of the survivor's pension. The Swiss law sets out that in order to be eligible for this benefit, the surviving parent must have one or more children at the time of the spouse's death. Furthermore, the surviving parent must be living together with the deceased spouse's children and the legislation also takes into account the marital status of the pension beneficiary. In principle, surviving spouses are not entitled to a pension if the family has no children, although exceptions apply (para. 74). The Court concluded that the pension in question seeks to promote family life for the surviving spouse by enabling the latter to look after his or her children full-time if that was previously the role of the deceased parent, or in any event to devote more time to them without having to face financial difficulties that would force him or her to engage in an occupation (para. 77). The ECtHR also observed that as the children of the applicant were young at the time of the applicant's wife's death, he left his job in order to devote himself full-time to his family. The Court underlined that the receipt of the widowers' pension necessarily affected the way in which his family life was organised throughout the period concerned (para. 80). In light of the above, the ECtHR concluded that the facts of the case fall within the ambit of Article 8 ECHR, which is sufficient to render Article 14 ECHR applicable (para. 82).

In a second step, the Court went on to review whether there was a difference in treatment on the grounds of sex within the meaning of Article 14 ECHR (para. 98). The Court considered that this was the case, as the applicant stopped receiving the widower's pension because he was a man (para. 102). The Court examined whether the difference in treatment had an objective and reasonable justification in light of Article 14 ECHR (para. 103).

As in earlier cases, the ECtHR repeated that social welfare constitutes a complex system in which a balance must be preserved and accordingly a wide margin is usually granted to the state at hand when it comes to general measures of economic or social strategy. Any adjustment to a pension scheme must be carried out in a gradual, cautious and measured manner, since any other approach could endanger social peace, the foreseeability of the pension system and legal certainty (para. 104). Nevertheless, as it concerns a difference in treatment on the grounds of sex, the margin of appreciation for Member States is more narrow (para. 105).

According to the Swiss government, gender equality had not yet entirely been achieved in practice as far as the involvement in paid employment and the distribution of roles within the couple were concerned. Consequently, they argued that it was still justifiable to rely on the presumption that the husband provided for the financial maintenance of the wife, particularly when she had children and thus to afford a higher level of protection to widows than to widowers (para. 106). The ECtHR held that no information has been provided on the percentage of widows and widowers who have successfully returned to the employment market after many years of absence once their children have reached the age of majority. According to the Court, the absence of relevant information is noticeable given repeated attempts to reform the system of widows' and widowers' pensions from 2000 onwards and the findings of the Swiss Federal Supreme Court (para. 107). The Court also referred to earlier cases (Petrovic v. Austria[5] and

[4] ECtHR, appl. no. 30078/06, Markin v. Russia, 22 March 2012.
[5] ECtHR, appl. no. 20458/92, Petrovic v. Austria, 27 March 1998.

Markin v. Russia) where it held that European societies had moved towards a more equal distribution of responsibility between men and women for the upbringing of their children and that there was an increasing recognition of the role of men in caring for young children (para. 108). The Court reaffirms that references to traditions, general assumptions or prevailing social attitudes in a particular country are an insufficient justification for a difference in treatment that puts widowers at a disadvantage in relation to widows (para. 110).

Although the ECtHR traditionally grants states a wide margin of appreciation in the sphere of social security, the Court observed that the Swiss government acknowledged already in 1997 that women were increasingly often in gainful employment and that protection was necessary for men who devoted themselves to carrying out household tasks and bringing up children. It appears that attempts to harmonise the eligibility conditions for widows' and widowers' pensions were thwarted at the time by financial constraints and by criticism stressing the difficulties faced by "older" widows in returning to employment. Other attempts by the government to reform the system of survivors' pensions from 2000 onwards, driven by the view that the existing system was no longer suited to the contemporary context and was at variance with the principle of gender equality, were unsuccessful (para. 111, see for an overview also para. 24 and further). The ECtHR also stressed that the Swiss Federal Supreme Court in 2012 already observed that the legislature had been aware, at the time of the introduction of the widower's pension, that the relevant rules established an unacceptable distinction on grounds of sex, which was contrary to the Constitution (para. 112, see also para. 17). In the ECtHR's view, the attempted reforms and the decision of the Swiss Federal Supreme Court show that the old "factual inequalities" between men and women have become less marked in Swiss society (para. 113). Having regard to the foregoing and the narrow margin of appreciation in this domain, the ECtHR considered that the Swiss government had not shown that there were very strong reasons or particularly weighty and convincing reasons justifying the difference in treatment on grounds of sex complained by the applicant (para. 115). The Court therefore concluded that the Swiss legislation violated Article 14 ECHR, read in conjunction with Article 8 ECHR (para. 116).

