Overview of recent cases before the European Court of Human Rights (October 2021 – February 2022)

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Abstract
In this reporting period (October 2021 – February 2022), four cases before the European Court of Human Rights (hereinafter: ECtHR) will be presented. The first case is Šaltinytė v. Lithuania (application no. 32934/19), dealing with a housing subsidy only available to young families of low income. The Court had to review this benefit scheme in light of the prohibition of discrimination in Article 14 European Convention on Human Rights (ECHR) and the right to property in Article 1 Protocol no. 1 to the ECHR (hereinafter: P1 ECHR). The second section discusses a case concerning retrospective changes in the Italian survivors’ pension scheme having an impact on ongoing procedures against the Italian Government. The Court had to review whether this change in the legislation was compatible with the right to a fair trial in Article 6 ECHR (D’Amico v. Italy, application no. 46586/14). Hamzagić v. Croatia is the third case that will be discussed (application no. 68437/13). It concerns the refusal to grant a disability pension, where the applicant argued that no adequate legal framework was in place to review the opinions of experts concerning the applicant’s invalidity for a disability pension. Finally, this overview ends with a discussion of Botoyan v. Armenia (application no. 5766/17), where the ECtHR had to review the relevant legal framework in place in case of medical malpractice, taking into account the right to private life in Article 8 ECHR.

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

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Right to equal treatment and age limit for a housing subsidy: Šaltinytė v. Lithuania

The applicant was a single mother of a daughter born in 2012. In 2016, she applied for a housing subsidy available to ‘young families’ of low income when buying their first home. The applicable legislation (Housing Assistance Act) defined young families as families where both spouses or the single parent were not older than 35 years, whereas the applicant was 37 years of age at the time of her application. The ECtHR was asked to review the compatibility of the Housing Assistance Act with the prohibition of discrimination in Article 14 ECHR, read in conjunction with the right to property in Article 1 of Protocol no. 1 to the ECHR (hereinafter: P1 ECHR).

The ECtHR first repeated its previous case law on the applicability of the Article 14 ECHR and Article 1 P1 ECHR. According to the Court, Article 1 P1 ECHR places no restriction on a state’s freedom to decide whether or not to have in place any form of social security scheme or to choose the type or amount of benefits to provide under any such scheme. If, however, a state has in force legislation providing for the payment of a social security benefit as a right, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 P1 ECHR. Furthermore, although Article 1 P1 ECHR does not include the right to receive a social security payment of any kind, if a state does create a benefit scheme, it must do so in a manner that is compatible with Article 14 ECHR. In the case at hand, the contested housing subsidy was a social security benefit scheme created by Lithuania, and fell within the scope of Article 1 P1 ECHR and the right to peaceful enjoyment of possessions that it safeguards (paras. 60-61). As a result, Article 14 of the Convention was applicable.

The ECtHR applied the test of Article 14 ECHR; it reviewed (i) the extent to which there was a difference in treatment between persons in analogous or relevantly similar situations and (ii) whether the difference was justified. The ECtHR first held that the applicant was in a relevantly similar situation to a younger single mother who, in the same circumstances, would have likely been granted the housing subsidy for young families of low income (paras. 65-66). As to the question of whether the difference in treatment was justified, the ECtHR reviewed whether the measure had a legitimate aim and whether the measure was proportionate in light of the pursued aim. Before discussing whether the measure was justified, the ECtHR first stressed that the Housing Assistance Act provided for different types of housing assistance (para. 69). Some of them were available to persons of very low income, irrespective of their age or other personal circumstances. Others, as in this case, were available to persons in need of housing assistance in view of their personal circumstances, such as disability or their family situation. The Court furthermore observed that the present case did not concern the eligibility for welfare benefits that were aimed at persons on the lowest income. The Court also took note of the various other welfare benefits available to parents and families in Lithuania (such as social assistance), including to the applicant in the case (para. 70). The benefit in the case at hand concerned an additional assistance benefit granted by the State to certain families, namely, young families (para. 71).

