

SOCIAL RIGHTS IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Dr. Danutė Jočienė

Judge of the European Court of Human Rights,
Associate Professor
of the Department of International
and European Union Law
of the Faculty of Law Vilnius University
Saulėtekio str. 9, I bld., r. 309, LT-10222, Vilnius-40
Tel. (+370 5) 236 61 79

The present Article deals with the question of interpretation of social rights in the jurisprudence of the European Court of Human Rights (hereafter – the Court)¹. In the article the Author analyses the social rights' issues under the European Convention on Human Rights and their interpretation given by the European Court of Human Rights. Social rights were not included into the text of the Convention adopted in 1950. Nevertheless, the Court has opened the door for a new interpretation of human rights enshrined in the Convention taking into account the social issues of the rights involved and setting up new tendencies for their full and effective implementation at international and national levels. Different social rights' issues, arising in the applications submitted to the Court, especially in the last years, raise the discussion whether exclusion of social rights can still be regarded as legitimate and where there is already a need to include expressly the social rights into the text of the Convention or, whether, the protection of social rights is sufficient under the provisions of the European Social Charter and under the broader interpretation of such rights provided for by the European Court of Human Rights.

Straipsnyje analizuojama socialinių teisių aiškinimo ir taikymo klausimai Europos žmogaus teisių teismo praktikoje. Pažymėtina, kad socialinės teisės nebuvo įtrauktos į Europos žmogaus teisių konvencijos tekstą, priimtą 1950 m., todėl peticijos dėl socialinių teisių gynimo buvo atmetamos kaip nesuderinamos su Konvencijos nuostatomis. Ilgainiui, vykstant socialiniams pokyčiams ir plečiantis teisių, numatytų Konvencijoje, aiškinimo ir taikymo riboms, Europos žmogaus teisių teismas ėmė aiškinti Konvencijoje numatytas teises plačiau, apimdamas ir atitinkamus socialinių teisių aspektus. Straipsnyje taip pat keliamas klausimas, į kurį kol kas negalima rasti vienintelio atsakymo, ar ne laikas būtų aiškiai įtraukti socialinių teisių kategoriją į Europos žmogaus teisių konvencijoje numatytų teisių sąrašą, ar vis dėlto užtenka Teismo plečiamo aiškinimo šių teisių atžvilgiu bei Europos socialinės chartijos nuostatų.

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms

(hereafter – the Convention or the ECHR) adopted in 1950 safeguards only the rights expressly included in it. The aim of the Convention is foreseen in the Preamble of the Convention – to pursue the maintenance and further realisation of human rights and fundamental freedoms [1, p. 3].

¹ For the Conference organised by the Finnish representation and the European Social Charter secretariat in honour of Judge Pellonpää and Mr Mikkola (outgoing member of the European Committee on Social Rights).

When preparing and adopting the Convention in 1950, the social rights were not included into the text of the Convention or its Protocols thereto. Applications entailing the complaints on social rights issues, submitted to the European Court, were or, with some exceptions, are generally declared inadmissible as manifestly ill-founded or inadmissible *ratione materiae* under Article 35 of the Convention.

However, the intention at the outset was to supplement later the Convention with an instrument on economic and social rights. This plan was not fulfilled until 1961, when the European Social Charter was signed [2, p. 5–45]. It was put into force in 1965, and has subsequently been revised, as well as supplemented by additional Protocols [3, p.1]. The European Social Charter is a treaty adopted within the framework of the Council of Europe, which protects the main economic and social rights, for ensuring of which three additional Protocols had been adopted, one of them – changing the control system of the Charter (on 21 October 1991 so called Turin Protocol No. 2 was adopted), and on 9 November 1995 Protocol No. 3, which establishes the collective complaints system, was adopted (this Protocol came into force on 1 July 1998). On 5 May 1988 the Protocol No. 1 was adopted, which guarantees the four rights, valid from 1992 [3, p. 11]. The Revised Social Charter was signed in 1996 and came into force on 1 July 1999. The Revised Social Charter will consequently replace the old Charter of 1961.

It should be also noted that the Universal Declaration of Human Rights, adopted in 1948, contains nearly the whole range

of human rights within one consolidated text. The subsequent division of human rights into two main categories in the United Nations system (the civil and political rights and economic, social and cultural rights – the Author’s note) resulted from a controversial and contested decision made by the UN General Assembly in 1951 [...], when the General Assembly decided that two separate human rights covenants should be prepared, one on civil and political rights and another on economic, social and cultural rights [4, p. 9–10]. These two mentioned covenants in the UN system were adopted in 1966 in the form of treaties which become binding upon the State after its ratification or accession to those treaties.

It was argued [...] that the two sets of rights were of a different nature and therefore needed different instruments. Civil and political rights were considered to be “absolute” and “immediate”, whereas economic, social and cultural rights were held to be programmatic, to be realized gradually, and therefore not a matter of rights [4, p. 10].

The sources of economic, social and cultural rights in international law can be found in numerous declarations and conventions. In this article the analysis of the mentioned rights will be focused under the European Convention on Human Rights and the Court’s jurisprudence.

Economic, social and cultural rights constitute three interrelated components [...]. At a core of *social rights* is the right to an adequate standard of living [...]. The enjoyment of this right requires, at a minimum, that everyone shall enjoy the

necessary subsistence rights – adequate food and nutrition, clothing, housing and the necessary conditions of care. Closely related to this right is the right of families to assistance [...]. In order to enjoy these social rights, there is also a need to enjoy certain economic rights. These are the right to property, the right to work and the right to social security [...] [4, p. 17–18].

The European Court of Human Rights was established in 1959 and can be described as the most successful international judicial mechanism with the compulsory jurisdiction for all its Member States (after the Protocol 11 entered into force in 1998). Granting the right to an individual complaint to every European citizen (nowadays there are 46 Member States to the Convention), the Court has opened the door for a new interpretation of human rights and set up the guidelines for their full and effective implementation at international level. Furthermore, the Court's final judgments are binding on the State concerned under Article 46 of the Convention and the Committee of Ministers has an obligation to supervise the execution of the final Court's judgments.

Furthermore, the increasing number of applications concerning different social rights' issues raises the discussion whether such exclusion of social rights can still be regarded as legitimate and where there is already a need to include expressly the social rights into the text of the Convention or to adopt a separate Protocol which could enshrine the social rights.

It should be also noted that the application and interpretation of social rights has become more visible in the recent decades

and the European Court of Human Rights has been interpreting the social rights issues under the provisions of many Articles of the Convention. Furthermore, after the Protocol 12 of the Convention (General non-discrimination clause) entered into force in 2005, the discussions on social rights issues under the Convention will become more appropriate [1, p. 54–58].

In the case *Airey v. Ireland* (Appl. No. 6289/73, judgment of 9 October 1979, § 26), where the Court had discussed the relationship between civil and political rights, it was declared: „The Court is aware that the further realisation of social and economic rights is largely dependent on the situation [...] in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions (above-mentioned Marckx judgment, p. 19, para. 41) and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals (see paragraph 24 above). Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. [...] Therefore the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention“.

