

12 OLD-AGE DISCRIMINATION: THE AGE-BLINDNESS OF INTERNATIONAL HUMAN RIGHTS LAW

Adrienne Komanovics*

“... today’s younger adults are tomorrow’s older people.”¹

12.1 INTRODUCTION AND DEFINITIONAL ISSUES

According to a UN survey, the world’s population is ageing at an unprecedented rate. Older people will outnumber children for the first time in history in 2050.² The Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat stated that “[t]he number of older people over 60 years is expected to increase from about 600 million in 2000 to over 2 billion in 2050. This increase will be the greatest and the most rapid in developing countries, where the number of older people is expected to triple during the next 40 years. By 2050, over 80% of older people worldwide will be living in developing countries.”³ In Europe, one third of the population will be 60 years and older in 2050.⁴ In addition, ageing has a gender aspect: women tend to live longer than men, and more older women than men live alone.⁵ Often, older women have to reconcile their work not only with “normal” family issues, but also with care responsibilities.⁶ This challenge would inevitably justify the adoption of a specific international document dedicated to the issues and problems faced by older persons. In fact, though the period

* LL.M, Ph.D, works at the Department of Public International and European Law of the Faculty of Law, University of Pécs. Her main research fields include the public law aspects of the European Union, democracy in the European Union, the protection of human rights at the universal level and in the framework of European organizations, UN human rights treaty monitoring.

1 Strengthening Older People’s Rights: Towards a UN Convention. Booklet prepared (produced) by INPEA (International Network for the Prevention of Elder Abuse) *et al*, 2010, p. 5. Available at <www.inpea.net/images/Strengthening_Rights_2010.pdf>.

2 Summary of the Report of the Secretary-General to the GA. The report (A/66/173) is submitted pursuant to the General Assembly resolution 65/182 of December 2010.

3 Population Division of the Department of Economic and Social Affairs of the United Nations Secretariat, *World Population Prospects: the 2008 Revision*: <<http://esa.un.org/unpp>>.

4 WHO Regional Office for Europe: European report on preventing elder maltreatment (2011), p. 1.

5 CEDAW General Recommendation No. 27, para. 5.

6 PACE Resolution 1793(2011): Promoting active ageing: capitalising on older people’s working potential, para. 3.

ADRIENNE KOMANOVICS

since 1945 has witnessed an unprecedented expansion in human rights instruments,⁷ these instruments are age-blind. While covering some age-related aspects, existing international human rights law does not explicitly recognize the position of older people. Furthermore, these instruments fail to consider the diversification of this segment of the society. Older people do not constitute a homogenous group. Older migrants, old women or indigenous older persons face multidimensional discrimination and, consequently, are particularly at risk.

Unfortunately, contemporary society often considers older persons as incapable of being independent. They are regarded as dependants receiving certain social benefits.⁸ This approach, however, can no longer be maintained.⁹ It is argued that bringing about a paradigm shift would help reframe older persons as holders of rights rather than recipients of welfare and charity.¹⁰

Inevitably, *the concept of old age* is multidimensional, including chronological, physiological and social age. Chronological age is essentially biological in nature. Nowadays, this is defined as beginning at 60 or 65 years. Physiological age is linked to chronological age, and relates to the loss of functional capacities. Finally, social age refers to the attitudes and behaviours that are regarded as being appropriate for a given chronological age group.¹¹ Since there is no comprehensive definition, the Drafting Group on the Human Rights of the Elderly of the Steering Committee for Human Rights, set up by the Council of Europe,

7 At universal level: the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966). In Europe: the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and the Protocols attached to it; the European Social Charter (1961) and the European Social Charter (Revised) (1996). In America: the American Convention on Human Rights (1969) and the Additional Protocol to the ACHR in the area of Economic, Social and Cultural Rights (1988). In Africa: African Charter on Human and Peoples' Rights (1981). Specific instruments include the International Convention on the Elimination of All Forms of Racial Discrimination (1965), Convention on the Elimination of All Forms of Discrimination against Women (1979), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (1984), Convention on the Rights of the Child (1989), International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), International Convention for the Protection of All Persons from Enforced Disappearance (2006) and the Convention on the Rights of Persons with Disabilities (2006) Available at <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

8 ECLAC: Ageing and the protection of human rights: current situation and outlook (April 2011), Document submitted to the First Session of the Open-ended Working Group on strengthening the protection of the human rights of older persons, convened from 18 to 21 April 2011, p. 16.

9 "Older people suffer from prejudice viewing them as non-productive members of society and therefore not worthy of full social participation." Keynote by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, held at the 5th Warsaw Seminar on Human Rights, reproduced in CDDH(2012)005, p. 3.

10 UN General Assembly, Report of the Open-ended Working Group on Ageing (Rapporteur: Léo Faber), A/AC.278/2011/4, 17 May 2011, p. 7.

11 ECLAC: Ageing and the protection of human rights: current situation and outlook (April 2011). Document submitted to the First Session of the Open-ended Working Group on strengthening the protection of the human rights of older persons, convened from 18 to 21 April 2011; at p. 14. Available at <www.inpea.net/images/ECLAC_Ageing_and_the_protection_of_human_rights.pdf>.

does not agree with the numerical delineation of old age. Instead, it is argued that old age is linked to internal factors such as the vulnerability of persons resulting from ageing, in interaction with external factors, such as social, cultural and economic factors resulting in discrimination.¹²

Various sources use *several terms* when referring to old persons, such as older persons, elder persons, the elderly, older adults, senior citizens, or even *tercera edad* (third age or old age in English). These terms will be used interchangeably throughout this article.¹³

Since the great majority of legal instruments and cases under review in this paper operate with the concept of *discrimination*, a working definition of discrimination based on age will be offered. Indeed, equality before the law, as well as substantive equality, lies at the heart of any human rights regime. Thus, based on the definition of other conventions,¹⁴ “age discrimination” means any distinction, exclusion or restriction based on age which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. In a less legally complex formulation, age discrimination is “when someone is treated differently, with an unreasonable or disproportionate impact, simply because of their age.”¹⁵

As mentioned above, older persons are a highly diverse group. Age-related discrimination is often compounded by other grounds of discrimination, such as sex, sexual orientation or gender identity, socio-economic status, ethnicity, literacy levels, disability or health status. Furthermore, migrants, persons living in poverty or social exclusion, persons of African descent and persons belonging to indigenous peoples, homeless persons, persons

12 Drafting Group on the Human Rights of the Elderly of Steering Committee for Human Rights (CDDH-AGE), Meeting Report (1st meeting), Strasbourg, 23 March 2012, CDDH-AGE(2012)R1, para. 13. – Quite interestingly, notwithstanding their denomination, the CDDH-AGE prefers the expression “older people” to “the elderly”. *Ibid.* para. 13.

13 The Committee on Economic, Social and Cultural Rights (CESCR) provides the following overview: “The terminology used to describe older persons varies considerably, even in international documents. It includes: “older persons”, “the aged”, “the elderly”, “the third age”, “the ageing”, and, to denote persons more than 80 years of age, “the fourth age”. The Committee opted for “older persons” (in French, *personnes âgées*; in Spanish, *personas mayores*), the term employed in General Assembly resolutions 47/5 and 48/98. According to the practice in the United Nations statistical services, these terms cover persons aged 60 and above (Eurostat, the statistical service of the European Union, considers “older persons” to mean persons aged 65 or above, since 65 is the most common age of retirement and the trend is towards later retirement still”). CESCR General Comment No. 6, para. 9.

14 Art. 1(1) of the Convention on the Elimination of All Forms of Racial Discrimination, Art. 1 of the Convention on the Elimination of All Forms of Discrimination against Women, and Art. 2 of the Convention on the Rights of Persons with Disabilities. *See also*, the definition of discrimination in Art. 2 of the Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons, CAJP/GT/DHPM-37/12 (30 April 2012).

