

## Overview of recent cases before the European Court of Human Rights and the European Committee of Social Rights (April 2022–September 2022)

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## Overview of recent cases before the European Court of Human Rights and the European Committee of Social Rights (April 2022 – September 2022)<sup>1</sup>

### Abstract

In this reporting procedure (April 2022 – September 2022)<sup>2</sup> three cases before the European Court of Human Rights (hereinafter: ECtHR) and one case before the European Committee of Social Rights (hereinafter: ECSR) will be presented.<sup>3</sup> All three cases before the ECtHR concern pension claims. The first case is *Savickis and Others v. Latvia* (application no. 49270/11) dealing with the payment of employment pensions in Latvia to “permanently resident non-citizens”. For those citizens the Latvian legislation did not take into account periods worked in other Soviet republics at the time of the occupation of Latvia by the Soviet Republic (hereinafter: the USSR), which it did do for Latvian citizens. The Court had to review this difference in treatment in light of the prohibition of discrimination in Article 14 European Convention on Human Rights (hereinafter: the ECHR) and the right to property in Article 1 Protocol no. 1 to the ECHR (hereinafter: AP ECHR). The second report discusses a case concerning the length of the appeal proceedings relating to the reduction of the applicant’s pension rights. In *Bieliński v. Poland* (appl. no. 48762/19) the Court had to review whether there was a violation of Article 6 ECHR (right to a fair trial) and Article 13 ECHR (right to an effective remedy). *P.C. v. Ireland* is the third case that will be discussed (application no. 26922/19). It concerns the disqualification of an old-age pension while serving a sentence of imprisonment. The applicant claimed that this disqualification violated Article 1 AP ECHR read alone as well as Article 14 ECHR read in conjunction with Article 1 AP ECHR. Finally, this overview ends with a discussion of the European Social Charter (ESC). In *Unione sindacale di base (hereinafter: USB) v. Italy* (collective complaint, appl. no. 170/2018), the ECSR had to review the compatibility of the Italian scheme of socially useful workers with several of the provisions of the ESC, o.a. the prohibition of discrimination (Article E) read in conjunction with the right to social security in Article 12 § 1 revised ESC.

**Keywords:** prohibition of discrimination, equal treatment, difference in treatment on the basis of nationality, right to property, right to a fair trial, reasonable time, effective remedy in domestic system, special diligence in case of proceedings concerning the applicant’s means of subsistence, difference in treatment on the basis of old age, different treatment on the basis of a person’s level of income, different in treatment on the basis of one’s status as a convicted person, unemployment, atypical work scheme, right to social security

### Different treatment regarding pension entitlements for work during the Soviet period: *Savickis and Others v. Latvia*<sup>4</sup>

After the dissolution of the USSR, Latvia created in 1996 a pension scheme, which took into account periods of work in Latvia and equivalent periods prior to the restoration of its independence. For Latvian citizens periods of work in other republics part of the USSR were also taken into account in the pension scheme. However, for permanently resident non-citizens (i.e. people who moved to Latvia from other republics during the Soviet occupation of Latvia) work in other republics part of the USSR would be taken into account only in particular circumstances (para. 17). In the case at hand, the applicants argued that, they had been treated unfairly as permanently resident non-citizens *vis-à-vis* Latvian citizens in respect of the amount of their retirement pension and eligibility for early retirement. The dispute concerned a supplement to the Latvian pension.

In an earlier case, *Andrejeva v. Latvia*, the ECtHR found that a difference in treatment between Latvian nationals and permanently resident non-citizens violated Article 14 ECHR, read in conjunction with Article 1 AP ECHR.<sup>5</sup> According to the Latvian Constitutional Court, the situation of the applicants in the case at hand was different from that of Mrs. Andrejeva, as she had a link with the territory of Latvia over the disputed periods. Mrs. Andrejeva performed work in Latvia, but for an entity established outside Latvia. The applicants on the other hand had worked outside the territory of Latvia and they did not acquire legal ties with Latvia at that time (para. 50).