The same approach extending some guarantees of the Convention was taken by the Court in the cases *Sidabras and Džiautas v. Lithuania* (appl. Nos. 55480/00 and 59330/00, judgment of 27 July 2004,

§ 47), with regard to Article 8 (in conjunction with Article 14) of the Convention issues, where the Court had decided that „[...] a *far-reaching ban on taking up private sector employment does affect “private life”*. It attached a particular weight to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights (see paragraph 31 above) and to the texts adopted by the ILO (see paragraph 32 above). It further reiterated that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention“ (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14–16, § 26).

Taking into account the above examples, the conclusion can be drawn that the place of the social rights under the Convention was not clearly determined, on the other hand, the European Court of Human Rights has successfully started to interpret the provisions of the Convention by broadening them and giving some particular weight to the economic/social aspects of the rights involved; it also seems that the broader application of the Convention can be expected taking into account the fact that the Court has successfully developed in the last years the theory of States’ positive obligations under the Convention to guarantee fully the rights enshrined in the Convention.

Some Articles (both procedural rights and substantial) of the Convention could or even are already interpreted by broadening their scope in order to cover and guarantee the protection of social rights which are not clearly enshrined in the Conven-

tion. Such Articles are (the Author submits her personal view only):

I. Procedural aspects:

1. Article 6 of the Convention and the right to a *fair trial*.

II. Substantial Articles:

2. Right to life – Article 2;
3. Prohibition of torture – Article 3;
4. Private and family life issues under Article 8;
5. Freedom of assembly and Association – Article 11;
6. Prohibition of discrimination – Article 14, taken in conjunction with Articles 2, 3, 8, 11 or Article 1 of the Protocol 1, etc.
7. Protection of property – Article 1 of the Protocol 1.

All the mentioned Articles are directly reflected in a number of provisions of the European Social Charter: Art. 1 – the right to work; Art. 5 and 6 – the right to association and the right to collective bargaining; Art. 12 and 13 – the right to social security and to social and medical assistance, etc.

I. Examples from the jurisprudence of the ECHR with regard to social rights issues

A. Inadmissibility decisions:

The cases where the Court has already declared a number of applications raising some social aspects as manifestly ill-founded or incompatible *ratione materiae* with the provisions of the Convention:

Case of *Zehnalova and Zehnal v. Czech Republic* (Appl. No. 3821/97, decision on admissibility of 14 May 2002) – the applicants were a physically disabled person

and her husband. In the town in which they lived many public buildings did not have any access for the disabled, despite the fact that Czech legislation required that they be accessible by people with mobility problems. The applicants asked the administrative authorities and then the courts to remedy this situation but no decision was made. Invoking Articles 3, 8 and 14 of the Convention the applicant complained that many public buildings in the town did not have any access for the disabled, therefore they had suffered discrimination in regard to their private life as a result of the physical condition of the first applicant. The Court had declared this case inadmissible *ratione materiae* and manifestly ill-founded under the provisions of Article 35 §§ 3 and 4 of the Convention because “the rights relied on were too broad and indeterminate” and lack of access to the public buildings in this particular case had not interfered with the applicants’ right to establish and develop relationship with other human beings or the outside world. The Court stated that “Article 8 of the Convention cannot be taken to be generally applicable each time the first applicant’s everyday life is disrupted [...]”.

In the case *Nitecki v. Poland* (Appl. No. 65653/01, decision as to the admissibility of 21 March 2002) the applicant complained that he was obliged to take “life saving” drugs which were very expensive, and only 70% of the costs of the drugs were compensated by the State’s social security system. The Court decided that the applicant’s life was not put at risk, and therefore the State, compensating the greater part of the cost of the required drugs, had fulfilled

its positive obligations under Art. 2 of the Convention. This case can be seen in correlation with Art. 11 and 13 of the Revised European Social Charter, which guarantees the right to protection of health and the right to social and medical assistance.

Another suitable example is the Committee case – *Ozbas v. Turkey*, in which the decision of the three Judges’ Committee was adopted on 24 October 2006. The applicant complained about the impossibility to benefit from the work accident insurance scheme after an accident in his working place, but the national courts in this case had decided that the accident could not be classified as an obvious work accident due to the negligence from the applicant’s side (moving his body incorrectly). The Court declared this case as manifestly ill-founded taking into account the fact that the proceedings at national level were conducted fairly and the applicant was able to present his case properly before the courts.

It should also be noted that the ECHR (The Committee of three judges) had dismissed as manifestly ill-founded and incompatible *ratione materiae* with the Convention a number of applications against Lithuania in 2004–2005, where the applicants had complained about infringement of their economic right to privatise the flats where they had been living for many years. The applicants were dissatisfied with the domestic provisions, claiming that the State should have permitted them to privatise their flats, instead of returning them to the previous owner. The Court decided that the Convention does not guarantee, as such, the right to obtain property or the right to socio-economic assistance such as

charge-free dwelling (see, *mutatis mutandis*, *Jasiūnienė v. Lithuania*, No. 41510/98, judgment of 3 March 2003). The Court had stated that the applicants had been only tenants of the flats at the moment of the entry into force of Protocol No. 1 with regard to Lithuania (24 May 1996), and had had no proprietary claims vis-à-vis the flat on the basis of the applicable domestic legislation (see, the Committee cases *Armalis v. Lithuania*, Appl. No. 17260/03, decision of 27 October 2004; *Kalinauskienė v. Lithuania*, Appl. No. 28055/03, decision of 23 November 2004; etc.).

Another Lithuanian example, a very sad one – the Lithuanian pensioner’s claims under Article 1 of the Protocol 1, with regard to reduction of their old-age pensions’ amount for pensioners continuing employment at the time of their retirement (*Jurgauskas v. Lithuania*, No. 17535/03, decision on 28 April 2005; *Valiulis v. Lithuania*, No. 5766/04, decision on 13 September 2005; *Gaivenis v. Lithuania*, No. 5768/04, decision on 13 September 2005; etc.). The Court, taking into account the fact that the pensions were reduced legally under the legislation changes introduced in 1994, decided that the State has still quite a broad *margin of appreciation* in the field of social legislation therefore, and the common interests in this cases prevailed. Furthermore, the Court quite clearly stated that the Convention does not guarantee, as such, a right to a pension of a certain amount. The Court in this case did not refer to the Revised European Social Charter which in Article 12 guarantees the right to social security.

The Court also rejected as manifestly ill-

founded the application *Mozuras v. Lithuania* (Appl. No. 8962/04, decision of the Committee of 13 September 2005) where the applicant complained that he was not allowed to obtain a special pension benefit for the specific period after the statutory amendments making the former Communist party ineligible for the special benefit. The same conclusion was made in another Committee case *Demėnokas v. Lithuania* (Appl. No. 22192/02, decision of 28 April 2005).