15 HelpAge: Briefing Paper for the 1st session of the OEWG on Ageing; Document submitted to the First Session of the Open-ended Working Group on strengthening the protection of the human rights of older persons, convened from 18 to 21 April 2011, p. 3.

ADRIENNE KOMANOVICS

in prison and persons belonging to traditional peoples face aggravated discrimination at an advanced age.¹⁶ To this already long list we can also add the “oldest” and the dependent old persons.

The last concept to be covered is *ageism*, which can be defined as “the stereotyping and prejudice against older people that can lead to age discrimination.”¹⁷ Ageism manifests itself in mistreatment, “ranging from stereotypic and degrading media images to physical and financial abuse, unequal treatment in the workforce, and denial of appropriate medical care and services.”¹⁸ To tackle this phenomenon,¹⁹ states must introduce measures to promote the transmittal of a dignified image of old age, to remove prejudice and stereotypes.²⁰

The aim of this article is twofold. Firstly, it briefly describes the existing legal framework at universal (Section 2) and regional level (Section 3). A more detailed analysis of the existing universal human rights instruments potentially relevant for age-related issues is available elsewhere by the author of this paper.²¹ Secondly, the paper describes the direct and indirect protection afforded to older persons by the case law of European Court of Human Rights (Section 4). While this paper cannot undertake to provide a whole coverage of the challenges created by increased longevity, it endeavours to draw a few conclusions in Section 5.

12.2 SURVEY OF THE EXISTING HUMAN RIGHTS FRAMEWORK: THE UNIVERSAL LEVEL

Any recollection of the most important milestones of human rights history must certainly be started with the Universal Declaration of Human Rights (1948), which provides *inter alia* for freedom and dignity, prohibition of discrimination, and the right to an adequate

16 See e.g., Art. 6(e) of the Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons.

17 Working Paper prepared by Mrs Chinsung Chung, Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1 (4 December 2009), para. 8. On stereotypes see e.g., A. Timmer, ‘Toward an Anti-Stereotyping Approach for the European Court of Human Rights,’ *Human Rights Law Review*, Vol. 11, No. 4, 2011, pp. 707-738.

18 Parliamentary Assembly of the Council of Europe: Promoting active ageing – capitalising on older people’s working potential. Report by Denis Jacquat. 18 November 2010. Point 35.

19 “All too often, older persons face employers’ negative perceptions of older workers; age limits, penalties and denials of service imposed by insurance service providers and financial institutions; preconceived notions and negative attitudes on the part of medical staff; and rationing of health care.” Point 57 of the Report of the Secretary General (Follow-up to the Second World Assembly on Ageing, A/67/188, 2012). On increased longevity see e.g., J. Johnson & R. Slater (Eds), *Ageing and Later Life*, Sage Publications Ltd/Open University, London, 1993.

20 See e.g., Arts. 18(h) and 22(a)(1) of the Preliminary Draft Inter-American Convention.

21 A. Komanovics, Discrimination: ‘A normative gap in international human rights law’, in: *Studia Iuridica Auctoritate Universitatis Pécs Publicata*, Pécs, 2013, forthcoming.

standard of living.²² We can find non-discrimination provisions in the majority of human rights treaties, such as the *International Covenant on Economic, Social and Cultural Rights*²³ (1966) and the *International Covenant on Civil and Political Rights*²⁴ (1966). While the Covenants do not list “age” as a prohibited basis of discrimination, these lists are illustrative and non-exhaustive, and usually include an open-ended category (“other status”). Accordingly, treaty monitoring bodies are entitled to consider age-related discrimination.²⁵ The *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) includes only one specific reference to old age: Article 11(1)e) prohibits discrimination against women in the field of social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.²⁶ Similarly, the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) contains only a brief reference to old age in its non-discrimination provision. Nonetheless, the Convention is unique in the sense that age is explicitly listed as one of several prohibited grounds for discrimination.²⁷ The *Convention on the Rights of Persons with Disabilities* (2006) includes various provisions in connection with older persons, such as Article 25(b) on health, and Article 28(2)(b) on an adequate standard of living and social protection. There are additional references to

22 Art. 1, 2 and 25(1) – On the debate over the enforceability and legal status of the Declaration, see e.g., R.K.M. Smith, *International Human Rights*, 4th edn, Oxford University Press, Oxford, 2010, pp. 37-38. For a very detailed analysis of the human rights approach of age-related issues see, D. Rodríguez-Pinzón & C. Martin, ‘The International Human Rights Status of Elderly Persons’, 18 *American University International Law Review* 4, 2003, pp. 915-1008.

23 Art. 2(2). Other relevant rights of the ICESCR are the right to the enjoyment of the highest attainable standard of physical and mental health (Art. 12), the right to social security (Art. 9), the right to adequate standard of living, including food, clothing and housing (Art. 11), the right to work (Arts. 6 and 7) and the right to education (Art. 13). – See also, Committee on Economic, Social and Cultural Rights, General Comment No. 6, ‘The economic, social and cultural rights of older persons’, E/1996/22, annex IV. In paras 11 and 12 of this General Comment, the Committee notes that their important issue is whether discrimination on the basis of age is prohibited by the Covenant. Neither the Covenant nor the Universal Declaration of Human Rights refers explicitly to age as one of the prohibited grounds. Rather than being seen as an intentional exclusion, this omission is probably best explained by the fact that, when these instruments were adopted, the problem of demographic ageing was not as evident or as pressing as it is now. This is not determinative of the matter, however, since the prohibition of discrimination on the grounds of “other status” could be interpreted as applying to age”

24 Arts. 2(1) and 26. See also, the case law of the Human Rights Committee, *Love et al. v. Australia*, Communication No. 983/2001, *Schmitzde-Jong v. The Netherlands*, Communication No. 855/1999, *Solis v. Peru*, Communication No. 1016/2001 and *Althammer et al. v. Austria*, Communication No. 998/2001 (available from <www2.ohchr.org/english/bodies/hrc>).

25 Paras 23 and 24 of Follow-up to the Second World Assembly on Ageing: Report of the Secretary General, UN General Assembly, 66th Session, A/66/173, 22 July 2009, available at <www.globalaging.org/aging-watch/report%202.pdf>.

26 Given the feminization of ageing, the Committee on the Elimination of Discrimination against Women, in 2010, adopted General Recommendation No. 27 on older women and the protection of their human rights under the Convention.

27 Art. 1(1) and Art. 7 of the Convention.

ADRIENNE KOMANOVICS

age-appropriate access to justice in Article 13 and to age-sensitive measures of protection in Article 16 (freedom from exploitation, violence and abuse).²⁸ The International Labour Organization has also given due consideration to the situation of older workers in its Convention No. 128 on Invalidity, Old-Age and Survivors' Benefits (1967).²⁹

These instruments have been complemented with various non-binding measures, including the *United Nations Principles for Older Persons*,³⁰ the *Vienna International Plan of Action on Ageing*, adopted at the (first) World Assembly on Ageing in 1992,³¹ and the *Madrid International Plan of Action on Ageing (MIPAA)*, 2002, adopted at the Second World Assembly on Ageing, and endorsed by the General Assembly in its resolution 57/167.³² These soft law instruments are expressly dedicated to age-related issues. Among others, the MIPAA recognized older persons as contributors to, not just beneficiaries of, economic and social development. The MIPAA emphasized the inclusion of older persons in deciding policies, rather than having policies designed for them.³³

The Universal Periodic Review (UPR), set up in 2006 is a relatively new monitoring machinery where every UN member state reports to the Human Rights Council on its human rights record. As it became clear from the analysis of the various documents issued during the first cycle (2008-2011), older persons have remained invisible in the UPR.³⁴

28 Other relevant provisions of Convention that can potentially benefit older persons include Art. 5 on non-discrimination, Art. 9 on accessibility, Art. 12 on equal recognition before the law, Art. 19 on living independently and access to in-home, residential and other community support services, Art. 20 on personal mobility, and Art. 26 on habilitation and rehabilitation to maintain maximum independence.

