Important, but not Fundamental?

The Protection of Social Benefits in the Case Law of the European Court of Human Rights and the Austrian Constitutional Court

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Contents

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I. Introduction

John Hart Ely once observed of US legal culture that there was a "systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges [...] are drawn." As a corollary, Ely concluded, the values that were considered fundamental rights were regularly limited to rights such as expression, association, academic freedom, privacy and personal autonomy. "But watch most fundamental-rights theorists start edging to toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental*."[1]

Similarly, Ewald Wiederin remarked that social rights traditionally had a "bad reputation" in Austrian legal scholarship.[2] This is explained, in part, by the fact that the core documents of the Austrian constitution, the Federal Constitutional Law of 1920 (*Bundes-Verfassungsgesetz* – B-VG) and the so-called Basic State Law on the General Rights of Citizens of 1867 (*Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger* – StGG), contain neither a welfare state principle nor do they provide fundamental social rights.[3]

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[1] Ely, *Democracy and Distrust. A Theory of Judicial Review* (Cambridge, Massachusetts, 1980) 59 (emphasis in original); for a more recent account of the deficiencies in US constitutional law, see Greene, *How Rights Went Wrong. Why Our Obsession with Rights Is Tearing America Apart* (Boston, 2021) 76 ff, 94 ff, 180 ff.

[2] Wiederin, 'Soziale Grundrechte in Österreich?' in Österreichische Juristenkommission (ed.), *Aktuelle Fragen des Grundrechtsschutzes, Kritik und Fortschritt im Rechtsstaat*, vol. 26 (Vienna, 2005) 153.

[3] Wiederin, 'Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge' (2005) *VVDStRL* 53 (70); Damjanovic, 'Soziale Grundrechte', in Heißl (ed.), *Handbuch Menschenrechte* (Vienna, 2009) 516 (520); Muzak, 'Armut und öffentliches Recht', in Rechtswissenschaftliche Fakultät Wien (ed.), *Armut und Recht, Juridicum Spotlight I* (Vienna, 2010) 85; Eberhard, 'Soziale Grundrechtsgehalte im Lichte der grundrechtlichen Eingriffsdogmatik' (2012) *ZÖR* 513 (514); Schäffer and Klaushofer, 'Zur Problematik sozialer Grundrechte', in Merten, Papier and Kucscko-Stadlmayer (eds.), *Handbuch der Grundrechte in Deutschland und Europa,* vol. VII/1, 2nd edn. (Vienna, 2014) 761 (765 ff); Berka, Binder and Kneihs, *Die Grundrechte. Grund- und Menschenrechte in Österreich*, 2nd edn. (Vienna, 2019) 877 f; as exception to the rule, see the Federal Constitutional Law on

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The ECHR, which too is part of the Austrian Constitution,[4] is also limited to civil and political rights and does not include social rights.[5] These were instead incorporated in the European Social Charter (ESC).[6] Moreover, for a long time the scholarly debate was dominated by the discussion on the justiciability of fundamental social rights, which, in retrospect, can only be described as not very fruitful.[7]

At first glance, this would suggest that neither the Austrian Constitutional Court (*Verfassungsgerichtshof* – VfGH) nor the European Court of Human Rights (ECtHR) can extend the protection of fundamental rights to the area of welfare benefits. However, this is not the case. In fact, the jurisprudence of both Courts encompasses the protection of social rights. Thus, although neither Court can refer to a catalogue of fundamental social rights, both have developed case law that provides fundamental guarantees for social benefits.

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the Rights of Children (*Bundesverfassungsgesetz über die Rechte von Kindern* – BVG Kinderrechte); on the social rights dimension of this Law, see Bertel, 'BVG Kinderrechte – Vorbemerkungen', in Korinek, Holoubek and others (eds.), *Österreichisches Bundesverfassungsrecht* (Vienna, 18th issue 2023) paras. 29 f.

The decisions of the Austrian Constitutional Court (VfGH) and the Supreme Administrative Court (*Verwaltungsgerichtshof* – VwGH) can be accessed via <ris.bka.gv.at/vfgh/> and <ris.bka.gv.at/vwgh/> by entering the number under which the decision was published in the reports of the case law (VfSlg.) in the box "Sammlungsnummer". Decisions not (yet) published in the reports may be accessed by entering the case number (e.g. "G238/2023") in the box "Geschäftszahl".

[4] Federal Law Gazette (*Bundesgesetzblatt* – BGBl.) No. 210/1958 and No. 59/1964.