B. Admissible cases

1. Article 6 of the Convention and the right to a fair trial – procedural aspects

With regard to this aspect it should be mentioned that application of Article 6 of the Convention in the social matters can arise in different situations: in the case of *Airey v. Ireland* (Appl. No. 6289/73, judgment of 9 October 1979) the right to free legal assistance was emphasized as a social dimension of the right to a *fair trial*; in some other cases the protection of social and economic rights through Article 6 of the ECHR relates to *access to courts*, full equality of arms with administrative authorities; independent, impartial, and timely decision making, full reasoning for the decision [...]. Article 6 § 1 of the Convention does not establish binding standards on the level of social security benefits, but in case social security benefit is interpreted as falling under the “civil rights” clause in Article 6 § 1, it becomes a truly individual right with all necessary safeguards against any arbitrariness or discrimination in its

allocation [11, p. 35]. In some specific circumstances Article 6 § 1 can be applied when a person claims for compensation for a medical negligence or damage made to his/her health or a person brings the proceedings for some social benefits, old-age pensions must be calculated and awarded in the case of old-age pension, sickness, accidents at work, contributions under the insurance schemes, etc. In such cases Art. 6 of the Convention is applicable under its *civil limb*, where clear pecuniary aspect is involved.

In the cases of *Feldbrugge v. the Netherlands* (judgment of 29 May 1986, Publications of the European Court of Human Rights, Series A, No. 99) and *Deumeland v. Germany* (judgment of 29 May 1986, Publications of the European Court of Human Rights, Series A, No. 100) the European Court of Human Rights took its first step in extending the protection of Article 6 § 1 to social security benefits. In those cases, the decisive criterion was that the private law features of the benefits in question were predominant in relation to coexisting public law features and that, therefore, the right to the benefits in question was a “civil right” [11, p. 35–36].

In 1993, the European Court took a second major step. In the cases *Salesi v. Italy* (see below) and *Schuler – Zraggen v. Switzerland* (judgment of 24 June 1993 Publications of the European Court of Human Rights, Series A, No 263), the protection of Article 6 § 1 was extended to statute-based social security benefits with a public law character. Irrespective of whether a certain form of social security or allowance has a background in private-

law relationships (notably an employment contract) or is a right guaranteed by public law, its allocation must meet all the standards of a fair trial [11, p. 37].

In the mentioned case of *Salesi v. Italy* (Appl. No. 13023/87, judgment of 26 February 1993) the Court solved the question concerning the applicability of Article 6 § 1 of the Convention to social security disputes. The applicant had initiated the proceedings against the social security services for refusal to grant her monthly invalidity pension. The Court had found the violation for the length of proceedings which had been lasting more than 6 years. The Court noted that, despite the diversity of national legislation on social matters, there was a legal trend that justified the application of Article 6 to cases concerning rights of pecuniary nature (§ 19). The Court had found the violation for the length of proceedings which had been lasting more than 6 years noting that in view of the importance of the right at issue, the time which had elapsed could not be considered as reasonable.

In the cases *Jacque and Ledun v. France* (Appl. No. 40493/98, judgment of 28 March 2000 and *Kritt v. France* (Appl. No. 57753/00, judgment of 19 March 2002) the applicants claimed for compensation for infection with the virus of Hepatitis C and of HIV following transfusion of blood products. The State’s liability was recognised for the infection and compensation was allowed. In both cases the Court had found a violation of Art. 6 of the Convention under its civil head with regard to the length of the compensation proceedings involved, which in both cases could not be

regarded as reasonable taking into account the exceptional diligence which is required from the authorities when dealing with such painful issues (in the first case – about 7 years and in the second case – a period of four years).

In the case of *Mennitto v. Italy* (Appl. No. 33804/96, judgment of 5 October 2000) the Court found a violation of the length of proceedings following the applicant's request for social benefit to be granted for families caring for disabled family members at home, which was based on the provisions of Italian legislation. The Court considered that the right invoked in this case was of a pecuniary nature and was a civil right within the meaning of its case-law.

The two very important cases – *Burdov v. Russia* (Appl. No. 59498/00, judgment of 7 May 2002) and *Svetlana Naumenko v. Ukraine* (Appl. No. 41984/98, judgment of 9 November 2004) – where social rights' issues were involved, the Court had also established a violation of Article 6 § 1 in that the applicants' "civil right" was not determined within a "reasonable time". The applicant Burdov as Chernobyl relief worker was granted some compensation, which was reduced and after, not paid due to the lack of funds. In the case of Svetlana Naumenko § 1 of Article 6 of the Convention was also applicable and furthermore, violated in respect of the quashing of a final and binding judgment given in the applicant's favour. The Court also found a violation of Article 1 of Protocol 1 with regard to her disability pension which was granted by a final and binding judgment of the Court and later on – refused.

2. *Material Articles of the Convention and their interpretation with regard to social rights aspects*

2.1. Article 2 of the Convention, right to life

Article 2 of the Convention, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted (see *Velikova v. Bulgaria*, no. 41488/98, § 68, ECHR 2000-VI). Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed (see *Salman v. Turkey* [GC], no. 21986/93, § 97, ECHR 2000-VII) [5, p. 30]. It may also be observed that the Court has already recognised that there may be a positive obligation on the State under the first sentence of Article 2 § 1 to protect the life of the individual from third parties or from the risk of life-endangering illness (see *Osman v. the United Kingdom*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, pp. 3159–63, §§ 115–22; *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, *Reports* 1998-III, pp. 1403–04, §§ 36–41) [5, 30].

In the case of *Calvelli and Ciglio v. Italy* (Appl. no. 32967/996, judgment of 17 January 2002) the Court analysed the responsibility of the State for negligence of a doctor during the delivery of a child. No violation of Art. 2 (right to life) and 6 (length of the proceedings) was established. The

Court had stressed the very important principle that Art. 2 of the Convention which imposes on States to take appropriate measures to safeguard the lives of people, must also be applied to the public health sphere (§ 48–49). This mentioned solution can be useful for interpretation and application of the right to protect health mentioned in Article 11 of the European Social Charter.

Moreover, in the case it was stated that the aforementioned positive obligations under Article 2 of the Convention require States to make regulations compelling hospitals, whether public or private, to adopt appropriate measures for the protection of their patients' lives. They also require an effective independent judicial system to be set up so that the cause of patients' death in the care of the medical profession, whether in the public or the private sector, can be determined and *those responsible made accountable* (see, among authorities, *Erikson v. Italy* (dec.), no. 37900/97, 26 October 1999; and *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V; see also *Işiltan v. Turkey*, no. 20948/92, Commission decision of 22 May 1995, DR 81-B, p. 35). This case can be regarded as a very important step in developing the interpretation of the State's responsibility in the health sphere.

In the case *Pretty v. the United Kingdom*, where the applicant was suffering from a degenerative and incurable illness, motor neurone disease (MND), which was at an advanced stage (see analysis submitted under Article 3), the Court found that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Ar-

ticle 2 of the Convention. However, the Court was careful to stress that this ruling did not mean that if a particular State does recognise such a right, that would *ipso facto* be contrary to Article 2; nor did it mean that if a State that did recognise a right to take one's own life were to be held to have acted in accordance with Article 2 [...] [6.1, p. 20].

2.2. Article 3 of the Convention – prohibition of torture, inhuman or degrading treatment and some social issues involved

As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). The Court further recalls that, according to its case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see *Valašinas v. Lithuania*, Appl. No. 44558/98, Judgment of 24 July 2001, §§ 100–101; *Peers v. Greece*, no. 28524/95, §§ 67–68, 74, ECHR 2001-III; etc.).