3. ECtHR, Šaltinytė v. Lithuania, appl. no. 32934/19, 26 October 2021.
The ECtHR did not accept the aim of Lithuania to take into account the needs of socially vulnerable groups and to correct factual inequalities between different types of families. According to the Court, the Government did not put forward the necessary proof to support this claim (para. 72-73). However, the ECtHR did accept the fact that the measure sought to address the problem of the ageing population and to improve the demographic situation in the country. According to the Court, the Housing Allowance Act did thus have a legitimate aim (para. 74).

When reviewing the proportionality of the measure, the ECtHR reiterated that the national legislator has a wide margin of discretion in the social sphere. The Court was also mindful of the difficult task for domestic authorities when allocating limited public resources and the need to set certain limits to the eligibility for specific welfare benefits (para. 77). The ECtHR attached particular importance to the statistical data provided by the Lithuanian Government: the Court accepted that the impugned measure was reasonably based on objective data, and not on general assumptions or prevailing social attitudes (para. 80). The Court also highlighted that the Lithuanian measure was recently updated, taking into account more recent data (including the fact that the age limit was increased, given that people were marrying and having children later in life). The Court decided that there was no violation of Article 1 AP ECHR (para. 82-83).

The test applied by the ECtHR on social security benefits in light of Article 14 ECHR differs depending on the discrimination ground. Over the years the ECtHR has applied a rather stringent test in cases of discrimination on the basis of nationality.4 This is less the case in other areas: the ECtHR has traditionally granted States a rather broad margin of appreciation, in particular, in the domain of social security. In the case at hand, the ECtHR again granted a broad margin of appreciation to the Lithuanian Government. However, two caveats have to be made here. The Court highlighted the fact that other social assistance benefits were also available to the applicant. In that regard, the ECtHR stressed that the benefit in question did not fall under the category of housing benefits extended to persons of very low income independently of age and other personal circumstances, but concerned a benefit for persons of a – comparatively – higher income and in view of their family situation. One could wonder whether or not the Court would have applied a stricter test, if no other benefits were available to the applicant or if the benefit was an income-related benefit reserved for households in the weakest financial position. A second caveat is also the fact that the difference in treatment needed to be justified by the necessary objective data by the Lithuanian Government. Mere statements, without any justification, would have not sufficed, according to the Court. The large margin of appreciation for governments does have certain limits, whereby the ECtHR asks states to put forward the necessary evidence-based justifications for explaining a difference in treatment.

Retrospective provisions interfering with ongoing judicial proceedings concerning a survivor’s pension: D’Amico v. Italy5

This case dealt with a legislative intervention in the course of ongoing proceedings concerning a survivor’s pension. The applicant complained that her right to a fair hearing as part of the right to a fair trial in Article 6 ECHR was violated due to the legislative intervention of the Italian Government in the ongoing proceedings.

4. See for example: ECtHR, Luczak v. Poland, appl. no. 77782/01, 27 November 2007.

5. ECtHR, D’Amico v. Italy, appl. no. 46586/14, 17 February 2022.
The ECtHR first repeated its earlier case law on this topic: although the legislator is not prevented from enacting new retrospective provisions to regulate rights derived from the laws in force, the principle of the rule of law and the right to a fair trial in Article 6 ECHR preclude any interference by the legislator with the administration of justice designed to influence the judicial determination of a dispute. The ECtHR makes an exception when there are compelling grounds of public interest justifying this interference. The ECtHR stressed that although statutory pension regulations are liable to change and a judicial decision cannot be relied on as a guarantee against such changes in the future, a state cannot interfere with an ongoing process of adjudication.