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<sup>2</sup> The selection of the case law was finalized on the 15<sup>th</sup> of September 2022: cases after that date will be discussed in a next case law report.

<sup>3</sup> The cases were 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.

<sup>4</sup> ECtHR, *Savickis and Others v. Latvia*, appl. no. 49270/11, 9 June 2022.

<sup>5</sup> ECtHR, *Andrejeva v. Latvia*, appl. no. 55707/00, 18 February 2009.

The ECtHR first held that Article 14 ECHR, read in conjunction with Article 1 AP ECHR was applicable, as in the case of *Andrejeva* (para. 122).

The absence of Latvian citizenship on the applicants' part had been the sole criterion for the distinction. The ECtHR thus came to the conclusion that there was a difference in treatment between persons in a similar situation and it then reviewed whether such a difference was justified.

The ECtHR followed the Latvian Constitutional Court that the impugned difference in treatment serves two legitimate aims. The first one was safeguarding the constitutional identity of Latvia by implementing the doctrine of state continuity. According to this doctrine, the Baltic states had been a victim of aggression, unlawful occupation and annexation on the part of the former USSR, starting from 1940. The underlying arguments for this doctrine had informed the setting up of the impugned system of retirement pensions following the restoration of Latvia's independence. The Court acknowledged that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practiced in the period of unlawful occupation and annexation of Latvia. The second aim was the protection of the country's economic system (para. 198).

Next, the ECtHR reviewed whether the differential treatment could be justified. Although in principle very weighty reasons have to be put forward in case of a difference in treatment on the basis of nationality in social security cases, the ECtHR accepted that Latvia had a wide margin of discretion. The Court first held that the test of very weighty reasons might differ depending on the different context and circumstances (para. 206). According to the ECtHR the special status of "permanently resident non-citizens" had been created by the Latvian legislature following the restoration of Latvia's independence with a view to addressing the consequences of a situation which had arisen from an occupation and subsequent annexation in breach of international law (para. 208). The Court also highlighted the specific temporal scope and context of the impugned measure: it concerned periods of employment outside Latvia before the introduction of the occupational pension scheme (para. 209). Moreover, the Court stressed the specific background of the measure and the particular historical and demographic circumstances, together with the constraints imposed by the severe economic difficulties prevailing at the time (para. 211). According to the Court, the margin of appreciation can also depend on whether the disputed measure entails a loss of individual contributions paid by or on behalf of the individual and whether the lack of entitlement had left the individual in question without social cover (paras. 212 and 213).

Then, the ECtHR proceeded to carry out the proportionality test, taking into account Latvia's broad margin of appreciation.

First, the Court found a direct link between the disputed measure and the aim of preserving Latvia's constitutional identity (para. 214).

Secondly, the ECtHR stressed that the difference in treatment depended on the lack of Latvian citizenship, a legal status distinct from the national origin of the person concerned and available to the applicants as permanently resident non-citizens. According to the ECtHR this status had been devised as a temporary instrument so that the individuals concerned could obtain Latvian citizenship or choose another State with which to establish legal ties. In this respect, the Court could accept that in the context of a different treatment based on nationality, there might be certain situations where the element of personal choice linked with the legal status in question might be of significance with a view to determining the margin of appreciation left to the domestic authorities, especially in so far as privileges, entitlements and financial benefits were at stake. Furthermore, the ECtHR also held that although naturalisation depended on the fulfilment of certain conditions and might require certain effort, this did not alter the fact that the question of legal status was largely a matter of personal aspiration rather than an immutable situation, especially in light of the considerable time-frame available to the applicants to exercise that option (para. 215).

Furthermore, the Court held that the difference in treatment only concerned past periods of employment, completed prior to the introduction of the pension scheme in question. Like, the Constitutional Court, the ECtHR also differentiated the situation of the applicants' with the *Andrejeva* case, as the difference in treatment for the applicants was limited to periods of employment completed by the applicants outside Latvia, before they had settled in Latvia or had any other links with the country (para. 216).