Even more, speaking from the position of the positive obligation under the Convention, Articles 1 and 3 of the Convention place a number of positive obligations

on the High Contracting Parties, designed to prevent and provide redress for torture and other forms of ill-treatment (the case of *Al-Adsani v. the United Kingdom*, Appl. No. 35763/97, judgment of 21 November 2001, § 38). Thus, in *A. v. the United Kingdom* (judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2699, § 22) the Court held that, by virtue of these two provisions, States are required to take certain measures to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment.

In the above mentioned *Pretty v. the United Kingdom* judgment (Appl. No. 2346/02, judgment of 29 April 2002 (final 29 July 2002, see §§ 49–52 of the judgment) the Court stated that Article 3 of the Convention, together with Article 2, must be regarded as one of the most fundamental provisions of the Convention and as enshrining core values of the democratic societies making up the Council of Europe (see *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, p. 34, § 88). It may be described in general terms as imposing a *primarily negative obligation on States* to refrain from inflicting serious harm on persons within their jurisdiction. However, in light of the fundamental importance of Article 3, the Court has reserved to itself sufficient flexibility to address the application of that Article in other situations that might arise (see *D. v. the United Kingdom*, judgment of 2 May 1997, *Reports* 1997-III, p. 792, § 49). In particular, the Court has held that the obligation [...] a positive obligation on the State to provide protection against

inhuman or degrading treatment has been found to arise in a number of cases: see, for example, *A. v. the United Kingdom* where the child applicant had been caned by his stepfather, and *Z and Others v. the United Kingdom* ([GC], no. 29392/95, ECHR 2001-V), where four child applicants were severely abused and neglected by their parents. Article 3 also imposes requirements on State authorities to protect the health of persons deprived of liberty (see *Keenan*, cited above, concerning the lack of effective medical care of a mentally ill prisoner who committed suicide, and also *Kudla v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI).

As regards the types of “treatment” which fall within the scope of Article 3 of the Convention, the Court’s case-law refers to “ill-treatment” that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering [...]. The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible (see *D. v. the United Kingdom* and *Keenan*, both cited above, and *Ben-said v. the United Kingdom*, no. 44599/98, ECHR 2000-I).

In the present case, the applicant has claimed rather that the refusal of the State authorities to give an undertaking not to prosecute her husband if he assisted her to commit suicide and the criminal-law prohibition on assisted suicide disclose inhuman and degrading treatment for which

the State is responsible as it will thereby be failing to protect her from the suffering which awaits her as her illness reaches its ultimate stages. This claim, however, places a new and extended construction on the concept of treatment [...]. The Court therefore concluded in that case that no positive obligation arises under Article 3 of the Convention to require the respondent State either to give an undertaking not to prosecute the applicant's husband if he assisted her to commit suicide or to provide a lawful opportunity for any other form of assisted suicide. There has, accordingly, been no violation of this provision.

In this case the Court did not go so far in declaring that Article 3 of the Convention can be interpreted as allowing the euthanasia. Furthermore, it's clear that a person adding to commit the euthanasia and to terminate the life of someone will be held to be responsible for the acts he commits under the provisions of the criminal law of the State concerned (where the euthanasia is not allowed).

2.2.1. Expulsion cases can raise the problem under Article 3 of the Convention when a person who is going to be expelled, would not be able to receive an adequate medical or other required treatment in the country of his/her destination

In the case *D. v. United Kingdom* (Appl. No. 146/1996/767/964, judgment of 2 May 1997) the applicant suffered from pneumonia and was diagnosed as suffering from AIDS. Before his release, directions were given for his removal to St. Kitts, although he was at the advanced stage of illness.

The Court notes that the applicant is at the advanced stages of a terminal and incurable illness. At the date of the hearing, it was observed that there had been a marked decline in his condition and he had to be transferred to a hospital.

Before the Court, the applicant argued that his expulsion to St. Kitts would condemn him to spend his remaining days in conditions of isolation and destitution, with no accommodation and no recourses. The termination of the medical treatment he was receiving would accelerate his death since no similar medical treatment was available in St. Kitts.

The Court noted the gravity of the offence which was committed by the applicant considering that severe sanctions to persons involved in drug trafficking, including expulsion is a justified response to this scourge (see § 46 of the judgment). However, in exercising its right to expel an individual to a third country, the Contracting State must have regard to the fact that Article 3 of the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment (§ 47). Therefore the Court thoroughly examined all the circumstances of the case and noted that there was a serious risk that the unfavourable conditions in St. Kitts would reduce the applicant's life expectancy and cause him extreme physical and psychological suffering. Given the compelling humanitarian considerations, the Court concluded that implementation of the decision to expel the applicant would be a violation of Article 3 of the Convention (§ 54 of the judgment) [5, p. 7].

But in the case of *Bensaid v. United Kingdom* (Appl. No. 44599/98, judgment of 6 February 2001) the Court came to the different conclusion – **no violation** of Article 3 of the Convention was found, where the circumstances of that case had been similar to the above mentioned *D. v. United Kingdom* case. The applicant had suffered from schizophrenia and complained that he would have great difficulties in obtaining an adequate medical treatment if deported to Algeria. The Court found the applicant's allegations as to a large extent of speculative nature and not reliable. Recalling that the risk of damage to the applicant's health from return to his country of origin was based on largely hypothetical factors and was not substantiated that he would suffer inhuman and degrading treatment, the Court concluded that in that case there was no violation of Article 3 of the Convention. Nor in the circumstances had it been established that his moral integrity would be substantially affected to a degree falling within the scope of Article 8 of the Convention (see § 48 of the judgment).

The same approach by the Court was taken in the case *S.C.C. v. Sweden* or even more stronger (Application no. 46553/99, decision on inadmissibility of 15 February 2000), when the application concerning the applicant who had suffered from AIDS was declared inadmissible as manifestly ill-founded due to the fact that AIDS treatment was also available in Zambia. It also noted that the applicant's children as well as other family members were living in Zambia. Considering this material, the Court decided that the applicant's situation was not such that her deportation

would amount to treatment proscribed by Article 3.

2.2.2. Socio-economic problems raised by the applicants under Art. 3 (can be seen in correlation with Art. 12 and 13 of the European Social Charter – the right to social security and the right to social and medical assistance)

In the case of *Pancenko v. Latvia*, decision of 28 October 1999 (inadmissible), the Court rejected all the complaints submitted by the applicant about her socio-economic problems in Latvia (debts for communal charges in respect of her flat, unemployment, absence of free medical assistance or financial support from the State) reiterating that: „The Convention does not guarantee, as such, socio-economic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance or the right to claim financial assistance from a State“.

The same approach was taken by the Court in the case *Rita Cannatella v. Switzerland* (stopping paying up work-seeking benefit for the woman who became pregnant), decision of 11 April 1996 (inadmissible), where the Court stated that “the Convention guaranteed no right to assistance from the State to maintain a certain standard of living”.

The same approach was also developed by the Court in the case *Larioschina v. Russia* (decision of 23 April, 2002, inadmissible) where the Court decided that an old-age pension and other social benefits were properly calculated and their amount, being wholly insufficient, could or may, in

principle, raise an issue under Art 3 (inhuman and degrading treatment), but in the present case no indications can be found showing that the amount of her pension had attained the minimum level of severity and had caused damage to her physical or mental health.