29 Convention concerning Invalidity, Old-Age and Survivors' Benefits (entry into force: 1 November 1969) Adoption: Geneva, 51st ILC session (29 June 1967).

30 Implementation of the International Plan of Action on Ageing and Related Activities (UN Principles for Older Persons), A/RES/46/91 of 16 December 1991. See <www.unescap.org/ageing/res/res46-91.htm>.

31 Vienna International Plan of Action on Ageing adopted at the First World Assembly on Ageing. UN GA resolution 37/51 on the question of ageing, 3 December 1982.

32 Madrid International Plan of Action on Ageing, adopted at the Second World Assembly on Ageing, and endorsed by the General Assembly in Res. 57/167, 18 December 2002 see <www.c-fam.org/docLib/20080625_Madrid_Ageing_Conference.pdf>.

33 Other relevant UNGA resolutions include the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Res. 43/173, 9 December 1988; the Standard Minimum Rules for non-custodial measures (the Tokyo Rules), Res. 45/110, 14 December 1990; the Declaration on fundamental principles of justice for victims of crimes and abuse of power, Res. 40/34, 29 November 1985; the Declaration on the elimination of violence against women, Res. 48/104, 20 December 1993, and the Declaration of the rights of indigenous peoples, Res. 61/295, 13 September 2007.

34 International Network for the Prevention of Elder Abuse: Strengthening Older People's Rights: Towards a UN Convention (2010), p. 7. Available at <www.inpea.net/images/Strengthening_Rights_2010.pdf>. On the major thematic issues discussed during the review see <www.upr-info.org/database/statistics/>. On UPR generally see e.g., A. Komanovics & N. Mazur-Kumrić, 'The Human Rights Council and the Universal Periodic Review: A novel method of promoting compliance with human rights', in T. Drinóczi, M. Župan & Zs. Ercsey (Eds.), *Contemporary legal challenges: EU – Hungary – Croatia, Pécs–Osijek 2012*, p. 641; V. Haász & M. Szappanyos, 'Az ENSZ tagállamok emberi jogi helyzetét értékelő egyetemes időszakos felülvizsgálat (UPR)', 1 *Föld-rész* 1, 2011, pp. 71-83; A. Komanovics, 'Keresztútzben Genfben. Magyarország emberi jogi helyzetének értékelése az ENSZ Emberi Jogi Tanácsában', 4 *Föld-rész* 2-4, 2011, pp. 7-27.

Finally, an Open-ended Working Group on Ageing was established by the General Assembly through its resolution 65/182 to consider the existing international framework of the human rights of older persons and to identify possible gaps and how best to address them.³⁵

12.3 AGE-RELATED PROVISIONS IN REGIONAL HUMAN RIGHTS INSTRUMENTS

Turning to the regional human rights instruments, Article 4(5) of the *American Convention on Human Rights* (1969) prohibits punishment for people under 18 or over 70 years of age. Apart from Article 9(1) on the right to social security in old age and disability, the Additional Protocol in the Area of Economic, Social and Cultural Rights (*Protocol of San Salvador*, 1988)³⁶ includes a specific article on the protection of the elderly (Art. 17). In Africa, Article 18(4) of the *African Charter on Human and Peoples' Rights* (1981)³⁷ provides that the aged shall "have the right to special measures of protection in keeping with their physical or moral needs". Article 22 of the 2003 Protocol³⁸ to the Charter obliges states to provide protection to elderly women. Article 33 of the *Arab Charter on Human Rights* (2004) provides for outstanding care and special protection for the older persons.³⁹

In addition to this existing framework, important developments have taken place on the American and African continent as well. The African Commission has drafted a Protocol on the Rights of Older Persons in Africa.⁴⁰ Likewise, Latin American states have been actively working towards the development of a regional convention on the rights of older

35 UN General Assembly Res. 65/182, 21 December 2010, <<http://social.un.org/index/Ageing.aspx>>. See also, <<http://social.un.org/ageing-working-group/>>.

36 The American Convention on Human Rights ("Pact of San José, Costa Rica"), adoption: 22 November 1969, entry into force: 18 July 1978. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), adoption: 17 November 1988, entry into force: 16 November 1999. The basic documents of the inter-American system are available at <www.oas.org/en/iachr/mandate/basic_documents.asp>.

37 Adoption on 27 June 1981, entry into force on 21 October 1986. Available at <www.achpr.org/instruments/achpr/>.

38 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), adoption on 7 November 2003, entry into force on 25 November 2005. Available at <www.achpr.org/instruments/women-protocol/>.

39 Art. 33(2): "The State and society shall ensure the protection of the family, the strengthening of family ties, the protection of its members and the prohibition of all forms of violence or abuse in the relations among its members, and particularly against women and children. They shall also ensure the necessary protection and care for mothers, children, *older persons* and persons with special needs and shall provide adolescents and young persons with the best opportunities for physical and mental development." (Emphasis added) The Charter is reprinted in *International Human Rights Reports*, Vol. 12, 2005, p. 893.

40 The draft Protocol on the Rights of Older Persons came up for discussion at the 48th Ordinary Session of the African Commission on Human and Peoples' Rights (ACHPR) in November 2010. It will be submitted to the African Union in the near future. See <www.achpr.org/sessions/49th/intersession-activity-reports/older-disabled/> and <www.achpr.org/sessions/52nd/info/agenda/>.

ADRIENNE KOMANOVICS

people. The preliminary draft of this convention was submitted to the Permanent Council of the Organization of American States in April 2012.⁴¹

The *European Convention on Human Rights*,⁴² the most important European human rights instrument, does not specifically address old age. Nevertheless, several provisions can be relevant, including Article 2 on the right to life, Article 3 on the prohibition of torture and inhuman or degrading treatment, Article 5 on the right to liberty and security, Article 6 on the right to fair trial, Article 8 on the right to respect for private and family life, Article 14 on the prohibition of discrimination (together with Protocol 12). The potential scope of these provisions will be set out in greater detail below, through the examination of the case law of the Court. Suffice here to say that despite the fact that the Court regards the Convention as a living instrument which must be interpreted in the light of present-day conditions,⁴³ the Convention is certainly not tailored to the specific needs of the elderly.

The *European Social Charter*⁴⁴ is silent on the specific problems of the elderly since ageing was not such a significant issue at the time of the adoption of the Charter. A few decades later, however, Article 4 of the Additional Protocol to the European Social Charter (1988)⁴⁵ already obliged states parties to enable older persons to remain full members of the society for as long as possible, to choose their life-style and to lead independent lives and to guarantee support for older persons living in institutions respecting their privacy and participation in decisions. In view of the demographic changes, the *Revised European Social Charter* of 1996 declared that every elderly person has the right to social protection, and integrated *verbatim* Article 4 of the Additional Protocol.⁴⁶

The next two milestones of our European review are the European Code of Social Security⁴⁷ which contains provisions dedicated to old-age benefit (*see*, Part V, Arts. 25 to 30), and Chapter 2 of the European Convention on Social Security⁴⁸ providing for invalidity, old age and death pensions.⁴⁹

41 Preliminary Draft Inter-American Convention on Protection of the Human Rights of Older Persons CAJP/GT/DHPM 37/12 – available through <www.oas.org/consejo/cajp/personas%20mayores.asp>. The mandate was created by OAS General Assembly resolution AG/RES. 2726 (XLII-O/12), “Protecting the Human Rights of Older Persons”.