[5] Schmahl and Winkler, 'Schutz vor Armut in der EMKR?' (2010) *AVR* 405 (406 f); cf. Iliopoulos-Strangas, 'Die sozialrechtliche Dimension der Europäischen Menschenrechtskonvention in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte', in Iliopoulos-Strangas (ed.), *Die Zukunft des Sozialen Rechtsstaates in Europa. The Future of the Constitutional Welfare State in Europe. L'Avenir de l'État de Droit Social en Europe* (Baden-Baden, 2015) 249 (283) ("sozialrechtlich freundliche[ ] Interpretation"); Wutscher, 'Sicherung des sozialen Rechtsstaates durch die EMRK?', in Iliopoulos-Strangas (ed.), *Die Zukunft des Sozialen Rechtsstaates in Europa. The Future of the Constitutional Welfare State in Europe. L'Avenir de l'État de Droit Social en Europe* (Baden-Baden, 2015) 81 (96) ("der Schutz der EMRK [ist] im Bereich sozialstaatlicher Forderungen begrenzt").

[6] European Social Charter, European Treaty Series (ETS) No. 35; European Social Charter (revised), ETS No. 163; for further discussion, see Schmahl and Winkler, (2010) *AVR* 405 (409 f); Nyström, 'The European Welfare State and the European Social Charter', in Iliopoulos-Strangas (ed.), *Die Zukunft des Sozialen Rechtsstaates in Europa. The Future of the Constitutional Welfare State in Europe. L'Avenir de l'État de Droit Social en Europe* (Baden-Baden, 2015) 285; Aranguiz, 'Bringing the EU up to speed in the protection of living standards through fundamental social rights: Drawing positive lessons from the experience of the Council of Europe' (2021) *MJ* 601 (615 ff).

[7] See Wiederin, 'Soziale Grundrechte in Österreich?', 153 ff.

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While the jurisprudence of the VfGH has been extensively discussed in Austrian scholarship, the cases of the ECtHR on social benefits have received less attention.[8] It is also noteworthy that the VfGH rarely refers to the guarantees of the ECHR and the jurisprudence of the ECtHR in its decisions on social law.[9] It thus will be instructive to understand how both Courts approach challenges that are brought against state measures in the area of social benefits and to identify both similarities and differences in the Courts' jurisprudence.[10]

This article attempts to shed light on how both the Strasbourg and the Viennese Court have contributed to the protection of existing social benefits (II.), to the right to equal access to social benefits (III.) and perhaps even to the establishment of a right to a dignified minimum subsistence (IV.). In the conclusion, I will summarise the most important findings (V.).

For this endeavour, I will focus on non-contributory social benefits[11] and examine, in particular, the extent to which both Courts have addressed unequal treatment of ben-

[8] But see, on the protection of reliance interests, Siess-Scherz, 'Vertrauensschutz im Sozialrecht' (2015) *DRdA* 433; on social benefits and migration see Kaspar, *Mindestsicherung und Migration* (Vienna, 2021); in general, e.g. Wutscher, 'Sicherung des sozialen Rechtsstaates durch die EMRK?', 81.

[9] Siess-Scherz, (2015) *DRdA* 433; for (rare) exceptions, see VfSlg. 15.129/1998, 20.244/2018, 20.297/2018.

[10] For its part, this article also leaves a gaping hole, namely the rights of the Charter of Fundamental Rights of the EU (CFR) and the case law of the CJEU; but see e.g. Wiederin, 'Soziale Grundrechte in der Europäischen Grundrechtecharta', in Eilmansberger and Herzig (eds.), *Soziales Europa. Beiträge zum 8. Österreichischen Europarechtstag 2008* (Vienna, 2009) 15; O'Gorman, 'The ECHR, the EU and the Weakness of Social Rights Protection at the European Level' (2011) *GLJ* 1833; Eberhard, (2012) *ZÖR* 513 (529 ff); Levits, 'Überblick über das Europäische Sozialrecht unter besonderer Berücksichtigung der neueren Rechtsprechung des EuGH', in Iliopoulos-Strangas (ed.), *Die Zukunft des Sozialen Rechtsstaates in Europa. The Future of the Constitutional Welfare State in Europe. L'Avenir de l'État de Droit Social en Europe* (Baden-Baden, 2015) 201; Axer, 'Sozialrechtsspezifische Grundrechte', in Heinig and Schlachter (eds.), *Enzyklopädie Europarecht Band 7: Europäisches Arbeits- und Sozialrecht*, 2nd edn. (Baden-Baden, 2021) 147; Bungenberg, 'Soziale Rechte', in Grabenwarter (ed.), *Enzyklopädie Europarecht Band 2: Europäischer Grundrechteschutz*, 2nd edn. (Baden-Baden, 2022) 935; Aranguiz, (2021) MJ 601; from the case law, see recently CJEU (GC) Case C-709/20 *CG/Department for Communities in Northern Ireland*, 15 July 2021, paras. 89 ff on Articles 1, 7 und 24 CFR; for a discussion of this case see Wollenschläger, 'Ein Unionsgrundrecht auf Sicherung des Existenzminimums im Aufnahmemitgliedstaat? Ambivalentes zur Freizügigkeit nicht erwerbstätiger Unionsbürgerinnen und Unionsbürger post Dano' (2021) *EuZW* 795; on differential treatment in the area of social rights within the EU law framework, see Bast, von Harbou and Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study* (Baden-Baden, 2022) 160 ff.