In the case *Z. and Others v. UK* (Appl. No. 29392/95, [GC], judgment of 10 May 2001), where the Court found a violation of Article 3 (and 13) for inaction on the part of the social services to react to the situation of four ill-treated children, the Court stated that the State had not granted an adequate protection for the minors (including their removal from the home where they had been ill-treated and malnourished). The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life. But the present case, however, leaves no doubt as to the failure of the system to protect these applicant children from serious, long-term neglect and abuse (see § 74 of the judgment). The mentioned case relates to the provisions of the Revised European Social Charter Art. 17 (the right of children and young persons to social, legal and economic protection) and the principles of that judgment can be used by the European Social Rights Committee in its practice.

2.3. Article 8 of the Convention and social rights issues involved

“Private life” is a broad term under the jurisprudence of the European Court of human rights and this term is not susceptible to an exhaustive definition. The Court has already held that elements such

as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18–19, § 41; *B. v. France*, judgment of 25 March 1992, Series A no. 232-C, pp. 53–54, § 63; *Burghartz v. Switzerland*, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports* 1997-I, p. 131, § 36)². Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, *Burghartz*, cited above, opinion of the Commission, p. 37, § 47, and *Friedl v. Austria*, judgment of 31 January 1995, Series A no. 305-B, p. 20, § 45). The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life (the case of *Bensaid v. the United Kingdom*, No. 44599/98, 8 February 2001, § 47).

In *Botta v. Italy* case (Appl. No. 153/1996/772/973, judgment of 24 February 1998) the applicant complained about the State’s failure to take appropriate measures to grant access to the beach (to lava-

² See also the case of *Lopez Ostra v. Spain*, judgment of 9 December 1994, Publications of the European Court of Human Rights, Series A, no. 303 – C; the case of *Guerra and Others v. Italy*, judgment of 19 February 1998, European Court of Human Rights, Reports of Judgments and decisions 1998-I, No. 64.

tories and ramps) to disabled people. The Court declared that Article 8 of the Convention is not applicable in this case due to the fact that the applicant's *private life was not directly affected* (Revised European Social Charter Art. 15 – the right of persons with disabilities to independence, social integration and participation in the life of the community). Another aspect in the jurisprudence of the ECHR with regard to social issues – the right to live in the clean surroundings – *Fadeyeva v. Russia* case (and see also *Taskin v. Turkey* case, Appl. No. 46117/99, CEDH 2004-X; *Öçkan and Others v. Turkey* case, Appl. No. 46771/99, judgment of 28 March 2006; *Hatton v. UK* case [GC], Appl. No. 36022/97, judgment of 8 July 2003, etc.), where the applicant invoked Article 8 of the Convention on account of the State's failure to protect her private life and home (she was living 450 m from the plant) from severe environmental nuisance arising from the industrial activities of the Severstal steel-plant. Finding a violation of Art. 8, the ECHR has broadened the notion of private life adding to it the person's right to live in the safe and clean atmosphere. The same conclusion was reached in the mentioned case *Taskin v. Turkey* case, where the applicants alleged that both the national authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making process had given rise to a violation of their rights guaranteed by Article 8 of the Convention. On 13 May 1997 the Supreme Administrative Court annulled the decision of 19 October 1994 and cited the State's positive obligation concerning the right to life and

the right to a healthy environment stating that due to the gold mine's geographical location and the geological features of the region, the operating permit did not serve the general interest; those studies had outlined the danger of the use of sodium cyanide for the local ecosystem, and human health and safety (see paragraph 26 above). The judgment of 13 May 1997 became enforceable at the latest after being served on 20 October 1997, however, the Ovacık gold mine was not ordered to close until 27 February 1998, that is, ten months after the delivery of that judgment and four months after it had been served on the authorities (see paragraph 35 above). Furthermore, the Council of Ministers by the decision of 29 March 2002 which was not made public, authorised the continuation of production at the gold mine, which had already begun to operate in April 2001 (see paragraph 75 above). In so doing, the authorities deprived the procedural guarantees available to the applicants of any useful effect and, therefore, the respondent State did not fulfil its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention [7, p. 207–208]³.

The conclusion can be drawn that the European Court of Human Rights has already established in its jurisprudence that a serious case of environmental damage creating health problems to the people living around could be a violation of Article 8

³ See also Danutė Jočienė, Kęstutis Čilinskas. Žmogaus teisių apsaugos problemos tarptautinėje ir Lietuvos Respublikos teisėje. Antrasis atnaujintas ir papildytas leidimas. Teisės projektų ir tyrimų centras, 2005. P. 105–123.

of the Convention under the scope of “private” life and home.

But in the above mentioned case of *Hatton v. the United Kingdom* the Court found no violation of Article 8 of the Convention, where the applicants complained about the aircraft noise generally, including night flights noise. The Court came to the conclusion that the authorities had consistently monitored the situation, and that the 1993 Scheme was the latest in a series of restrictions on night flights which stretched back to 1962. The particular new measures introduced by that scheme were announced to the public [...]. The applicants and persons in a similar situation thus had access to the Consultation Paper, and it would have been open to them to make any representations they felt appropriate [...]. In these circumstances the Court could not find that, in substance, the authorities overstepped their *margin of appreciation* by failing to strike a *fair balance* between the right of the individuals affected by those regulations to respect for their *private life and home* and the conflicting interests of others and of the community as a whole, nor did it find that there had been fundamental procedural flaws in the preparation of the 1993 regulations on limitations for night flights, and, accordingly, there had been no violation of Article 8 of the Convention [8, §§ 123–130].

In the already mentioned Lithuanian case – *Sidabras and Džiautas v. Lithuania* (judgment of 27 July 2004) where the applicants, the former KGB workers, complained about the restrictions to be employed in the private sector of the State, the Court had decided that: „[...] a far-

reaching ban on taking up private sector employment does affect “private life”. It attached a particular weight in this respect to the text of Article 1 § 2 of the European Social Charter and the interpretation given by the European Committee of Social Rights (see paragraph 31 above) and to the texts adopted by the ILO (see paragraph 32 above)“.

It further reiterated that there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 14–16, § 26).

In these Lithuanian cases, Art. 14 was found to be violated in conjunction with Art. 8 of the Convention, because former KGB workers were in a discriminatory position for their possibilities to be employed in the private sector with regard to their past KBG activities.

This case, in my opinion, is a very clear development of the notion of *private life* adding to it also a possibility to be employed in the private sector of the State without any unreasonable restrictions. This interpretation provided by the Court could give some thoughts to the European Committee of Social Rights when applying and interpreting the right to work foreseen in Art. 2 of the Revised Social Charter.

No violation had been found by the Court in the case *Chapman v. the United Kingdom* (Appl. No. 27238/95, judgment of 18 January 2001), where the applicant (being of Roma origin) complained about the State’s interference in her private and family life when she was not allowed to station her caravan on the land which was

in a Green Belt area. The Court decided that Art. 8 did not impose on the State an obligation to provide a home for every person. In § 115 of the judgment the Court decided: „[...] The humanitarian considerations which might have supported another outcome at national level cannot be used as the basis for a finding by the Court which would be tantamount to exempting the applicant from the implementation of the national planning laws and obliging governments to ensure that every Gypsy family has available for its use accommodation appropriate to its needs [...]“.