Fourthly, the Court stressed that the difference in treatment does not concern the applicant's entitlement to basic pension benefits, nor had it entailed any deprivation or other loss of benefits made by the applicants (para. 217).<sup>6</sup>

With regard to the legitimate aim of protecting the economic system, the Court stressed that the Latvian system of employment pensions was based on social insurance contributions. Determining the scope of eligible periods of employment (prior to the adoption of the new Latvian pension system) has an impact on the level of the benefits and the contributions required to fund them. Such types of trade-offs in social welfare systems generally calls for a wide margin of appreciation according to the ECtHR (para. 218).

The Court concluded that the difference in treatment by the Latvian legislator had been consistent with the legitimate aims pursued, and could be justified by very weighty reasons. It thus reached a different decision than in *Andrejeva v. Latvia*. Accordingly, the ECtHR did not find a violation of Article 14 ECHR, read in conjunction with Article 1 AP ECHR (para. 220).

Two dissenting opinions were attached to this case, namely a joint dissenting opinion of judges O'Leary, Grozev and Lemmens as well as a dissenting opinion of judge Seibert-Fohr, joined by judges Turkovic, Lubarda and Chaturia. All came to the conclusion that there was a violation of Article 14 ECHR, read in conjunction with Article 1 AP ECHR.

The decision of *Savickis and Others v. Latvia* departs from the ECtHR's earlier reasoning in *Andrejeva v. Latvia* (2011). It has been heavily criticized, a.o. in the two dissenting opinions just mentioned and by legal scholars, such as Ganty and Kochenov<sup>7</sup>. Moreover, the Court seems to depart from its traditional case law concerning a difference in treatment on the basis of nationality with regard to social security rights: in those cases the Court normally applies a rather stringent test.<sup>8</sup> This report briefly comments on the case.<sup>9</sup>

It is noteworthy that the ECtHR rather easily set aside the obligation for states to provide weighty reason to justify a discrimination on the basis of nationality. As held in earlier case law, the weighty reasons test should be applied in case of a discrimination on the basis of nationality. However in the case at hand, the Court held that the application of this test can vary depending on the circumstances of the case. For the *Savickis and Others* case, this meant that the Court, in the end, did grant a wide margin of appreciation to Latvia. It remains unclear how to apply the weighty reasons test in future cases, as the Court did not provide any clear guidelines on how this test can vary, depending on the specific circumstances.

The Court also does not explain in much detail why the *Andrejeva* case was not followed. The Court merely states that the case at hand differs from the case of Mrs. *Andrejeva* on the basis that Mrs. *Andrejeva* had worked in Latvia but for an employer outside Latvian territory, in contrast to the applicants. The Court seems to ignore that the main criterion to distinguish was nationality, and not the link with the territory of Latvia: all periods worked outside Latvia were taken into account for Latvian citizens, whilst they were only taken into account in a few cases for non-permanent residents.

Lastly, the ECtHR also emphasised the wide margin of discretion that must be granted to states within social security systems. According to the Court such reasoning should in particular be applied in systems where solidarity plays an important role. An example could be the build-up of pension rights for periods for which no contributions were paid as an exception to the general rule introduced. However, the Latvian government did not explain to what extent the economic difficulties in the 1990's still play a role

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<sup>6</sup> According to the Latvian government the case at hand did not concern a refusal to grant the applicants a retirement pension or any other social benefit: "*just like Latvian citizens, the applicants were receiving the retirement pension provided by law and were entitled to apply for other social services and assistance. [...] In this regard, the responded Government emphasizes that benefits paid on account of employment or military service performed outside Latvia were to be considered as supplements for additional pension payment, and not the core of the old-age pension itself.*" (para. 167).

<sup>7</sup> S Ganty and D. Kochenov, *Citizenship Imposition is the new Non-Discrimination Standard: ECtHR Blames the Victims in Savickis*, *VerfBlog* 2022/7/22.

<sup>8</sup> See for example: ECtHR, *Luczak v. Poland*, appl. no. 77782/01, 27 November 2007.