[11] Examples in Austrian law being the basic social assistance (*Sozialhilfe*), the family allowance (*Familienbeihilfe*) and the care allowance (*Pflegegeld*).

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eficiaries in the context of migration, e.g. on the basis of nationality or migration status. This focus, firstly, is owed to the fact that the status of non-contributory social benefits is more precarious than that of social insurance benefits (e.g. pensions), which are based on contributions and therefore enjoy greater protection from the outset.[12] Secondly, those most dependant on non-contributory benefits are often socially marginalised, resulting in their interests being underrepresented in the democratic parliamentary process.[13] This holds true even more in the case of non-citizens who are regularly excluded from voting in national elections. It is precisely in such circumstances that a counter-majoritarian judicial review of the democratically elected legislature is warranted.

II. The protection of existing social benefits

A. The case law of the ECtHR

1. Scope of protection of existing social benefits

To protect existing social benefits, the ECtHR regularly invokes the right to property in Article 1 of Protocol No. 1 to review the denial, withdrawal or reduction of entitlements.[14]

Unlike the VfGH, the ECtHR does not require that the benefit be based on previous own contributions. Article 1 of Protocol No. 1 equally protects contributory and non-contributory benefits, according to settled case law.[15] The ECtHR based this extended protection on the argument that in modern democratic states, many people are dependent on welfare benefits and that many national legal systems guarantee that such benefits are provided. Where such rights exist, the ECtHR went on to say, this should

[12] VfSlg. 20.278/2018, with further references.

[13] Cf. Lavrysen, 'Strengthening the Protection of Human Rights of Persons Living in Poverty under the ECHR' (2015) *NQHR* 293 (308); Merli, 'Armut und Demokratie' (2016) *JRP* 107.

[14] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, ETS No. 009.

[15] *Stec and others v United Kingdom* App nos 65731/01 and 65900/01 (ECtHR [GC] [dec], 6 July 2005), paras. 47 ff; *Andrejeva v Latvia* App no 55707/00 (ECtHR [GC], 18 February 2009), para. 77; *Beeler v Switzerland* App no 78630/12 (ECtHR [GC], 11 October 2022), para. 55; *Domenech Aradilla and Rodríguez González v Spain* App nos 32667/19 and 30807/20 (ECtHR, 19 January 2023), para. 82; see also Kaspar, *Mindestsicherung* 157; Grabenwarter and Pabel, *Europäische Menschenrechtskonvention* § 25 para. 6.

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be reflected in Article 1 of Protocol No. 1, irrespective of prior contributions.[16] The Court furthermore argued that the differentiation between contributory and non-contributory benefits has become increasingly arbitrary, as ever more benefits are funded by both taxes and contributions. Finally, the Court acknowledged that beneficiaries of fax-funded benefits would also contribute (indirectly) to its financing through the payment of tax.[17]

This is persuasive: property is not given by God or nature, but created by law. Consequently, it should be irrelevant for the protection of fundamental rights whether a claim is rooted in private or public law and whether it was preceded by a contribution of one's own. Even in the case of private property, it has never been considered necessary for it to be based on an own contribution in order to be covered by the protection of fundamental rights, e.g. in the case of inheritance rights.[18] The payment of a personal contribution may be taken into account in favour of the applicant when assessing the proportionality of a restrictive measure, but it is not decisive for the preceding question whether Article 1 of Protocol No. 1 is applicable at all.[19]

The Contracting States are therefore free to decide what social benefits, if any, they will provide. However, as soon as such a system is established and benefits are provided, they are covered by Article 1 of Protocol No. 1.[20] This does not mean that anyone can successfully claim any benefit at any time. As a rule, Article 1 of Protocol No. 1 protects only existing possessions and does not create a right to acquire property.[21]

Yet, the ECtHR has extended this protection to "legitimate expectations" of obtaining a benefit.[22] This includes all assertible proprietary interests rooted in domestic law

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[16] *Stec and others v United Kingdom* App nos 65731/01 and 65900/01 (ECtHR [GC] [dec], 6 July 2005), para. 51.