Two concurring opinions were attached to this case, namely a concurring opinion of judge Seibert-Fohr and of judge Zünd, as well as a joint dissenting opinion of judges Kjølbro, Kucksko-Stadlmayer, Mourou-Vikström, Koskelo and Roosma.

The decision of Beeler v. Switzerland can be considered a landmark case as the ECtHR clarified the scope of application of Article 8 ECHR when read in conjunction with Article 14 ECHR in social security cases. This report briefly comments on the case.

Similarly as for Article 1 AP ECHR[6], the ECtHR makes a distinction in this case between the scope and the ambit of Article 8 ECHR. The notion of ambit is used when Article 8 ECHR is invoked together with Article 14 ECHR (see also para. 62). The ECtHR indicates that the Markin case serves as a reference point; the concurring opinion of judge Seibert-Fohr discusses the notion of ambit further in detail: "*what is needed […] is a close link between the provisions of the welfare benefit and the enjoyment of family life, close meaning substantively close and close in terms of direct effect. Such a close link can be established if a financial benefit enables the beneficiary to exercise the right to family life" (*para. 4) and *"This is a factual question which is not limited to legislative intent […]. A regulatory effect which is evidence of the close substantive connection between the welfare benefit and family life can be established on the basis of the statutory criteria for awarding, calculating and terminating the benefit, which are indicative of whether a benefit objectively serves to facilitate family life, whereas a direct effect is to be determined on the basis of the effects on the organisation of family life, including those envisaged by the legislation and the practical repercussions of the benefit, given the applicant's individual circumstances and family life throughout the period during which the benefit is paid"* (para. 7).

However, the dissenting opinion strongly criticises the decision in Beeler v. Switzerland, stating that the ECtHR's reading is too far-reaching. They argue that this will lead to a significant expansion vis-a-vis

[6] See for example ECtHR, P.C. v. Ireland, appl. no. 26922/19, 1 September 2022, para. 49 as discussed in the previous case law report: E. De Becker, "Overview of recent cases before the European Court of Human Rights and the European Committee of Social Rights", *EJSS* 2022, will be published in issue 4.

the applicability of Article 8 ECHR when invoked together with Article 14 ECHR in the field of social security benefits. The questions raised in the dissenting opinion touch upon the foundations of the ECHR monitoring framework, i.e. to what extent social security benefits fall within the scope of the different rights and what the role of the ECtHR in providing protection in such cases should be.[7]

Points of criticism in the dissenting opinion are among others that the principles articulated by the Court are rather vague (para. 9 and 10) and difficult to apply (para. 11). Moreover, the judges in the dissenting opinion point out that the situation at hand does not fall under the notion of a family life. The ECtHR in previous case law held that there is no family within the meaning of Article 8 ECHR between parents and adult children, unless additional elements of dependency exist (para. 9). They argued that the "*subject matter of the disadvantage*" suffered by the applicant was not the inability to receive a survivor's pension when his children were still minors, but the inability to receive a survivor's pension once his children had reached adulthood. Another point of criticism is also the importance of the applicant's individual circumstances that the Court takes into account in its assessment ("*practical repercussions on the individual's specific circumstances and family life throughout the period during which the benefit is paid*"). By focusing on the individual circumstances, they state that the Court broadens the principles as laid down in the Markin judgment.

The points highlighted above show that in practice the decision in Beeler v. Switzerland will give rise to additional discussions on the ambit of Article 8 ECHR, when read in conjunction with Article 14 ECHR. Moreover, the importance attached to the organisation of one's family life and the individual circumstances could potentially lead to divergent outcomes. Furthermore, although this is explicitly not the intention of the ECtHR[8], the case discussed could also result into a situation where all social security benefits fall under the ambit of Article 8 ECHR. As already pointed out by the judges in the dissenting opinion, the demarcation line between family and private life is not easy to make and there is no identifiable reason why the interpretation on the ambit of Article 8 ECHR in Beeler v. Switzerland should be limited to one's family life only (para. 15, dissenting opinion). All social security benefits can potentially be understood as having a link with one's private life.