And therefore the Court came to the conclusion that in this case the State had acted “in accordance with the law” in order to protect “the rights of others”.

2.4. Article 11 of the Convention – freedom of assembly and association

In the opinion of the Author, it could be stressed that this Article is one of the most important Articles where social rights issues are clearly established and foreseen – this Article is the closest Article to the provisions of Articles 5 and 6 of the European Social Charter and of the Revised European Social Charter of 1996 (Art. 5 – the right to organise and Art. 6 – the right to bargain collectively).

The freedom of assembly is a fundamental right in a democratic society and, also, it is one of the foundations of a democratic society. This right covers both private meetings and meetings in public thoroughfares [9, p. 335].

With regard to the freedom of association the Court in the case *The National*

Union of Belgian Police (judgment of 27 October 1975, Series A No. 19, p. 17) the Court observed that trade union freedom is a particular feature of freedom of association.

The freedom of association has been very deeply developed and interpreted in the jurisprudence of the Court. The Court decided that this freedom applies also to political parties [9, p. 337]. The Court has developed the principle that Art. 11 of the Convention enshrines “**not only a positive right to form and join an association, but also the negative aspect of that freedom, namely the right not to join or withdrawn from an association**” [9, p. 340–343].

The Court found no violation in the case of *Gustafsson v. Sweden* (Appl. No. 18/1995/524/610, judgment of 26 March 1996 (pronounced 25 April 1996), where the applicant was complaining about the State’s failure to protect him from a trade union pressure whose aim was to have him bound by a collective bargaining although he did not wish this. The Court stated in this judgment: „[...] In the most recent judgment delivered in this connection, Article 11 (art. 11) of the Convention has been interpreted to encompass not only a positive right to form and join an association, but also the negative aspect of that freedom, namely the right not to join or to withdraw from an association (see Sigurdur A. Sigurjónsson judgment, pp. 15–16, para. 35). Whilst leaving open whether the negative right is to be considered on an equal footing with the positive right, the Court has held that, **although compulsion to join a particular trade union may not always be contrary to the Convention**

[...]“ (see, for instance, Sibson judgment, p. 14, para. 29).

Therefore the Court came to the conclusion that bearing in mind the special role and importance of collective agreements in the regulation of labour relations in Sweden, the Court saw no reason to doubt that the union action pursued legitimate interests consistent with Article 11 (art. 11) of the Convention (see, for instance, the *Swedish Engine Drivers' Union* judgment, pp. 15–16, para. 40; and the *Schmidt and Dahlström v. Sweden* judgment of 6 February 1976, Series A no. 21, p. 16, para. 36). In this judgment the Court also referred to the number of international instruments, in particular Article 6 of the European Social Charter, which concerns the freedom of association and the right to organise.

In the light of the foregoing, the Court decided that compulsion to sign a collective agreement had not significantly affected the enjoyment of the freedom of association and had not therefore given rise to a positive obligation on the State (§ 52). The Court decided that Sweden had not failed to secure the applicant's rights under Article 11 of the Convention.

But in the Grand Chamber case *Sorensen and Rasmusen v. Denmark* (Appl. Nos. 52562/99 and 52620/99, [GC] judgment of 11 January 2006), where the applicants complained that the existence of pre-entry closed-shop agreements in Denmark and their application to them **violated their right to freedom of association guaranteed by Article 11 of the Convention**, the Court found the violation of Art. 11 in respect of both applicants. With regard to the context of this article it is very impor-

tant to mention that the Court also referred to (§ 35) Article 5 of the European Social Charter which provides for “the right to organise” and made a reference to the case of *Confederation of Swedish Enterprise against Sweden* (Collective Complaint no. 12/2002), where the European Committee of Social Rights found that the situation in Sweden as regards pre-entry closed-shop clauses infringed Article 5 of the Revised European Social Charter and the Swedish Government was obliged to bring the situation into conformity with the Revised Social Charter. The Court in the § 72 noted: „The Court also observes that the wish of the Danish legislature to bring an end to the use of closed-shop agreements in the private sector is consistent with the manner in which the 1961 Social Charter has been applied to the issue of pre-entry closed-shop agreements. In its Conclusions XIV-1, XV-1 and XVI-1 the European Committee of Social Rights found that the Danish Act on Protection against Dismissal due to Association Membership infringed Article 5 of the Social Charter [...] and the Governmental Committee proposed that a recommendation be addressed to Denmark. [...]. However, shortly thereafter, in September 2002, the Danish Government informed the Governmental Committee of the European Social Charter of their intention to introduce a bill prohibiting closed-shop agreements and the latter therefore decided to await the next assessment by the European Committee of Social Rights. [...] In its Conclusions XVII-1 of March 2004 the European Committee of Social Rights maintained that the Danish Act on Protection against Dismissal due to Association

Membership infringed Article 5 of the Social Charter, in response to which the Government stated that once the parliamentary situation was more favourable they would resubmit the draft legislation [...]“.

And the Court was in view that there is little support in the Contracting States for the maintenance of closed-shop agreements and that the European instruments referred to above clearly indicate that their use in the labour market is not an indispensable tool for the effective enjoyment of trade-union freedoms. Therefore the Court found that the respondent State had failed to protect the applicants' negative right to trade union freedom (a violation of Article 11 of the Convention in respect of both applicants). This Grand Chamber case illustrates perfectly the possible mutual cooperation between the European Court of Human Rights and the European Committee of Social Rights and possibilities to use each-others' recommendations or judgments when analysing the cases raising the same issues protected under the both international instruments.

In some Turkish cases the Court found no violation of Article 11, when people were moved to work to other places for the fact, according to the applicants, that they had been active members of some political parties, labour syndicates and the Federation of such syndicates. The Court took into account the arguments presented by the Government and decided that people had been moved to other places not for their activities in the mentioned workers' organisations, but for the reason of good administration of public service in case of emergency. Furthermore, the Court de-

cidated that the moved persons still have a right to participate in the activities of the mentioned syndicates or organisations without any disproportionate restrictions. The Court held (see the case of *Bulga et autres c. Turquie*, No. 43974/98, § 73, 74, 20 septembre 2005): „73. [...] la Cour constate que les requérants n'étaient pas suffisamment ni de manière convaincante le fait que les décisions incriminées auraient constitué une contrainte ou une atteinte touchant à la substance même de leur droit à la liberté d'association tel que le consacre l'article 11 de la Convention. Elle n'est en outre pas plus convaincue qu'ils seraient empêchés de mener des activités syndicales dans leur nouveau poste ou lieu de mutation. 74. Bien que les décisions de mutation soient considérées par les requérants comme une ingérence des autorités nationales dans leur droit à exercer des activités syndicales, la Cour est d'avis que ces mesures s'inscrivent dans le cadre de la gestion et de l'exercice d'une bonne administration du service public de l'Etat. En décidant de muter les intéressés dans une autre ville ou une autre région, les autorités nationales ont agi dans le cadre de leur marge d'appréciation” [...].