<sup>9</sup> This aspect will not be discussed further in this case law report, but the ECtHR also attached significant importance to the possible route of naturalisation, and the lack of any willingness of the applicant's to gain Latvian citizenship, see also the criticism in the dissenting opinion of judges O'Leary, Grozev and Lemmens pointing out that in *Andrejeva* the Court clearly said that the discussion whether or not the applicant applied for Latvian citizenship should not play any role in the proportionality assessment. If proceeded otherwise, this could render Article 14 ECHR void of substance (ECtHR, *Andrejeva v. Latvia*, appl. no. 55707/00, 18 February 2009, para. 91); the judges also indicated the difficulties in gaining Latvian citizenship, as discussed by Ganty and Kochenov as well.

in this day; furthermore, one should not forget that the disputed measure did not concern the basic pension benefit but a supplement: the economic impact of such a supplement to the overall financial sustainability of the scheme will be different. Furthermore, a long period has passed since the introduction of the Latvian pension scheme, even though the introduction of the Latvian pension scheme had an important financial impact. Referring to those economic difficulties thirty years later without substantiating this claim does not seem reconcilable with the very weighty reasons test normally applied by the Court in case of a discrimination on the basis of nationality.

As the decision makes clear, the Court seems to forget, that while the ECHR does not oblige states to take into account work performed outside the territory of Latvia in the calculation of pension rights, Latvia should when it decides to take into account such periods of work respect Article 14 ECHR. While the granting of certain periods worked abroad may be subject to certain conditions, e.g. a sufficient link with Latvia, one should expect that the Court would say that nationality cannot be used as the sole criterion, as also pointed out by the dissenting opinions of judge Seibert-Fohr. The applicants in the case at hand all had long standing ties with Latvia build up over the years.

It remains to be seen whether Savkickis and Others will have a resonance in other nationality cases before the ECtHR or whether the Court will restrict this case to its specific circumstances. Needless to say that the principles formulated in this case have the potential of undermining significantly the prohibition of discrimination on the basis of nationality.

### **Excessive length of proceedings in case of the reduction of pension rights: Bieliński v. Poland<sup>10</sup>**

The case at hand concerns the two-fold reduction of the applicant's old-age pension due to a change in the Polish legislation. The pensions for former employees of the uniformed services, including the pension of the applicant, were reduced a first time when the new law entered into force in 2009 (para. 6). In October 2017, the Director of the Board for Pensions reduced the monthly pension of the applicant a second time pursuant to the amended sections of the Law of 2009 (para. 7). The applicant launched an appeal against the decisions reducing his pension benefits, which were brought before the Warsaw Regional Court in 2017 (para. 8). The Court stayed this proceedings due to a similar case before the same court, where it has questioned the Polish Constitutional Court on the constitutionality of the new calculation methods (para. 10).

In the years after, the applicant had challenged more than once the duration of the proceedings; such claims were dismissed by the Warsaw Regional Court and the Warsaw Court of Appeal (paras. 14-19). However, more than two years after the start of the proceedings, the Warsaw Court of Appeal did hold that the state of suspension of the proceedings deprived the applicant of his constitutional right of access to a court and suggested the Warsaw Regional Court to examine the case on the merits applying directly the provisions of the Polish Constitution (para. 21). In May 2021, the Warsaw Regional Court amended the challenged decisions of the Director of the Board of Pensions, and established that the amount of the applicant's benefits should be equal to the amount paid to him before October 2017 (para. 23). This decision was upheld by the Warsaw Court of Appeal (para. 24) and the Director of the Board for Pensions issued a decision to recalculate the applicant's pension in light of the court's decision. The applicant was also compensated for the whole period during which he had received a reduced pension.

The applicant complained that the length of the proceedings in his case was excessive, relying on Article 6 § 1 ECHR (right to a fair trial within a reasonable time) and Article 13 ECHR (right to an effective remedy). As in earlier case law, the Court reiterated that Article 6 § 1 ECHR imposes on Contracting States the duty to organise their judicial system in such a way that their courts can hear cases within a reasonable time. As to the present case, the ECtHR held that the proceedings before the Constitutional Court has been pending for over four years and that no judgment yet has been issued. The ECtHR also stressed that the proceedings in issue concerned the applicant's means of subsistence. Throughout the whole proceedings, the applicant received a reduced pension amount. Such cases require special diligence in their examination by the national authorities. The Court came to the conclusion that the lengthy proceedings violated Article 6 § 1 ECHR.