42 Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No.: 005), Rome, 4 November 1950, entry into force: 3 September 1953.

43 *See e.g., Tyrer v. the United Kingdom*, no. 5856/72, Judgment of 25 April 1978, para. 31; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, Judgment of 11 July 2002, para. 75; and *Van der Mussel v. Belgium*, no. 8919/80, Judgment of 23 November 1983, para. 32.

44 CETS No. 035, 18 October 1961, entry into force: 26 February 1965.

45 Additional Protocol of 1988 extending the social and economic rights of the 1961 Charter, 5 May 1988, entry into force: 4 September 1992. CETS No.: 128.

46 Part I, para. 23 and Part II, Art. 23 of European Social Charter (revised) (1996) CETS No. 163, Strasbourg, 3 May 1996, entry into force: 1 July 1999.

47 CETS No. 048, Strasbourg, 16 April 1964, entry into force: 17 March 1968.

48 CETS No. 078, Paris, 14 December 1972, entry into force: 1 March 1977.

49 For the list of non-binding instruments developed in the framework of the Council of Europe, *see*, the Draft Preliminary Study on the Promotion of the Human Rights and Dignity of the Elderly: Existing Standards and Outstanding Issues of the Steering Committee for Human Rights (CDDH), Strasbourg, 18 January 2012, CDDH(2012)002, pp. 8-9.

Finally, it is also worth mentioning that the Committee for the Prevention of Torture, which was set up by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment,⁵⁰ also came across the situation of older detainees, albeit rather rarely. Inevitably, the main focus of the CPT is not the old-age population, however, during its visits it paid attention to elderly prisoners⁵¹ and the homes for elderly persons.⁵² In the course of these visits, the material conditions, treatment, control procedures, nursing and other care, means of restraint, as well as the arrangements for lodging a complaint were scrutinized by the CPT.⁵³

12.4 AGE-RELATED ISSUES IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights has been developing a case law, albeit scanty as of yet, which is relevant to older persons. Some of them are directly relevant to the elderly, while other cases are only indirectly related to old age. These cases will be briefly described, grouped in accordance with the relevant Convention article.

12.4.1 *Right to Life (Art. 2)*

In *Dodov v. Bulgaria*,⁵⁴ which concerned the disappearance from a nursing home of an aged person (the applicant's mother) suffering from Alzheimer disease, the Court was called upon, *inter alia*, to assess certain aspects of institutional care for the elderly, as well as the adequacy of the investigation of the disappearance carried out by the national authorities.

With regard to the state's *procedural obligations* under Article 2, the Court pointed out that states had a duty to investigate the facts surrounding the case and hold accountable the persons or institutions that breached their duties.⁵⁵ Here, the Court first examined the complaint relating to *the impossibility to hold accountable the nursing home and staff*. Clearly, the Court was not called upon to characterize the conditions in the nursing home, thus embarking on an analysis largely outside the ambit of the Convention.⁵⁶ The Court

50 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CETS No. 126), Strasbourg, 26 November 1987, entry into force: 1 February 1989.

51 See the visits to Turkey in 2004 and to Albania in 2005; CPT/Inf (2005) 18, para. 52; and CPT/Inf (2006) 24, paras 106 and 107, and 119 to 121, respectively.

52 The first visit to such type of institution was carried out during a visit to Germany in 2003. See further, CPT/Inf (2003) 20 (visit to Germany), and CPT/Inf (2002) 30 (visit to the Netherlands).

53 See also, the visit to Turkey in 2004, CPT/Inf (2005) 18, para. 52, and Albania in 2005, CPT/Inf (2006) 24, paras 106 and 107, and 119 to 121.

54 *Dodov v. Bulgaria*, ECHR (2008) no. 59548/00, Judgment of 17 January 2008.

55 Para. 97.

56 Paras 84-86.

ADRIENNE KOMANOVICS

went only as far as to require states “to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients’ lives and to set up an effective independent judicial system so that the cause of death of patients in the care of the medical profession, whether in the public or the private sector, can be determined and those responsible made accountable”.⁵⁷ In *Dodov*, the Court concluded that although domestic law provided for possibilities to seek accountability through criminal, disciplinary and civil proceedings, none of them secured an effective remedy.⁵⁸

Secondly, the Court had to decide on the complaint relating to *the reaction of the police to the victim’s disappearance*. The applicant claimed that the police had failed to undertake intensive searches in the area immediately after his mother’s disappearance. Here, the Court was more circumspect in its conclusions. While it acknowledged that more could have been done by the police in the present case, the key question was whether their reaction was adequate in the circumstances. Taking into consideration the wide-ranging duties of police authorities, their relative autonomy in making operational choices and setting out priorities, and, inevitably, the financial restraints, the Court found that the police authorities have satisfied their obligation, or at least, their decision not to deploy forces for an immediate search was not unreasonable.⁵⁹

As mentioned above, the Court did not pronounce on substantive standards like the conditions prevailing in the nursing home. Although the Court recalled the national prosecutor’s opinion that the duties of the nursing home staff had not been clearly regulated, which made it impossible to determine any criminal liability, nevertheless the Court thought that it was not required to generally investigate the standard of treatment in the nursing home.⁶⁰ Thus, we are left without any clue as to the substantive duty of the state, *i.e.* what steps must have been taken in advance by the national authorities to safeguard the lives of those within its jurisdiction.⁶¹

12.4.2 *Prohibition of Torture (Art. 3)*

Article 3 of the Convention on the prohibition of torture and *inhuman or degrading treatment* or punishment, imposes positive duties on states parties to protect vulnerable individuals from ill-treatment or undignified conditions. This clearly includes the protection of older persons from violence, abuse, neglect, ill-treatment, undignified conditions, disproportionate use of force or restraint or denial of essential medication or aids.⁶²

⁵⁷ Para. 80.

⁵⁸ Paras 97 and 98.

⁵⁹ Paras 100 and 102.

⁶⁰ Paras 85-86.

⁶¹ On the right to life generally, see E. Wicks, ‘The Meaning of ‘Life’: Dignity and the Right to Life in International Human Rights Treaties’, 12 *Human Rights Law Review* 2, 2012, pp. 199-219.

⁶² Further examples include abuse or neglect, denial of essential medication or aids, disproportionate use of force or restraint, grossly inadequate personal care.

The applicability of Article 3 was raised in several cases in connection with the detention of elderly persons. In *Sawoniuk*,⁶³ a case relating to conditions of detention, the application was found inadmissible by the Court. Nevertheless, the Court made a few comments on the detention in prison of persons who reached an advanced age. In this case the applicant was over 78 years of age when he was sentenced to life imprisonment. The Court noted that while matters of appropriate sentencing largely fell outside the scope of the Convention, an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention. Thus, a failure to provide the necessary medical care to prisoners may constitute inhuman treatment and there is an obligation on states to adopt measures to safeguard the well-being of persons deprived of their liberty.⁶⁴

In *Enea*,⁶⁵ the applicant (born in 1938) was placed in detention in 1993 (at the age of 55) and sentenced to 30 years of imprisonment for, among other offences, membership of a Mafia-type criminal organisation, drug-trafficking and illegal possession of firearms. The applicant suffered from a number of disorders which obliged him to use a wheelchair. The applicant had, on several occasions, applied to the judge for a stay of execution of his sentence on health grounds, which had been rejected.

The European Court of Human Rights was called upon to decide whether the restrictions imposed on the applicant under the special prison regime had attained the minimum level of severity required to fall within the scope of Article 3 of the Convention. This assessment depended “on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, *age* and state of health of the victim.”⁶⁶ In case of detention, the positive obligations inherent in Article 3 required states to ensure that the execution of detention did not subject the applicant to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that he was provided with the requisite medical assistance.⁶⁷

The Court also noted that, in principle, the detention of an elderly sick person over a lengthy period may fall within the scope of Article 3. In the circumstances of the case,

63 *Sawoniuk v. the United Kingdom*, no. 63716/00, decision of 29 May 2001.