The law at hand only excluded from its scope survivors’ pensions that had already became final (and were settled once and for all before a court). The legislative intervention had the effect of altering the outcome of the pending litigation to which Italy was a party, endorsing the state’s position to the applicant’s detriment. Only compelling reasons of general interest could justify this interference. The ECtHR did not accept the reasons put forward by the Italian Government, that is (i) to settle conflicting decisions before national courts (para. 36), (ii) the heavy financial imbalance of the pension system (para. 37) and (iii) the need to achieve a homogenous pension system (para. 38). Whilst the ECtHR accepted that the last two reasons are, in general, legitimate reasons for justifying pension reforms, it found that they are not compelling enough to justify such interference in a procedure in which the state in question is one of the parties (para. 37 and 38). As to the divergent case law before the Italian national courts, the ECtHR reiterated that such divergences are an inherent consequence of any judicial system which is based on a network of courts with authority over the area of their territorial jurisdiction, and the role of a supreme court is precisely to resolve conflicts between decisions of the lower courts.

The ECtHR concluded that even assuming that the law sought to reintroduce the legislator’s original intention (i.e. harmonising the pension system), this was not compelling enough to overcome the dangers inherent in the use of retrospective legislation affecting a pending dispute. Indeed, even accepting that Italy was attempting to adjust a situation it had not originally intended, the Court noted that this could have been done without resorting to a retrospective application of the law (para. 40). According to the ECtHR, Article 6 ECHR had been violated (para. 41).

The decision of the ECtHR in D’Amico v. Italy is rather brief: the ECtHR built on a long line of previous case law, where the Court referred to the dangers inherent to the use of retrospective legislation which has the effect of influencing the judicial determination of a dispute to which a state is party. As it did in previous case law, the Court examined closely the justification put forward by the Italian Government. Only compelling grounds of interest can justify such retrospective legislation. While financial reasons or the need to harmonise pension schemes can justify changes to the social security legislation in place, they are not compelling enough to justify retrospective changes such as those in the case at hand.

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7. ECtHR, Zielienski, Pradal, Gonzalez and others v. France, appl. nos. 24846/94, 34165/96 to 34173/96, para. 57.
8. See, for example, ECtHR, Koufaki and Aedy v. Greece, appl. nos. 57665/12 and 57657/12, 7 May 2013, paras. 37–39 (on the financial sustainability of the Greek pension scheme) and ECtHR, Maggio and others v. Italy, 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011, para. 60 (on the harmonisation of the Italian pension scheme).
9. See also, previously, ECtHR, Azienda Agricola Silverfunghi S.A.S and other v. Italy, appl. nos. 48357/07, 52677/07, 52687/07 and 52701/07, 24 April 2014, para. 76 and paras. 88–89 referring in this case also to earlier case law of the ECtHR such as Maggio v. Italy: ECtHR, Maggio (et. al.) v. Italy, appl. nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011, para. 60.
Right to a fair trial and need for adequate framework in place when determining a person’s disability for the purposes of being granted a disability pension: Hamzagić v. Croatia\(^{10}\)

The above case concerned a decision on the granting of a disability pension. According to the applicant, the right to a fair trial in Article 6 ECHR was violated in the administrative proceedings concerning his entitlement for a disability pension benefit, because this decision was based on the findings of experts who lacked the relevant competence and neutrality to assess his condition.

The ECtHR first pointed out that the expert reports prepared by the in-house experts of the administrative authority had a decisive role in the assessment of the merits of the claim of the applicant. The Court repeated its earlier case law: the fact that an expert is employed by the same administrative authority that is a party to the case might give rise to doubts on the part of the applicant as the opposing party; such doubts cannot be considered decisive if there was no objective reason to fear that the expert lacked neutrality in his or her professional judgement (para. 44 and 46).

In the case at hand, a question about the neutrality of the expert in the appeals procedure was raised. The ECtHR found it understandable that doubts could have arisen in the mind of the applicant as to the competence and neutrality of the expert, taking into account the fact that the applicant applied for a disability pension on the basis of his post-traumatic stress disorder (hereinafter: PTSD), as the expert was not a specialist in psychiatry. Also, the expert stated, during the hearing, that PTSD could not cause disability.