The same position was taken by the Court in the case *Ertas Aydin et autres c. Turquie* (No. 43672/98, § 53, 20 septembre 2005).

In the case of *Wilson, National Union of Journalists and Others v. the United Kingdom* (judgment of 2 July 2002) the Court established a violation of the State's positive obligation under the Convention (Article 11) with regard to the fact that the United Kingdom law allowed employers

to use financial inducements to encourage employees to give up their trade union rights. The law at that time allowed the possibility for the employers to require their employees to be affiliated to a specific union without leaving them the freedom to choose which is one of the most important features of union membership. In this case the Court referred to the criticism made by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association with regard to that problem existing in the UK: „48. Under United Kingdom law at the relevant time it was, therefore, possible for an employer effectively to undermine or frustrate a trade union's ability to strive for the protection of its members' interests. The Court notes that this aspect of domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the ILO's Committee on Freedom of Association (see paragraphs 32–33 and 37 above). It considers that, by permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants“.

The jurisprudence of the Court shows clearly that the freedom of association including the right to form and to join a trade union for the protection of his/her interests is a right protected by international law. The Convention mechanism gives a possibility to guarantee this right fully and pro-

pects it from any unjustified interference or restriction by the State.

2.5. Article 1 of Protocol 1 – right to property and social rights aspects involved

With regard to social rights issues which could arise under Art. 1 of Prot. 1, in the majority of cases the questions of the amount of payable pensions or other social benefits, its calculation, conditions for entitlements and interruption of payment, etc. arise.

The case of *Azinas v. Cyprus* judgment (Appl. No. 56679/00, [GC], judgment of 28 April 2004

In this case the Court had examined a question concerning the loss of pension rights as an automatic consequence of dismissal from the civil service. Consequently, the third section of the Court in the judgment of 20 June 2002 found a violation of Article 1 of Protocol 1, taking into account the fact that the imposition of criminal sanction to the applicant entailed automatically the forfeiture of the applicant's retirement benefits, because such automatic consequences to the applicant were particularly harsh. But after the case was relinquished to the Grand Chamber, the Grand Chamber in its judgment of 28 April 2004 rejected the case as inadmissible for non-exhausted of domestic remedies under Article 35 of the Convention by stating that the applicant did not provide the Cypriot courts with the opportunity of addressing the alleged Convention violations [...]. The objection that the relevant “effective” domestic remedy

was not used by Mr Azinas in the instant case is therefore well-founded.

Termination of disability pension as a result of changes to the conditions for entitlement (Kjartan Asmundsson v. Iceland, Appl. No. 60669/00, judgment of 12 October 2004 (final 30 March 2005))

The disability of the applicant after a serious work accident was assessed at 100%, which made him eligible for a disability pension from the Seamen's Pension Fund ("the Pension Fund"), to which he had paid premiums intermittently from 1969 until 1981. Legislative amendments in 1992 changed the conditions for entitlements for such benefits and the applicant lost them. It is significant that the applicant lost his pension on 1 July 1997 not due to any circumstance of his own but to changes in the law altering the criteria for disability assessment. Although he was still considered 25% incapacitated to perform work in general, he was deprived of the entirety of his disability pension entitlements. Which at the time constituted no less than one-third of his gross monthly income. The Court finding a violation of Article 1 of Protocol No. 1 in this case noted that: "45. [...] the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation [...] by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities [...]. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate

reduction rather than the total deprivation of his entitlements ([...] see *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, pp. 44–45, § 121).

The third type of case, which was already mentioned when discussing social rights' aspects under Art 6, is the case of *Svetlana Naumenko v. Ukraine* (Appl. No. 41984/98, judgment of 9 November 2004 (final 30 March 2005)), where the Court had examined the questions concerning the denial of benefits for a lengthy period on account of the length of proceedings and supervisory review of final and binding decision.

The Court concluded (see § 104 of the judgment) that the applicant had been deprived of her pension right and State privileges established by law for the benefit of Chernobyl relief workers, which were more substantial in value than ordinary disability pensions and State privileges. Her right to such benefit was recognised by a final and binding court's judgment. The applicant therefore had an enforceable claim within the meaning of Article 1 of Protocol No. 1, which constituted a "possession" within the meaning of that provision (see *Stran Greek Refineries and Stratis Andreadis v. Greece*, judgment of 9 December 1994, Series A no. 301-B, § 59 etc). Taking into account the applicant's financial and social status and the fact that the situation was partially rectified by the judgment of the Malinovsky District Court of Odessa of 24 May 2004, the Court notes that the impossibility for the applicant to obtain enforcement of the judgment recognising her status of a "Chernobyl relief

worker” for an unreasonably long period of time constituted an interference with her right to the peaceful enjoyment of her possessions. The Government have not advanced any justification for that interference. The Court established therefore an infringement of Article 1 of Protocol No. 1 to the Convention.

In the cases of *Draon v. France* (Appl. No. 1513/03, judgment (just satisfaction and striking out on 21 June 2006) and *Maurice v. France* (Appl. No. 11810/03, judgment (just satisfaction and striking out on 21 June 2006) the Court found a violation of Article 1 of Protocol 1 with regard to the reducing of possible compensation based on the State’s liability for damage inflicted by the health care professionals or establishments occasioned by a disability not detected during the pregnancy. The applicants stated that the immediate application to pending proceedings of the Law adopted on 4 March 2002, which reduced the possible compensation to a significant amount, placed on the applicants a substantial portion of the damages they had claimed, thus making them bear an individual and excessive burden.

Therefore it should be noted that the State cannot adopt the laws and to apply them retroactively to the pending proceedings seeking to reduce the sums of compensation claimed by the applicants. This situation could lead to a violation of legal certainty enshrined in Article 6 of the Convention (in the mentioned cases, the Court decided not to examine separately the applicants’ complaint under Article 6 § 1 of the Convention (the Author’s opinion on this point is reflected in the Joint partly

dissenting opinion of judges closed to the main judgments in these two cases of 6 October 2005).

Conclusions

1. The European Convention on Human Rights adopted in 1950 and guaranteeing in principle “civil and political rights” and the European Social Charter adopted in 1961 (entered into force in 1965) and guaranteeing principally “economic, social and cultural rights” can be regarded as two separate instruments of the Council of Europe human rights protection system. However, such separation of these two instruments is not an absolute one; the Court has already decided that there is no water-tight division separating the social sphere from the field covered by the Convention.
2. Furthermore, the Convention’s provisions with the right of individual complaint and the Charter’s provisions with its collective complaint’s rights overlap. The acceptance and quick development of the notion of *positive obligations* under the Convention by the European Court of Human Rights has opened the door for a broader interpretation of the Convention’s rights which can cover also social rights aspects.
3. The European Court has already recognized that the States must fully respect all procedural guarantees of Article 6 § 1 when deciding various social rights issues, such as calculation and conditions to receive social benefits and allowances, to claim for compensation for the damage to health, to bring suits to courts in social field matters, etc. The

Court has also recognized the Convention's right to private life and home as covering the aspect of clear and healthy environment and the persons' right to live in such a healthy sphere.