64 The applicant was born in 1921 in Domachevo in Belarus, joined the local police force established by the Germans soon after the beginning of the occupation (1941). The applicant left the region in 1944 and arrived in the United Kingdom in about 1946 and has lived there ever since. Pursuant to the British War Crimes Act 1991, he was interviewed by the British police concerning his activities in Domachevo during the German occupation and was alleged to have participated in the massacre of Jewish inhabitants of the ghetto in Domachevo. He was charged with murder, and in April 1999 (at the age of 78) was convicted and sentenced to a mandatory term of life imprisonment.

65 *Enea v. Italy* (GC), no. 74912/01, Judgment of 17 September 2009.

66 Para. 55, emphasis added.

67 Para. 57.

ADRIENNE KOMANOVICS

however, the Court found that the national authorities fulfilled their obligation to protect the applicant's physical well-being.⁶⁸

Haidn v. Germany,⁶⁹ another case relating to conditions of detention, concerned an applicant who in 1999, then aged 65, was given a three-and-a-half-year prison sentence which was later converted to preventive detention in prison for an indefinite duration under the 2002 Bavarian Act for the placement of particularly dangerous offenders very liable to reoffend. The applicant complained that he had been old and in a poor state of health at the relevant time and only able to walk with a cane. He had been diagnosed as suffering from an organic personality disorder which led to a continuous decomposition of his personality. He submitted that he had been taken by surprise and shocked by the order of preventive detention for an indefinite duration brought retrospectively against him, and of which he had been notified three days before his scheduled release from prison.⁷⁰ The applicant also complained that his continued detention in prison for preventive purposes violated, *inter alia*, Article 3.

The Court started with the recapitulation of its findings in *Sawoniuk*, namely that while appropriate sentencing largely fell outside the scope of the Convention, and advanced age as such was not a bar to detention, but an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention. It also added that leaving a detainee in a state of uncertainty for a long time as to his future, notably as to the duration of his imprisonment, or removing from a detainee any prospect of release might also give rise to an issue under Article 3.⁷¹

In the particular circumstances of the case, however, the Court considered that the applicant's relatively advanced, but not particularly old age, combined with his state of health, which could not be considered as critical for detention purposes, were not such as to bring him within the scope of Article 3.⁷² The Court also took into consideration that the applicant had been entitled to a two-yearly review by the domestic courts of his detention of indefinite duration. Consequently, the minimum level of severity required for inhuman or degrading treatment or punishment had not been attained.⁷³

68 National authorities monitored his state of health carefully, assessing the seriousness of his health problems and providing him with the appropriate medical care. On two occasions he was admitted to a civil hospital to undergo major operations. Paras 59-62.

69 *Haidn v. Germany*, no. 6587/04, Judgment of 13 January 2011.

70 Para. 101.

71 Para. 107.

72 Para. 108.

73 The applicant also alleged the violation of Art. 5. The Court concluded that the applicant's preventive detention did not constitute detention "after conviction" for the purposes of Art. 5(1)(a) of the Convention in the absence of a sufficient causal link between the conviction and the detention. Accordingly, Germany violated Art. 5 (deprivation of liberty). Paras 73-97.

12.4.3 *Right to Liberty and Security (Art. 5)*

*H.M. v. Switzerland*⁷⁴ concerned the placement of the applicant, born in 1912, in a nursing home against her will. Previously, she had lived in a house owned by one of her sons, but regular visits by an association carrying out house and sick visits and by the house doctor had stopped due to problems relating to access to the house, heating, washing and meals. Finally, in 1996, the national authorities ordered the applicant's placement for an unlimited period of time in a nursing home on account of serious neglect. The applicant argued that she could wash and dress herself, that her son could cook for her, and complained that in the nursing home she was no longer free to decide where she lived, to take decisions concerning her everyday life or to go home.

The Court, however, disagreed. Firstly, it noted that the applicant had had an opportunity to receive care in her own home, but that she and her son had refused to cooperate.⁷⁵ Subsequently, her living conditions had deteriorated to such an extent that the authorities decided to take action in the applicant's own interests, in order to provide her with the necessary medical care and adequate living conditions. Secondly, it found that she was placed in a ward where she had freedom of movement and was able to maintain social contact with the outside world.⁷⁶ Accordingly, her involuntary placement did not amount to a deprivation of liberty within the meaning of Article 5(1).⁷⁷

Respectfully, we cannot wholly agree with the judgment. Firstly, even though the applicant may be allowed to move freely within the nursing home and have social contact with the outside world, she can be still regarded as "deprived of her liberty", similarly to detainees in prison. Secondly, the question remains as to what extent state authorities may be allowed to substitute their judgment with that of the applicant. As Judge Loucaides argued in his dissenting opinion, "the question whether a measure amounts to a deprivation of liberty does not depend on whether it is intended to serve or actually serves the interests of the person concerned." Not contending that the state measures could be regarded as unjustified under the particular circumstances of the case, such an interpretation could open the door to uncontrolled arbitrariness. The balance to be struck is clearly not an easy one, but states are required to take measures to ensure the autonomy of older people as long as possible.

12.4.4 *Right to a Fair Trial (Art. 6)*

With regard to the requirements of fair trial, the issue of legal capacity as well as the length of the proceedings are of considerable importance to older persons. In *Süssmann v.*

⁷⁴ *H.M. v. Switzerland*, no. 39187/98, Judgment of 26 February 2004.

⁷⁵ Para. 44.

⁷⁶ Para. 45.

⁷⁷ Para. 48.

ADRIENNE KOMANOVICS

Germany,⁷⁸ the applicant was dissatisfied with the sum payable to him under the German supplementary pension scheme. The reduction of his pension resulted from the amendments of the German rules governing the Supplementary Pensions Fund, which came into force in 1982 and 1985. In 1988, he filed a constitutional complaint with the Federal Constitutional Court concerning the amendments of the relevant rules. It must be noted that the timing of his complaint was rather unfortunate inasmuch as the Constitutional Court was flooded with appeals stemming from the German reunification, which were given priority over other cases. In November 1991, a panel of three judges of the Federal Constitutional Court refused to accept his complaint for adjudication on the ground that it did not afford it sufficient prospects of success. This decision was served on the applicant in December 1991. Mr Süssmann decided to lodge an application in Strasbourg, complaining that the length of the proceedings in the Federal Constitutional Court exceeded a reasonable time. The Strasbourg Court recalled its well-developed criteria as to the assessment of the length of proceedings.⁷⁹ Accordingly, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the complexity of the case, the conduct of the applicant and the relevant authorities, and the importance of what was at stake for the applicant in the litigation.⁸⁰ In the particular case, the total period of the proceedings lasted three years, four months and three weeks. The Court found that the case was of some (but not extreme) complexity, and the applicant did not cause any delay in the proceedings.

The Court also noted that while the contracting states were under a duty to organize their judicial systems in such a way that their courts could meet each of the requirements of Article 6(1), this obligation could not be construed in the same way to a Constitutional Court as for an ordinary court.⁸¹ Inevitably, in *Süssmann*, the Court had to consider various interests. Firstly, while the Court acknowledged that in view of his age, the proceedings were of undeniable importance to the applicant, it found that it did not cause prejudice to him to such an extent as to impose on the court concerned a duty to deal with his case as a matter of very great urgency. Secondly, the other cases before the Constitutional Court were regarded by the Strasbourg Court as more important than that of the applicant and other 23 constitutional appeals raising similar issues which, according to Süssmann, concerned some 600,000

78 *Süssmann v. Germany*, no. 20024/92, Judgment of 16 September 1998.