Essential in the decision of the ECtHR was the fact that Croatia, due to an international agreement between Croatia and Germany, was responsible for the disability pension of the applicant. Before this agreement, Germany was the responsible state, and conditions concerning the German disability scheme applied. Due to the international agreement, Croatia became responsible and had to review whether the applicant qualified under Croatian law on disability pensions. The ECtHR pointed out that the bar for being recognised as having a disability for the purposes of being granted a disability pension under Croatian legislation was quite high. A disability pension was only granted if the disability had an effect on the person’s health and consequently reduced that person’s ability to work.

The fact that prior to the international agreement the applicant was granted a disability pension in Germany, on the basis of his PTSD, was of no relevance to the Croatian authorities, since the latter had to examine whether he was entitled to a Croatian disability pension (para. 50). The experts of the Croatian fund had reviewed the extent to which the applicant’s illness affected his ability to work. According to the report of the German medical specialist, the applicant had no functional psychic deficiencies that may have affected his working ability (para. 51). The report also pointed out that the existent neurotic disorders could have been treated and that, in any event, the applicant had worked for years with his medical condition. In these circumstances, the doubt of the applicant as to the neutrality of the expert in question could not be justified, according to the Court (para. 52). Further, the ECtHR did not find it problematic that the experts who submitted an opinion in this case were not specialists in psychiatry, or in any of the other particular illnesses suffered by the applicant. Their task was not to diagnose and treat the psychiatric illness, but to assess, on the basis of the medical documentation prepared by the medical specialists in Germany, the effect on his ability to work. The Court underlined that the experts had this specific

\(^{10}\) ECtHR, Hamzagić v. Croatia, appl no. 68437/13, 9 December 2021.
experience (para. 54). Lastly, the Court also pointed out that the applicant had the opportunity to effectively challenge the expert reports and the relevant decisions of the competent court (para. 55). The Court thus concluded that it did not find anything unfair in the reasoned decision of the national court and Article 6 ECHR was not violated, according to the ECtHR (para. 59).

A separate opinion of judges Turkovic and Schembri is attached to this case. Both judges came to the conclusion that there was a violation of Article 6 ECHR. They highlighted that a proper assessment of the illness of the applicant required special medical knowledge and expertise. The vulnerability of the person at hand required particular attention and was neither addressed adequately by the Croatian authorities nor sufficiently taken into account by the majority of the ECtHR.

**Need for adequate legal framework under the right to private life in case of medical deficiencies that lead to a disability: Botoyan v. Armenia**

In *Botoyan v. Armenia*, the applicant held that Armenia failed to comply with its regulatory duties stemming from the right to respect for private and family life, home and correspondence in Article 8 ECHR, as the failures in the treatment of the applicant at a public hospital led to medical complications leaving her permanently disabled. Moreover, the applicant stated that she was not properly informed of the risks of the medical procedure she underwent. According to the applicant, there was also no effective mechanism in place to enable her to obtain compensation for the damage suffered. The applicant experienced post-surgical complications after a surgery performed by the responsible doctor in a public hospital. She was then obliged to undergo further medical procedures, but was eventually left permanently disabled.

The ECtHR reiterated that the right to health is not one of the rights guaranteed under the ECHR or its Protocols. Similar as for the right to life in Article 2 ECHR, a positive obligation arises out of Article 8 ECHR: firstly, states must have in place regulations compelling both public and private hospitals to adopt appropriate measures for the protection of their patients’ physical integrity; and secondly, victims of medical negligence must be provided with access to proceedings in which they can, where appropriate, obtain compensation for damage. In determining whether Armenia had fulfilled its positive procedural obligation to set up an effective independent judicial system, the Court examined whether the available legal remedies, as provided for in law and applied in practice, secured the effective legal means capable of establishing the relevant facts, holding accountable those at fault and providing appropriate redress to the victim. States are free to decide how to set up such legal remedies, taking into account their margin of appreciation.