The applicant had also complained that he had no effective remedy at his disposal as provided for in Article 13 ECHR at national level (para. 50). The Court agreed. It held that in the case at hand, where the length of the proceedings depended to a large extent on the examination of the case by the Polish

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<sup>10</sup> ECtHR, Bieliński v. Poland, appl. No. 48762/19, 21 July 2022.

Constitutional Court, the applicant did not have an effective remedy at his disposal by which to obtain appropriate relief for the breach of Article 6 § 1 ECHR by the Polish authorities (para. 62).

Lastly, the applicant argued that the national courts' prolonged examination of his appeal proceedings effectively deprived him of his right of access to a court in Article 6 § 1 ECHR (para. 64). Excessive delays in the examination of a claim may render the right of access to a court meaningless and illusory, as stated in earlier case law of the ECtHR. Although the proceedings in the applicant's case were lengthy, the Court did not consider the length of the proceedings excessive to such an extent as to deprive the applicant of the very essence of his right to a fair trial in Article 6 § 1 ECHR (para. 71).

Following remarks can be made on the case at hand: it builds on previous case law of the ECtHR: the Court underlines the need for a timely treatment of judicial proceedings in line with Article 6 ECHR.<sup>11</sup> The criteria in such cases are the following, (i) the complexity of the case, (ii) the conduct of the applicant and (iii) of the relevant authorities and (iv) what is at stake for the applicant in the dispute. The Court gave particular importance to the fact that the dispute concerned the applicant's means of subsistence. The ECtHR insisted that in such cases a special diligence is required, and the long duration of the proceedings (for over four years) before the Constitutional Court could not be considered a justification for delaying the outcome in the applicant's case.<sup>12</sup> The case of *Bieliński v. Poland* makes clear that although the ECtHR accepts that a Constitutional Court is not an ordinary court and that it can prioritise certain cases in light of the specific circumstances, it does pose a limit to such a discretion, in particular in social security disputes.<sup>13</sup>

Not only in the case at hand did the applicant suffer a serious delay due to the lengthy proceedings before the Polish Constitutional Court. The Helsinki Foundation for Human Rights, as an intervening party, pointed out that almost 26,000 appeals were lodged against the decisions decreasing the pensions of former employees of the uniformed services (para. 37). In most of cases, as in the case of Mr. Bieliński, the court proceedings were suspended, until the review of the Polish Constitutional Court of the compatibility of the disputed legislation with the Polish constitution. One would expect that there will be a violation of Article 6 §1 ECHR as well in those other cases, due to the excessive length of the Constitutional Court proceedings.

#### **Ban on prisoners receiving a state pension: P.C. v. Ireland<sup>14</sup>**

The case at hand concerns the disqualification of the applicant for his old-age pension while serving a sentence of imprisonment (para. 1).

The facts of the case may be summarised as follows. The applicant made during his professional career social insurance contributions qualifying for the state pension until he reached the age of 66 years. After reaching the retirement age, the applicant began to receive an old-age benefit (para. 4). In 2011, the applicant was convicted for sexual assault and rape and was sentenced to fifteen years of imprisonment, with the final three years suspended (para. 5). The Irish legislation disqualifies persons who were undergoing imprisonment or detention in legal custody from receiving a.o. an old-age benefit. On this basis, the payment of the applicant's pension ceased as from the date of his imprisonment (para. 6).

The applicant first claimed that this disqualification, provided for by statute, violated his rights under Article 1 AP ECHR (para. 43). The ECtHR held that as far as Article 1 AP ECHR taken alone is concerned, the pension payments that were withheld from the applicant during his imprisonment cannot be regarded as possessions. In that period, the pension payments of the applicant were withheld due to his disqualification by law (para. 50).