79 As a preliminary issue, the Court had to decide whether Art. 6 was applicable to a Constitutional Court. The Government argued that the Federal Constitutional Court was not an ordinary court. According to the Government, its role at national level is comparable to that of the European Court of Human Rights at European level. As the supreme guardian of the Constitution, the task of the Federal Constitutional Court is to ensure that general constitutional law is complied with and not to rule on the "civil rights and obligations" of individuals. The Court however, rejected this argument and pointed out that the Federal Constitutional Court proceedings were directly decisive for a dispute over the applicant's civil right. Paras 34-46.

80 Para. 48.

81 Paras 55-56.

persons.⁸² Accordingly, the Court found the Constitutional Court to be entitled to give priority to other appeals, stemming from the German reunification. In the words of the Court:

60. . . . these appeals [relating to the reduction of civil servants' supplementary pensions] were filed at the same time as those brought by former civil servants of the German Democratic Republic to challenge a provision of the Treaty on German Unification terminating the employment contracts of around 300,000 persons . . .

Admittedly, as the Commission pointed out, the amendments to the supplementary pensions scheme also concerned a large number of German civil servants. However, bearing in mind the unique political context of German reunification and the serious social implications of the disputes which concerned termination of employment contracts, the Federal Constitutional Court was entitled to decide that it should give priority to those cases. The Court, however, was split over the decision. Several judges submitted a dissenting opinion, advocating for more weight to be given to the criteria relating to what is at stake for the applicant. All six of them, on various bases, argued that the length of the proceedings in the national court exceeded reasonable time. Judge Mifsud Bonnici argued that there were particular circumstances in the case which called for a quicker consideration of the appeal than is usual. Pension rights obviously and of their very nature, require, almost always, urgent consideration. In addition, the Treaty on German Unification was signed on 3 October 1990, that is two years and two months after the applicant filed his appeal and when all the 24 similar appeals were already before the Constitutional Court. Judge Jambrek, joined by Judge Pettiti, argued that the shifting of the cases downwards from the top of the list, although in principle legitimate, must nevertheless respect the basic obligation of the Constitutional Court to hear also the case moved further down the list within a reasonable time limit. Furthermore, the Federal Constitutional Court provided no acceptable justification for giving priority to "more urgent cases of considerable political importance". It is not clear why the cases concerning implications of German reunification are more urgent than the supplementary pensions of large numbers of German civil servants (some 600,000 persons). According to Judge Casadevall, to take into account the argument based on an excessive workload in the Federal Constitutional Court would be inconsistent with the Court's decision in similar cases. Moreover, in view of Mr Süssmann's age (80), the case was of undeniable importance for him.

In *Jablonská v. Poland*,⁸³ submitted to the Strasbourg Court in 2000, the applicant was a Slovak national of Polish origin, born in 1921, who sought restitution of, or compensation

82 Para. 52.

83 *Jablonská v. Poland*, ECHR (2004) no. 60225/00, Judgment of 9 March 2004.

ADRIENNE KOMANOVICS

for, loss of her property nationalised by the Polish authorities after 1945. She filed an action in 1992, and her case was rejected in May 1997. Then she complained to the Minister of Justice about the excessive length of the proceedings. After several appeals, the appeals were dismissed on 23 October 2002. The applicant claimed that the length of the proceedings in her case had exceeded a reasonable time within the meaning of Article 6(1) of the Convention.

The Court started with the recapitulation of its well-settled case law.⁸⁴ The Court found that the annulment of an ordinary contract for sale of property was not particularly complex, that the delay could not be attributed to the applicant, and even though the proceedings were stayed for about 4 years and 4 months, this could not justify the overall length of the time the relevant authorities needed to hear the case which was merely of average complexity.⁸⁵ In view of all the relevant circumstances and, more particularly, of the applicant's old age (she was already 71 years old when the litigation started), the Polish courts should have displayed particular diligence in handling her case. Accordingly, the Court concluded that the "reasonable time" requirement was not satisfied.⁸⁶

12.4.5 *Right to Respect for Private and Family Life (Art. 8)*

Article 8 on the right to respect for private and family life might also be relevant in certain circumstances. Thus, the right to privacy can be interpreted as to include personal privacy in institutional care, freedom from the violation of family life by separating spouses in residential care, the prohibition of social isolation in such homes or the proscription of the infringement of physical and psychological integrity by poor quality care which does not amount to ill-treatment and thus are not caught by Article 3.

In the case of *Schwizgebel v. Switzerland*,⁸⁷ the European Court of Human Rights had to deal with the issue of age in relation to a child-adoption dispute. The case concerned the refusal of an adoption application by a single Swiss woman on the ground of her age which was 47 at the time of the application. Adoption by a single parent is possible under Swiss law; nonetheless her application to adopt a second child was refused by the Swiss courts. Albeit the domestic courts did not call into question her child-raising capacities or her financial resources, the applicant's age (47,5 at the time of her last application) and

84 Accordingly, the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and having regard to the criteria laid down in the Court's case law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what was at stake for the applicant in the litigation. Para. 31.

85 Paras 34, 38 and 41.

86 Para. 43.

87 *Schwizgebel v. Switzerland*, ECHR (2010) no. 25762/07, Judgment of 10 June 2010.

the age difference in relation to the child played an important role in the dismissal of her application.

In her application to the Court, she claimed among other things that she had been discriminated against in comparison with other women of her age, who were able nowadays to give birth to children of their own. She relied in substance on Article 14, taken together with Article 8 of the Convention.

Having found that the applicant had been subjected to a difference of treatment, the Court found that Ms Schwizgebel's age difference with the child to be adopted constituted an objective and reasonable justification for the difference in treatment. In view of the different solutions by the member states of the Council of Europe as regards the age of the adopter or the age difference between the adopter and the child, the Swiss authorities had considerable discretion to decide on such matters. The Swiss rules seemed to be consonant with the solutions adopted by the majority of the member states of the Council of Europe. In those circumstances, the Court found no violation of Article 14 taken together with Article 8.⁸⁸

12.4.6 *Just Satisfaction (Art. 41)*

Age-related aspects can also play a role when deciding on the extent of just satisfaction. In *Georgel and Georgeta Stoicescu v. Romania*,⁸⁹ Mrs Stoicescu was 71 years old when she was attacked, bitten and knocked to the ground by several stray dogs in front of her house in 2000. The attack had had severe consequences for her state of health, which, having regard to her advanced age and lack of financial means to pay for medical care, had caused her serious physical and mental suffering and finally resulted in her being declared as disabled. At the time of the incident the applicant and her husband were retired and their entire monthly income amounted to the equivalent of €80. They claimed that this amount was wholly insufficient for her medical treatment, and that they had to live at subsistence level. Her action for damages was rejected on procedural grounds.⁹⁰

⁸⁸ This case also shows the “relativity” of the concept of old age: what may be considered a high age in one case (e.g., 47 in *Schwizgebel*) might not be so in other circumstances.

⁸⁹ *Georgel and Georgeta Stoicescu v. Romania*, ECHR (2011) no. 9718/03, Judgment of 26 July 2011. Since Mrs Georgeta Stoicescu died on 29 December 2007, her husband was allowed to pursue the proceedings as her legal heir.

⁹⁰ She brought an action in damages against the local mayor's office. Although a district court found in her favour on the merits, her action was dismissed on appeal on the technical ground that the mayor's office was not the proper defendant as it was the municipal council which exercised authority over the animal control agency. A subsequent action against the municipal council failed on the grounds that the animal control agency was by then defunct and responsibility for stray dogs had reverted to the mayor's office. Paras 17 to 19.