4. Article 11 of the Convention guaranteeing the freedom to association and the right to form trade unions and to participate freely in their activities is one of the Convention's clearly established rights linked directly to the social rights field. This right has a direct connotation with the provisions of Articles 5 and 6 of the European Social Charter and of the Revised European Social Charter of 1996 (Art. 5 – the right to organise and Art. 6 – the right to bargain collectively). The broad application by the Court of the notion of *positive obligations* under Article 11 and, also the application in its jurisprudence the provisions of the European Social Charter clearly shows

that these two separate international instruments can be successfully applied together and can supplement each other when needed. The future of these two instruments raises a very important question, how these two instruments would be living together? The Author of this Article does not support an idea to prepare and adopt the new additional Protocol to the European Convention concerning social rights issues, especially taking into account the present backlog of the Court (this idea was refused some time ago), but one possible tendency can be clearly seen – the co-existence and fruitful mutual interaction between the Convention and the Social Charter as two main human rights instruments in the Council's of Europe activities is possible and should be more strongly encouraged and developed by the two human rights bodies in their every day practise.

LITERATŪRA

1. European Convention on Human Rights as amended by Protocol No. 11. Council of Europe Treaty Series, No. 5.

2. European Social Charter and protocols. Social Charter, 1998. Žr. Taip pat Europos socialinė chartija. Vadovas. Lietuvos žmogaus teisių centras. Europos Tarybos informacijos biuras, 2002.

3. Matti Pellonpää. Making the indivisibility visible. ECHR and ESC. The speech presented during the Conference organised by the Finnish representation and the European Social Charter secretariat in honour of Judge Pellonpää and Mr Mikkola (outgoing members of the European Court of Human Rights and the European Committee on Social Rights). Council of Europe, 4 December 2006.

4. Asborn Eide. Economic, Social and Cultural Rights as Human Rights. In: Economic, Social and Cultural Rights. A Textbook, Second Revised Edition. Edited by Asborn Eide, Catarina Krause and Al-

lan Rosas, Martinus Nijhoff Publishers, Dordrecht/Boston/London, p. 9–10.

5. Steering Committee for Human Rights (CDDH). Working Group on Social Rights (GT-DH-SOC). Overview of the case-law of the European Court of Human Rights in social matters. Document prepared by the Secretariat Directorate General of Human Rights (DG II). GT-DH-SOC (2004)001, p. 7.

6. Council of Europe. ECHR. Case of *Makaratzis v. Greece* (Appl. No. 50385/99). Judgment [GC]. Strasbourg, 20 December 2004. P. 30.

- 6.1. See also The right to life. A guide to the implementation of Article 2 of the European Convention on Human Rights. Douwe Korff. Human Rights handbooks, No. 8. Council of Europe, p. 20.

7. *Taskin and Others v. Turkey* case, Appl. No. 46117/99, CEDH 2004-X, §§ 121–126, p. 207–208.

8. *Hatton and Others v. the United Kingdom* [GC], Appl. No. 36022/97, judgment of 8 July 2003, §§ 123–130.

9. Gilles Dutertre. Key case-law extracts. European Court of Human Rights. Council of Europe Publishing, 2003, p. 335.

10. Guidelines for Laws Affecting Civil Orga-

nizations. Second Edition. Open Society Institute, New York, 2004, p. 20.

11. Martin Scheinin. Economic and Social Rights as Legal Rights. In: *Economic, Social and Cultural Rights. A Textbook*, Second Revised Edition. Edited by Asbjorn Eide, Catarina Krause and Allan Rosas, Martinus Nijhoff Publishers, Dordrecht/Boston/London.

SOCIALINĖS TEISĖS EUROPOS ŽMOGAUS TEISIŲ TEISMO PRAKTIKOJE

Danutė Jočienė

S a n t r a u k a

Straipsnyje analizuojama socialinių teisių aiškinimo ir taikymo klausimai Europos žmogaus teisių teismo praktikoje. Pažymėtina, kad socialinės teisės nebuvo įtrauktos į Europos žmogaus teisių konvencijos tekstą, priimtą 1950 m., todėl iš pradžių peticijos dėl socialinių teisių gynimo buvo atmetamos kaip nesuderinamos su Konvencijos nuostatomis. Ilgainiui, vykstant socialiniams pokyčiams ir plečiantis teisių, numatytų Konvencijoje, aiškinimo ir taikymo riboms, Europos Žmogaus teisių teismas ėmė aiškinti Konvencijoje numatytas teises plačiau, apimdamas ir atitinkamus socialinių teisių aspektus. Ši tendencija yra ypač aiški, analizuojant Konvencijos 6 straipsnio taikymą, kai Teismas taiko 6 straipsnio garantijas, sprenddamas ir socialinius klausimus (pensijų mokėjimo, socialinių pašalpų skyrimo aspektai, teisės į *teisingą* teismą, proceso ilgumo klausimai, sprendžiant socialinius klausimus ir pan.). Socialinių teisių aspektas išskyla ir taikant Konvencijos 2, 3 straipsnius, taip pat Konvencijos 8 straipsnį, kuris Teismo praktikoje yra aiškinamas gana plačiai, kaip apimantis pačius įvairiausius socialinių klausimų aspektus (pvz., teisė gyventi švarioje ir sveikoje aplinkoje, nelegalių asmenų teisė patekti į pastatus (specialūs įėjimai), čigonų teisė keliauti ir statyti karavanus, ir kiek ši teisė gali būti ribojama ir pan.). Europos žmogaus teisių

teismo jurisprudencija aiškiai rodo, kad socialinės teisės, nors ir nebūdamos įtrauktos į Konvencijos tekstą, yra gana sėkmingai aiškinamos ir plėtojamos Teismo praktikoje, išplečiant tradicinių, vadinamųjų *pilietinių* teisių taikymo sritį, įtraukiant į jas įvairius socialinius aspektus. Taikant Konvencijos 1 Protokolo 1 straipsnį taip pat susiduriama su socialinių teisių taikymo aspektais, kai asmenims neteisėtai yra panaikinamas ar nutraukiamas pensijų ar įvairių kitų socialinių išmokų mokėjimas, pakeičiamos tokio mokėjimo ar skyrimo sąlygos ir panašiai.

Straipsnyje taip pat keliamas klausimas, į kurį kol kas negalima rasti vienintelio atsakymo, ar ne laikas būtų aiškiai įtraukti socialinių teisių kategoriją į Europos žmogaus teisių konvencijoje numatytų teisių sąrašą arba priimti naują papildomą Konvencijos protokolą, kuris numatytų socialines teises, ar vis dėlto užtenka Teismo plečiamojo šių teisių aiškinimo bei Europos socialinės chartijos nuostatų taikymo Europos žmogaus teisių teismo praktikoje, ir atvirkščiai. Šio straipsnio autorė linkusi palaikyti trečiąjį galimą variantą, kuris jau naudojamas ir rodo, kad dviejų Europos Tarybos žmogaus teisių gynybos instrumentų sąveika yra galima ir turi būti kuo labiau skatinama.

Įteikta 2007 m. birželio 21 d.

Priimta publikuoti 2007 m. gruodžio 5 d.