The ECtHR firstly examined the existence of a relevant regulatory framework. On the basis of the available information, the ECtHR found that the framework developed by Armenia fulfilled this condition. It held that the fact that a regulatory framework may be deficient in some respect is not in itself sufficient to raise an issue under the ECHR. In respect of the informed consent procedure, the ECtHR also held that there was a relevant legal framework in place. It stressed that such a framework should allow individuals facing risks to their health to have access to information enabling them to assess those risks. On the basis of the applicable legislation at that time, the patient had a right to be informed of, *inter alia*, the methods of diagnosis and treatment of the disease and

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the related risks, as well as the consequences and results of treatment. Furthermore, the consent of the patient to a medical procedure was a necessary precondition for receiving the proposed treatment. According to the ECtHR, Article 8 ECHR was not violated in respect of the alleged absence of a relevant regulatory framework (para. 105).

Secondly, the ECtHR examined whether the applicant had access to a procedure capable of establishing the relevant facts, holding accountable those at fault and providing the applicant with appropriate redress. The Court reiterated that states do not have to put in place a special mechanism for medical malpractice claims at domestic level. A balance should be struck, according to the Court, between the positive obligations towards the alleged victims of medical malpractice and the risk of unjustifiably exposing medical practitioners to liability, which can compromise their professional morale and induce them to practise a more ‘defensive medicine’ (para. 108). The ECtHR stressed that when right to physical integrity is not infringed intentionally, the positive procedural obligation arising out of Article 8 ECHR will be satisfied if the legal system affords victims a remedy in the civil courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress to be obtained (para. 109).

The ECtHR observed that there was a criminal-law remedy available to the applicant and that she pursued it. In view of the facts of the case and the state of domestic criminal law, her recourse to this remedy was not unreasonable, according to the ECtHR (para. 110). After reviewing the criminal-law remedy, the Court stated that this procedure did not meet the requirement of thoroughness. The applicant raised important factual issues pertaining to the medical care provided to her and the possible liability of the health professionals involved, which called for a proper examination. Those matters were not addressed in the course of the medical proceedings, according to the Court (para. 114). The ECtHR furthermore examined whether there was a possible recourse via a civil law procedure. The Court found that there was nothing to support the claim by the Government that the applicant could have claimed compensation in respect of non-pecuniary damage from the state directly in relation to the activity of a public hospital (para. 123). The Court also assessed the extent to which there was a disciplinary remedy available to the applicant (para. 126). The ECtHR observed that there were no professional disciplinary bodies with the authority to examine cases of medical malpractice in Armenia. It held that the possibility of reviewing of an administrative decision was not relevant either (paras. 128-129). Furthermore, it was also not clear what type of redress the applicant could have been provided with had she pursued such a complaint. As Armenia could not provide the applicant with an effective procedure enabling her to bring her claim and obtain compensation for the medical malpractice to which she alleged to have fallen victim, the ECtHR concluded that there was a violation of Article 8 ECHR (para. 132).

In this case the ECtHR discussed in much detail the legal framework available under Armenian law in cases of medical negligence. The principles arising out of Article 8 ECHR have certain similarities with the case law developed by the ECtHR under Article 2 ECHR (the right to life). However, the test under Article 2 ECHR only applies to medical negligence threatening a person’s right to life. Other cases that can have the effect of impacting on the person’s medical integrity fall under Article 8 ECHR.

An interesting aspect of the discussed case is the in-depth analysis by the ECtHR in which it reviewed the Armenian legal framework and thus laid down the principles that such a legal framework should respect. The Court not only reviewed the legal framework in place, but also examined whether it was effectively capable of holding accountable those at fault and allowed for appropriate redress. Having a legal framework in place as such is not enough; such framework also must be adequate, according to the ECtHR.
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