ADRIENNE KOMANOVICS

As a background, it was submitted that since the mid-1990s the national and international media have regularly reported on the large number of stray dogs in Romania and attacks resulting in serious injuries or even death to passers-by. By 2000, the population of stray dogs in the city of Bucharest alone numbered some 200,000. In 2000, some 22,000 persons had required medical care following attacks.

The Court had to determine whether the state authorities had failed to comply with their positive obligation under Article 8. The Court recalled that the concept of private life included a person's physical and psychological integrity and that the states had a positive obligation to prevent breaches of the physical and moral integrity of an individual by other persons when the authorities knew or ought to have known of those breaches.⁹¹ It added, however, that the scope of positive obligations varied considerably from case to case, and the obligation to adopt appropriate measures must be interpreted in a way that did not impose an impossible or disproportionate burden on the authorities.⁹²

While the Court agreed with the Government that responsibility for the general situation of stray dogs in Romania also lied with civil society, it was not disputed that the authorities had broad and detailed information on the large number of stray dogs and the danger.⁹³ Having said that, the Court went on to analyse how the national authorities have violated their positive obligations. Firstly, they failed to take sufficient measures to properly implement the existing legislative framework to address the issue of stray dogs. Secondly, the national rules were not capable of providing appropriate redress for the cases of victims of attacks by stray dogs, evidenced by the fact that the authorities had dismissed the applicant's civil actions for damages and sent her from one institution to another without awarding compensation.⁹⁴

What is the most relevant for our purposes, however, is the issue of just satisfaction, notably the level of damages awarded. The Government's contention that a finding of a violation of the Convention would in itself constitute sufficient just satisfaction was rejected by the Court. It held that "in assessing the suffering that the applicant must have experienced regard must also be had to her dire financial situation, her *advanced age* and deteriorating *state of health*".⁹⁵ Accordingly, when deciding on the issue of just satisfaction, the Court must take into account, *inter alia*, the age and the state of health of the victim.

91 Para. 49.

92 Para. 51.

93 Para. 56.

94 Para. 61. The Court also held that the Court considers that the applicant did not have an effective right of access to a court.

95 Paras 79-80, emphasis added. Given the relatively low standard of living among older persons as compared with other segments of the population, the criterion of "financial situation" can also be of great importance in assessing the damages.

12.4.7 *The Protection of Property (Art. 1 of Protocol No. 1)*

In *Stummer v. Austria*,⁹⁶ the applicant has spent approximately 28 years of his life in prison, working in the prison kitchen and in the prison bakery. Pursuant to the relevant Austrian law, during these years he was not affiliated to the Austrian old-age pension system. Thus, the number of months worked during his years in prison was not counted as insurance months for the purpose of assessing his pension rights. Consequently, Stummer had not accumulated the necessary 240 insurance months for an early retirement pension. He complained that the exemption of those engaged in prison work from affiliation to the old-age pension system was discriminatory. He relied in substance on Article 14, taken in conjunction with Article 1 of Protocol No. 1.⁹⁷

The national authorities argued that working prisoners were not in an analogous situation to regular employees. In their opinion, there was a fundamental difference between voluntary work on the basis of a regular employment contract and prisoners' work performed in fulfilment of their statutory obligation to work.⁹⁸ Secondly, even assuming that the situation of working prisoners was comparable to regular employees, the difference in treatment was justified. Here the argument concentrated on economic considerations: the Government contended that contracting states enjoyed a wide margin of appreciation in the organization of their social security systems. Given the strained financial situation of the social security institutions, only persons who were able to make meaningful contributions could be included in the old-age pension system.⁹⁹ Thirdly, the national court argued that, in essence, the applicant raised a question of legal or social policy. In this regard, it was not for the courts but for the legislature to decide whether or not to change the provisions relating to the social insurance of prisoners.¹⁰⁰

Having found that the relevant Austrian legislation (General Social Security Act) generated a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements,¹⁰¹ the Court went on to decide whether the fact that prisoners

96 *Stummer v. Austria* (GC), ECHR (2011) no. 37452/02, Judgment of 7 July 2011. The complexity and importance of the case is evidenced by the fact that, in accordance with Art. 30 of the Convention, the Chamber to which the case was assigned relinquished jurisdiction in favour of the Grand Chamber. See para. 4.

97 The applicant also complained that the prison work performed by him clearly amounted to "forced or compulsory labour" within the meaning of Art. 4(2) of the Convention, which was rejected by the Court. Paras 112 to 134.

98 Para. 73: "... regarding its nature and aim, prison work differed considerably from regular employment. The former, corresponding to a statutory obligation and reintegration, while the latter was based on an employment contract and served the purpose of securing a person's subsistence and professional advancement".

99 Paras 76-77.

100 Para. 14. In a comparative perspective, at the material time, 22 member states of the Council of Europe gave prisoners access to the old-age pension system; while in 12 member states, including Hungary, prisoners were not covered by an old-age pension scheme. Para. 60.

101 Para. 82.

ADRIENNE KOMANOVICS

were not affiliated to the old-age pension system, violated Article 14 of the Convention in conjunction with Article 1 of the First Protocol.

First, the Court rejected the Government's arguments and found that the applicant as a working prisoner was in a relevantly similar situation to regular employees.¹⁰² Here, however, the Court's dynamism diminished and found that the difference in treatment pursued a legitimate aim, namely that of preserving the economic efficiency and overall consistency of the old-age pension system by excluding from benefits persons who have not made meaningful contributions.¹⁰³ When deciding on whether the difference in treatment was proportionate, the Court relied on the existence or non-existence of common ground between the laws of the contracting states.¹⁰⁴ The Court found that states had a relatively wide margin of appreciation when deciding on whether or not to affiliate working prisoners to the old-age pension system.¹⁰⁵ The Court noted the complexity of the issue, took into consideration the general costs of maintaining prisons, the fact that a prisoner's entire livelihood, including health and accident insurance, is provided for by the state, and also the fact that the applicant, although not entitled to an old-age pension, was not left without social cover.¹⁰⁶ Basing its argument on a comparative analysis, the Court held that it is only *gradually* that societies are moving towards the affiliation of prisoners to their social security systems and to their old-age pension systems.¹⁰⁷ This piecemeal feature seems to be the decisive factor in the Court's argument: apparently, the lack of a clear consensus among the member states of the Council of Europe in the matter served as an appropriate justification for a wide margin of appreciation for the states.

We cannot, however, but agree with the dissenter judges. Despite its sluggish nature, there is a clear and evolving trend in the Council of Europe's member states towards the affiliation of working prisoners to national social security systems. Arguably, this development is gradually reducing the margin of appreciation which states may enjoy in this area.¹⁰⁸ While it is reasonable to take economic realities into account, we have an uneasy feeling that the protection of an important human right was subordinated to economic considerations. Nevertheless, a ray of hope was given by the Court by requiring the

102 Paras 91 to 95.

103 Para. 98.

104 Para. 104.

105 Para. 89: "... a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'. ..". See also, para. 110.

106 Paras 102, 103 and 108.

107 Para. 106.

108 Para. 5 of the Joint partly dissenting opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popović, Malinverni and Pardalos.

respondent state to keep the issue raised by the present case under review and to take note of changing standards.¹⁰⁹

The dissenting judges also drew attention to the issue of elderly prisoners:

Nowadays, because of the long-term sentences being imposed in many countries, the presence of an older prison population is a new sociological reality which will necessarily raise the question of old-age pensions for such prisoners at the time of their release.¹¹⁰

12.4.8 *Indirect Impact*

The European Convention on Human Rights can be useful for the protection of the rights of the elderly in an indirect fashion as well. An interesting case concerned the freedom of expression of a so-called whistle-blower,¹¹¹ whose role is extraordinary important in the protection of the rights of the vulnerable, including the elderly. In *Heinisch v. Germany*,¹¹² the applicant was employed as a geriatric nurse in a nursing home, a state-owned company. She and her colleagues regularly indicated to the management that they were overburdened owing to a shortage of staff and that services were not being properly documented. In November 2004 the applicant's legal counsel lodged a criminal complaint alleging aggravated fraud in that her employer had knowingly failed to provide the high quality care announced in its advertisements, had systematically tried to cover up the problems and had urged staff to falsify service reports. In January 2005, however, the public prosecutor's office discontinued the preliminary investigations it had opened. In the same month, the applicant was dismissed on account of repeated absences through illness.¹¹³

The applicant alleged that her dismissal, on the ground that she had brought a criminal complaint against her employer alleging deficiencies in the institutional care provided, and the refusal of the domestic courts in the ensuing proceedings to order her reinstatement had infringed her right to freedom of expression.