The ECtHR secondly also discussed to what extent the applicant was discriminated against contrary to Article 14 read in conjunction with Article 1 AP ECHR. The applicant alleged three types of discrimination (para. 56).

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<sup>11</sup> See the references in ECtHR, *Bieliński v. Poland*, appl. No. 48762/19, 21 July 2022, para. 43 and the cases cited in ECtHR, Guide on Article 6 of the Convention – right to a fair trial (civil limb), available online: [https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf).

<sup>12</sup> See the references in ECtHR, *Bieliński v. Poland*, appl. No. 48762/19, 21 July 2022, para. 43 and the cases cited in ECtHR, Guide on Article 6 of the Convention – right to a fair trial (civil limb), available online: [https://www.echr.coe.int/documents/guide\\_art\\_6\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_eng.pdf), 109.

<sup>13</sup> See in that regard also ECtHR, *Oršuš and others v. Croatia*, appl. no. 15766/03, 16 March 2010, paras. 108-110 and ECtHR, *Project-Trade D.O.O. v. Croatia*, appl. no. 1920/14, 19 November 2020, para. 92.

<sup>14</sup> ECtHR, *P.C. v. Ireland*, appl. no. 26922/19, 1 September 2022.

The applicant held that the stopping of his old-age benefits resulted in a discrimination on the basis of old-age. Although all social security benefits are stopped in case of imprisonments, his age-related medical conditions left him unable to work in prison and to earn additional money during his imprisonment (para. 57). He claimed that he was in a relevantly similar situation to younger prisoners similarly disqualified from social welfare benefits during imprisonment, but they were more likely to be able to work and obtain additional funds to purchase basic commodities. The ECtHR noted that there was no direct discrimination as similar kind of benefits during imprisonment were stopped. As for the claim of indirect discrimination, the applicant did not show that the measure had a disproportionate effect on older people. According to the Court the claim of the applicant has not been properly substantiated (paras. 74 and 75). The applicant also claimed that this reliance on the old-age benefit as his sole source of income qualified as an "other status" for the purpose of Article 14 ECHR. He argued that the private pensions, public service pensions and private income of other prisoners were not subject to any interference similar to the disqualification. The applicant held that even if the disqualification was framed in neutral terms as applying to all social welfare recipients, it impacted disproportionately on the poorest (para. 58). The ECtHR stated that the different impact between the removal of the State pension from prisoners with and without other sources of income was not related to any aspect of their personal status within the meaning of Article 14 ECHR and therefore did not fall under this provision (paras. 78-79).

According to the applicant, he was also discriminated against on the basis of his status as convicted prisoner compared to other persons in legal detention, including those detained while awaiting trial or detained in psychiatric care, who were not subject to the disqualification (para. 59). The ECtHR first held that the status of a convicted prisoner can be considered an "other status" within the meaning of Article 14 ECHR (para. 80). The Court recalled its approach used in earlier case law, that in order to review the comparability of the different groups the elements that characterize their circumstances in the particular context should be taken into account. According to the ECtHR, their comparability must be assessed in light of the subject-matter and purpose of the measure which makes the distinction in question (para. 82).

The Court held that the situation of individuals in secure psychiatric facilities under civil law were not comparable to the situation of convicted prisoners. The Court stressed that the physical liberty of this first group is restricted under civil law for the purpose of treatment; convicted prisoners, however, are detained under criminal law mainly for a punitive purpose (para. 85). Similarly, the Court held that remand prisoners are also not comparable to convicted prisoners, in light of the presumption of innocence (para. 92).

Lastly, the applicant complained that he did not have an effective remedy for the alleged breach of his convention rights. The applicant was critical of the fact that the Irish Supreme Court did not examine the merits of his Convention complaints, but ruled only on distinct constitutional grounds (para. 95); he also alleged that the awards granted by the Supreme Court were not an effective remedy (para. 97). The ECtHR did not find a violation of Article 13 ECHR: the Court stressed that the Irish Supreme Court did properly engage with the substance of the Convention rights. Furthermore, the fact that the claim of the applicant fails or that the redress granted was not in line with what he sought, does not mean that the State failed to make effective remedies available (paras. 107 and 110).