Lastly, as to the discussion whether Article 14 ECHR was violated, the ECtHR attached particular importance to the different legislative initiatives launched in Switzerland over the years to end the difference in treatment. Although the ECtHR traditionally grants states a wide margin of discretion in social security cases, the fact that such legislative proposals were initiated showed a changed mind-set whereby such a situation was no longer deemed in line with the principle of gender equality. The Swiss Federal Supreme Court judgment also expressed a changed societal view, according to the ECtHR. The case at hand shows how the margin of discretion granted by the Court interacts with changed societal perceptions. The Court also reflected extensively on those aspects in its judgment. Nevertheless, even in such cases, the ECtHR accepts that a difference in treatment can be justified in case of very weighty reasons (e.g. the difference in retirement age between Stec v. United Kingdom). However, Switzerland did not put forward any additional grounds to justify the difference in treatment.

Automatic termination of the employment agreement with a different retirement age for women and men: Moraru and Marin v. Romania[9]

The applicants in the case at hand are civil servants, who had attained the retirement age for women and wished to continue work until they reached the retirement age for men (para. 1). The applicants complained that they had been discriminated on the grounds of sex. The applicants relied on Article 1 of Protocol no. 12 to the ECHR (hereinafter: Protocol 12). This Protocol contains a general prohibition clause against discrimination, as opposed to an accessory clause which can be found in Article 14 ECHR and can only invoked together with one of the other rights in the ECHR. In addition, the second applicant also relied on Article 14 ECHR, taken together with Article 8 ECHR (para. 81).

[7] See also the concurring opinion in the decision of 2020 of the chamber of the third section: ECtHR, B. v. Switzerland, appl. no. 78630/12, 20 October 2020, concurring opinion of judge Keller.
[8] The ECtHR itself described such a situation as excessive.
[9] ECtHR, Moraru and Marin v. Romania, appl. no. 53282/18 and 31428/20, 20 December 2022.

The ECtHR first repeated its earlier case law on the relationship between Article 1 Protocol 12 and Article 14 ECHR: the meaning of the notion of discrimination in Article 1 Protocol 12 was intended to be identical to that in Article 14 ECHR (para. 99). Consequently, the same principles as developed by the ECtHR in its case law concerning Article 14 ECHR are applicable to cases brought under Article 1 Protocol 12 (para. 100). As the claim concerning Protocol 12 was admissible[10], the Court adjudged that the case would be examined under Article 1 Protocol 12 alone.

In a short reasoning, the ECtHR stated that there was a difference in treatment on the basis of sex. The Court repeated its earlier case law in Stec v. United Kingdom.[11] In that case, the Court held that a difference in retirement age between men and women constitutes a difference in treatment on grounds of sex. The same applies to the measure complained of in the present case, namely the automatic termination of the applicant's employment when they reached the retirement age for women (para. 108).

Secondly, the ECtHR reviewed to what extent the difference in treatment was justified. As already stated by the Court in earlier case law, Member States have a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (para. 104). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background. In this respect, the Court is mindful of the fact that the present case concerns the field of social welfare, which constitutes a complex system in which a balance must be preserved, and that accordingly, a wide margin is usually granted to a state (para. 115, see also para. 105). Consequently, the Court has in the past accepted that any adjustment of pension schemes must be carried out in a gradual, cautious and measured manner, since any other approach could endanger social peace, the foreseeability of the pension system and legal certainty (para. 115). However, the Court held that very weighty reasons would have to be put forward before it could regard a difference of treatment on the grounds of sex as compatible with the ECHR and that the margin of appreciation in justifying such a difference is narrow (para. 116, see also para. 106). The Court also reiterated the importance of gender equality as a major goal in the Member States of the Council of Europe (para. 106).

The ECtHR acknowledged that a harmonisation of the retirement age between men and women is part of a state's pension scheme and requires a gradual adjustment (para. 117, and see also para. 24), which may be regarded as a measure designed to correct factual inequalities. The Court also stated that the Romanian Constitutional Court has repeatedly upheld the constitutionality of this measure (para. 117). However, the Court underlines the difference with the harmonisation of the retirement age of women and men with the case at hand, where it concerns the automatic termination of the applicants' employment agreement. The Court stated in stark terms that by instituting and maintaining a blanket rule on a mandatory termination of women's employment at a lower age than for men with the possibility of only a few exceptions, the legislature perpetuates a stereotypical view of gender roles; in doing so, women's personal situations or desires in terms of their professional life and career development as well as their alignment with those of men are completely disregarded (para. 118). The ECtHR observed that neither the public authorities nor the domestic courts offered any explanation as to how their decisions not to allow the applicants to continue work were compatible with the ECHR or the applicable EU law, even though one of the applicants argued that her termination had been contrary to EU law (para. 119, see for an overview of the applicable EU legislation and case law: para. 66 and further). The ECtHR also took into account that the Romanian government did not put forward any evidence that the measure sought by the applicants would entail any significant costs for society or a systemic change to the pension system in place (para. 120).