The Court followed its usual course of analysis: having established that the criminal complaint lodged by the applicant could be regarded as whistle-blowing falling within the scope of Article 10, it went on to find that her dismissal and the related decisions of the

¹⁰⁹ Para. 110.

¹¹⁰ Para. 7 the Joint partly dissenting opinion of Judges Tulkens, Kovler, Gyulumyan, Spielmann, Popović, Malinverni and Pardalos.

¹¹¹ Whistle-blowing means the disclosure of deficiencies in enterprises or institutions (para. 31); while a whistle-blower can be defined as an individual sounding the alarm in order to stop wrongdoings that place fellow human beings at risk (para. 37 of the judgment in *Heinisch v. Germany*).

¹¹² *Heinisch v. Germany*, no. 28274/08, Judgment of 21 July 2011.

¹¹³ From 19 May 2003 onwards the applicant repeatedly fell ill and was sometimes unable to work. One medical certificate stated that this was the result of overworking.

ADRIENNE KOMANOVICS

domestic courts had interfered with her right to freedom of expression. That interference was prescribed by law, *i.e.* it was foreseeable for an employee that a criminal complaint against her employer might lead to the termination of her employment. The applicant's dismissal pursued the legitimate aim of protecting the reputation and rights of others, namely the business reputation and interests of the applicant's employer.

The key question was therefore whether this interference was proportionate and necessary in a democratic society. Here, the Court applied the criteria laid down in *Guja v. Moldova*,¹¹⁴ which include the issues of whether in making the disclosure the individual acted in good faith and in the belief that the information was true, whether it was in the public interest to disclose it and that no other, more discreet means of remedying the wrongdoing was available to him or her.¹¹⁵

The Court made a very detailed analysis of these criteria when deciding on the necessity of the restrictions of Ms Heinisch's freedom of expression. Due to the particular vulnerability of elderly patients and the need to prevent abuse, the Court found the information disclosed as undeniably of public interest.¹¹⁶ It noted that the applicant not only indicated, on numerous occasions to her superiors that she was overburdened, but also alerted the management to a possible criminal complaint.¹¹⁷ The information disclosed by Ms Heinisch was found to be authentic, accurate and reliable, and the applicant's motives for lodging the criminal complaint, while possibly including the amelioration of her own working conditions, had mainly been the potential threat to the health of the particularly vulnerable patients resulting from the unsatisfactory working conditions in the nursing home.¹¹⁸ While the allegations were certainly prejudicial to the business reputation and commercial interests of the nursing home, the public interest in receiving information about shortcomings in the provision of institutional care for the elderly by a state-owned company was so important in a democratic society that it outweighed the interest in protecting the latter's business reputation and interests.¹¹⁹ Finally, the applicant had been given the heaviest penalty possible under labour law, which, apart from the direct effect it had on the applicant's career, had a more general negative impact, notably a serious chilling effect both on other company employees and on nursing-service employees generally, so discouraging reporting in a sphere in which patients were frequently not capable of defending their own rights.¹²⁰

114 *Guja v. Moldova* [GC], ECHR (2008) no. 14277/04, 12 February 2008, para. 77.

115 Para. 69.

116 Para. 71.

117 Para. 73.

118 Paras 77 and 82, respectively.

119 Para. 90.

120 Para. 91.

The Court sustained that whistle-blowing is particularly important “in the area of care for the elderly, where the patients are frequently not capable of defending their own rights and where members of the nursing staff will be the first to become aware of unsatisfactory conditions in the care provided and are thus best placed to act in the public interest by alerting the employer or the public at large”.¹²¹ Thus, quite progressively, the Court found that the applicant’s dismissal without notice from her employment constituted a disproportionate interference with her freedom of expression.

Since most member states of the Council of Europe have no comprehensive laws for the protection of whistle-blowers,¹²² the Judgment in *Heinisch* (and in *Guja*) provides a significant complementary protection to whistle-blowers.

12.5 CONCLUSIONS

From the brief description of the cases above, we can conclude that the European Convention on Human Rights certainly has a potential when it comes to the protection of the rights of the elderly. In this regard, the treatment of older persons in institutionalized or home care (ill-treatment, deprivation of liberty); the guarantees of fair trial and timeliness of any judicial remedy; the prohibition of discrimination (or multiple discrimination); and the need to protect their property (including welfare benefits) might be of particular importance.

Nevertheless, it also transpires that existing international instruments, while applicable to older persons, do not offer adequate protection.¹²³ This became clear in *Stummer*, where the Court accepted that the protection afforded to the applicant could be made, at least partially, dependant on the economic realities of the state.

Arguably, unique barriers and specific challenges faced by older persons deserve dedicated attention. Neither the Convention, nor other European treaties actually cover issues like violence and abuse of older persons, compulsory retirement age,¹²⁴ the integration of the elderly in information society in the light of rapid technological change, bioethical issues,¹²⁵ the right to a dignified death, including the right of access to palliative treatment or the right to be free from negative stereotypes.

121 *Ibid.*

122 Parliamentary Assembly of the Council of Europe Res. 1729 (2010), 29 April 2010.

123 See e.g., K.L. Tang & J.J. Lee, ‘Global Social Justice for Older People: The Case for an International Convention on the Rights of Older People’, 36 *British Journal of Social Work* 7, 2006, pp. 1135-1150, or F. Megret, ‘Human Rights of Older Persons: A Growing Challenge’, 11 *Human Rights Law Review* 1, 2011, pp. 37-66.

124 See e.g., Case C-286/12, *Commission v. Hungary*, judgment of the Court of Justice of the European Union of 6 November 2012, on a national scheme requiring compulsory retirement of judges, prosecutors and notaries on reaching the age of 62.

125 CDDH, ‘Draft Preliminary Study on the Promotion of the Human Rights and Dignity of the Elderly: Existing Standards and Outstanding Issues’, CDDH (2012)002, Strasbourg, 18 January 2012, paras 28-30.

ADRIENNE KOMANOVICS

The Advisory Committee of the UN Human Rights Council argued that

[j]ust as women, children, and the disabled have been recognized as distinct groups requiring special care and concern under the existing human rights regime, the elderly population must be recognized as a distinct group whose human rights are protected by international law.¹²⁶

Furthermore, when it comes to the aged population usually more weight is attached to economic and social rights, though arguably civil and political rights are just as important.¹²⁷ In our view, transition towards demographic maturity necessitates the development of specific standards on the human rights of elderly persons. Currently, notwithstanding the complexity of the problem, low political priority is given to ageing issues, partly because older persons are not usually an organized and visible group that demands attention, partly due to the lack of resources. Hopefully, a specific convention on the elderly would further promote a rights-based approach to ageing policies.

126 Working Paper prepared by Mrs Chinsung Chung, Human Rights Council Advisory Committee, A/HRC/AC/4/CRP.1 (4 December 2009), para. 60.

127 Report of the UN Open-ended Working Group on Ageing, first working session (April 2011). A/AC.278/2011/4, 17 May 2011, p. 8.