In the case at hand, the ECtHR had to consider several aspects, which this report discusses briefly. The Court first discussed the difference in scope when the claim concerns only Article 1 AP ECHR or Article 14 ECHR, read in conjunction with Article 1 AP ECHR.

In the latter case, it falls to the applicant to prove a proprietary interest and not a cognisable property right, as the Court has already clarified in previous case law.

The Court first held that the case did not fall within the material scope of Article 1 AP ECHR, distinguishing the case at hand from *Nagy v. Hungary*<sup>15</sup>. Unlike in *Nagy*, in this case the limitation of pension rights resulted from the personal situation of the person concerned, who no longer met the eligibility requirements for obtaining a pension, rather than a change in the legislation or in the manner of its implementation. The fact that the Irish legislation stopping the pension benefit was overturned by the Irish Supreme Court from 2007 does not alter this finding according to the Court: the ECtHR upheld the qualification under domestic law, and the Irish Supreme Court did not find that there was a property right.

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<sup>15</sup> ECtHR, *Belane Nagy v. Hungary*, appl. no. 53080/13, 13 December 2016.

As to the discrimination grounds, the ECtHR quickly came to the conclusion that there was no indirect discrimination on the basis of old-age: the applicant failed to put forward the necessary evidence. As to the distinction on the basis of his status as a convicted prisoner, the Court held on to its earlier case law and came to the conclusion that the different group of prisoners were not in a similar situation, taken into account the subject-matter and the purpose of the Irish legislation.

More noteworthy was the question whether the lack of income could be considered an “other status” as mentioned in Article 14 ECHR. The Court decided that this was not the case: the level of income cannot therefore be regarded as an aspect of a person's personal status.

### **Limited social protection for socially useful workers: Unione sindacale di base (USB) v. Italy<sup>16</sup>**

The Unione sindacale di base (hereinafter: USB) alleges that the situation in Italy where municipalities and public bodies in Sicily and Campania make use of abusive contracts for “socially useful workers” amounts to a violation of several provisions of the revised ESC. According to the USB, those workers carry out regular work, which should be assigned to workers under permanent or fixed-term contracts, with a full social protection coverage.

The ECSR first discussed the origins of the socially useful work scheme, before reviewing the compatibility with the revised ESC. In the discussion below, only the compatibility of the Italian legislation with Article 12 § 1 and Article E of the revised ESC are discussed.<sup>17</sup>

The first steps to develop a socially useful work scheme were taken in the 1970's as a response to the then economic crisis, that affected several countries, a.o. Italy. This scheme became more widely used in the 1990's and a legislative scheme regulating socially useful work was established by the government in that period. Socially useful work allowed unemployed persons to conduct work for public administrations. Even though this work scheme was supposed to be used by the public administrations to implement a specific project and for simple short-term tasks, over time the situation developed and those workers were formally unemployed but conducted for a longer period of time similar work for the public administration as civil servants or regular workers who are employed under a permanent or a fixed-term contract. After a certain period of time, the conversion of those long-term socially useful work contracts into regular permanent or fixed-term contracts commenced, but this process was delayed with the Covid-19 crisis (para. 47).

As the different parties disagree on the status of the socially useful workers, the ECSR first analysed this question. The Committee makes a distinction between the “socially useful workers” who carry out certain short-term tasks in the public administrations specified in a project solely for the duration of the project and the socially useful workers who work for longer periods of time in public administrations in a similar manner as regular workers who are employed under a permanent or a fixed-term contract (para. 50). As to the first category of workers, the Committee considers that their status is closer to that of a person seeking a job, included into jobseekers' registers and receiving unemployment benefits than to a worker in the regular labour market. The ECSR held that those workers are not part of the public administrations concerned, as their activities are limited in time and in substance (para. 51). As to the second category, the Committee notes that such workers do carry out similar or even the same tasks as regular workers for public administrations. In that case, the socially useful worker receives a social benefit and such work cannot exceed the limit of 20 hours per week (para. 25). For socially useful work performing more than 20 hours per week social contributions have to be paid by the specific public administrations and the hours worked are taken into account for the build-up of pension rights in the same manner as for regular workers. The ECSR held that it will only focus its assessment on the second category, and it will examine whether this category of workers are more vulnerable in comparison to regular workers of the public administrations (para. 52).