The ECtHR concluded that the arguments put forward by the Romanian government were not consistent nor convincing (para. 121). Furthermore, the Court also held that the situation has been remedied in the meanwhile; the Romanian Constitutional Court decided in 2018 that the automatic termination of a women's employment contract constituted a discrimination on the grounds of sex (para. 122). The Romanian labour code was modified soon after the decision. In light of the above, the ECtHR concluded that Article 1 Protocol 12 was breached, as the situation were the applicants were not given the option

[10] See the discussion in para 83 and further.
[11] ECtHR, appl. nos. 65731/01 and 65900/01, Stec and Others v. United Kingdom, 12 April 2006, para. 60.

to continue work past their retirement age and until they reached the retirement age set for men constituted a discrimination on grounds of sex.

The following comments can be made concerning the case at hand. In this brief judgement the ECtHR underlines in unambiguous terms the importance of gender equality and the limited margin of discretion for states to justify differences in treatment based on sex. In doing so, the Court draws not only on previous case law, but strongly relies also on EU primary and secondary law and the case law of the CJEU (as discussed in para. 66 and further). According to the Court, the Romanian Court of Appeal failed to engage meaningfully with the judgements of the CJEU (para. 119). Whilst discussing the applicable EU law and CJEU case law is not new for the ECtHR[12], Callewaert argues that the approach of the ECtHR by insisting that national courts should uphold and engage in a meaningful dialogue with the CJEU could reinforce the coherence of fundamental rights protection in Europe.[13] Like the Romanian Constitutional Court in 2018, the ECtHR came to the conclusion that the automatic termination of an employment agreement on the basis of a different retirement age between women and men constitutes a violation of the prohibition of discrimination in Article 1 Protocol 12.

Similar to EU law, the ECtHR distinguishes the (gradual) harmonisation of the retirement age of women and men from the automatic termination of the employment contract upon reaching the retirement age. Whilst in the latter case, the ECtHR is rather strict, this is different for the retirement age itself, as the case in Stec v. the United Kingdom made clear.[14] This does not come to any surprise, taking into account the impact of such a measure on the overall pension scheme and its financial equilibrium. EU secondary law, as well, still allows for different retirement age between men and women (Article 7 (1) Directive 79/7[15]). Considering the strong language of the ECtHR in this case, as well as in Beeler v. Switzerland (discussed above) where the ECtHR repeatedly underlined the importance of gender equality, the question arises whether the jurisprudence on retirement age between men and women is not also in need of a revision. Such questions arose at EU level as well, as Article 7 Directive 79/7 does not contain any time frame by when the different retirement age for women and women should be harmonised.[16] Time will tell … .

[12] See also the overview in ECtHR, Guide on the case law of the ECtHR: European Union Law in the Court's case law, December 2022; see however on the different approaches in gender equality law: S. Burri, "Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR", *Utrecht Law Review* 2014, 80-103.

[13] As discussed in J. Callewaert, Failure to "engage meaningfully" with CJEU case-law: judgment of the ECHR in the case of Moraru v. Romania, accessible via: https://johan-callewaert.eu/failure-to-engage-meaningfully-with-cjeu-case-law-judgment-of-the-echr-in-the-case-of-moraru-v-romania/; see also in a similar manner the case law of the ECtHR on the obligation to give reasons for refusing a request a preliminary ruling from the CJEU: ECtHR, Sanofi Pasteur v. France, appl. no. 25137/16, 13 February 2020. In the case at hand (Moraru and Marin v. Romania), it was not clear why a preliminary ruling to the CJEU was not made, but the ECtHR did not touch upon this aspect as it was not raised by the applicants.

[14] ECtHR, appl. nos. 65731/01 and 65900/01, Stec and Others v. United Kingdom, 12 April 2006, para. 66: "*In conclusion, the Court finds that the difference in State pensionable age between men and women in the United Kingdom was originally intended to correct the disadvantaged economic position of women. It continued to be reasonably and objectively justified on this ground until such time as social and economic changes removed the need for special treatment for women. The respondent State's decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field (see paragraph 52 above). Similarly, the decision to link eligibility for REA to the pension system was reasonably and objectively justified, given that this benefit is intended to compensate for reduced earning capacity during a person's working life. There has not, therefore, been a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1 in this case".*

[15] Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, *OJ L* 6, 10 January 1979.

[16] See also M. De La Corte Rodriguez, "Recent cases and the future of Directive 79/7 on equal treatment for men and women in social security : how to realise its full potential", *EJSS* 2021, 55-56.