As to the compatibility with Article 12 ESC, the ECSR finds that socially useful workers carry out equivalent functions to regular workers of the public administrations, regardless of their classification under domestic law (para. 110).

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<sup>16</sup> ECSR, collective complaint no. 170/2018, 26 January 2022: the collective complaint was published on 5 July 2022.

<sup>17</sup> The USB also claimed a violation of Artt. 1 § 1, 1 § 2, 4 § 1, 4 § 4, 5, 6 § 4 and 24 revised ESC. The ECSR declared the collective complaint admissible as far as it concerns Artt. 1 § 1, 1 § 2, 4 § 4 and 24 as well as Article E read in conjunction with Artt. 1 § 1, 1 § 2 § 1, 24 and 12 § 1 revised ESC. In its decision of the merits, the ECSR only reviewed the Italian legislation in light of Article 1 § 2 and Article E, read in conjunction with Article 12 § 1 revised ESC. According to the ECSR, the applicant did not substantiate its claims as far as the other provisions are concerned.



USB argues that socially useful workers do not have a social protection that would guarantee them a pension similar to that received by regular workers (para. 101). According to the Italian legislation, socially useful work is limited to 20 hours a week and those workers receive a remuneration, which constitutes a social assistance measure (para. 25). In that case, the benefit paid for socially useful workers is incompatible with direct payments for compulsory insurance in case of disability, old-age, survivor's and early retirement pensions. USB clarifies that for the periods during which one has worked as a socially useful worker only notional contributions are taken into account. Furthermore, those periods worked are only used to establish an entitlement to a pension, and they do not lead to an increase in the pension amount (para. 102).

The ECSR points out that there are certain means available to receive a higher old-age pension. A first option is paying voluntary contributions: if such contributions are not paid, the periods of socially useful work are only taken into account for the purpose of establishing the contribution period necessary to receive a pension, but it does not result in an increase in the pension amount. Another option is that socially useful workers work more than 20 hours per week: in that case, social security contributions are paid, which will lead to higher pension rights (para. 111).

According to the Committee there is a different treatment for socially useful workers who only work for 20 hours per week, compared to other workers. As for the proportionality of the differential treatment, the Italian government did not put forward any justification. Consequently, the ECSR held that there is a violation of Article E, read in conjunction with Article 12 § 1 revised ESC.<sup>18</sup>

Following comments can be made: in the case at hand, the ECSR decided in a brief manner that it should also be possible to build up higher pension rights for long-term activities performed by a socially useful worker for 20 hours per week. The decision itself can be applauded for strengthening the social protection of those socially useful workers who for a long period of time perform the same work as regular workers, without the same social protection.

However, the ECSR only looked at the situation of socially useful workers who perform activities over a longer period of time, without in detail explaining why such a distinction should be made. An important aspect in the reasoning of the Committee was the difference between short and long term activities. Different from socially useful work performed over a longer period, the ECSR accepted that short-term tasks can be linked to job search and labour mediation measures. According to the Committee "such workers do not constitute a part of the public administrations concerned and the activities they carry out in favour of the public administrations are limited in time and in substance, usually they carry out certain tasks specified in the project". However, one could wonder why the nature of the task itself is not taken into account, as well as the extent to which the task can actually be considered a labour mediation measure. Furthermore, the ECSR did not elaborate on the distinction between short term and long work periods: from which moment in time can work be considered of a long-term nature? More clarification could have been provided by the ECSR to make this distinction.

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<sup>18</sup> The ECSR also held that there was a violation of Article 1 § 1 revised ESC (the right of the worker to earn his living in an occupation freely entered upon).