[17] *Stec and others v United Kingdom* App nos 65731/01 and 65900/01 (ECtHR [GC] [dec], 6 July 2005), para. 50.

[18] *Molla Sali v Greece* App no 20452/14 (ECtHR [GC], 19 December 2018).

[19] *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 212.

[20] *Stummer v Austria* App no 37452/02 (ECtHR [GC], 7 July 2011), para. 82; *Šaltinytė v Lithuania* App no 32934/19 (ECtHR, 26 October 2021), paras. 58 f; *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 180; *Beeler v Switzerland* App no 78630/12 (ECtHR [GC], 11 October 2022), para. 55.

[21] *Stummer v Austria* App no 37452/02 (ECtHR [GC], 7 July 2011), para. 82; *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 74.

[22] Grabenwarter and Pabel, *Europäische Menschenrechtskonvention*, 7th edn. (München, 2021) § 25 para. 3; Berka, Binder, and Kneihs, *Grundrechte* 448; Beeler-Sigron, 'Protection of Property', in van

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(e.g. in legislation or case law).[23] Thus, Article 1 of Protocol No. 1 applies if the applicant fulfils the legal conditions for entitlement.[24]

In general, a legitimate expectation exists only when the claim is actually enforceable and assertable, which presupposes that the applicant fulfils the legal conditions for obtaining the benefit under national law.[25] Therefore, there is normally no need for justification on the basis of the principle of proportionality, if eligibility criteria are changed before the persons concerned have actually become entitled to a particular benefit.

Where there was no enforceable legal entitlement in the first place, there is no right to property. Only when the state interferes with a pre-existing benefit or entitlement, for example by introducing new conditions of eligibility or existing beneficiaries or by reducing the level of benefits, does it have to justify itself under Article 1 of Protocol No. 1.[26]

As Judge Wojtyczek noted, the Court's use of the term "legitimate expectation" in relation to enforceable claims is confusing.[27] The confusion is even greater when the concept of legitimate expectations is applied to claims that have expired or have not yet materialised into an enforceable. This is particularly the case when applicants challenge a change in the legal conditions for obtaining a benefit.

The case law has not yet provided a reliable method for determining legitimate expectations regarding such claims. The Court has thus far only proclaimed "a careful consideration of the individual circumstances of the case – in particular, the nature of the change in the requirement – may be warranted" in order to assess the existence

Dijk and others (eds.), *Theory and Practice of the European Convention on Human Rights*, 5th edn. (Cambrigde, 2018) 852 (853).

[23] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), paras. 74 ff.

[24] *Stec and others v United Kingdom* App nos 65731/01 and 65900/01 (ECtHR [GC] [dec], 6 July 2005), para. 55 ("for persons satisfying its requirements").

[25] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), paras. 76 ff.

[26] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 86; *Domenech Aradilla and Rodríguez González v Spain* App nos 32667/19 and 30807/20 (ECtHR, 19 January 2023), para. 83.

[27] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), Concurring Opinion *Wojtyczek*, para. 3.

of a legitimate interest in accordance with the "demands of legal certainty and the rule of law."[28]

This assessment is, nevertheless, crucial: In the absence of legitimate expectations, there is no need to examine an interference based on the principle of proportionality. Rather, it is only possible to assess the non-discriminatory nature of the exclusionary eligibility criteria under Article 14 ECHR (for further discussion, see III. A. below). However, the test for the applicability of the full scope of Article 1 of Protocol No. 1 and the test for the applicably of the (mere) ambit of Article 1 of Protocol No. 1 for the purposes of Article 14 ECHR bear a certain resemblance, although they are separate tests. This has also contributed to the confusion surrounding the concept of "legitimate expectation". Unsurprisingly, in many cases, it has been unclear and controversial whether a legitimate expectation existed in the first place.[29]

The following examples from the case law might help to clarify the distinction or at least to highlight existing uncertainties:

Consider, for example, the Chamber's decision in the case of *Azinas v Cyprus*, in which the total loss of a civil servant's pension as a result of disciplinary sanction was qualified as a (disproportionate) interference with Article 1 of Protocol No. 1.[30] The Chamber argued that the applicant, when he became a civil servant, had a legitimate expectation within the meaning of Article 1 of Protocol No. 1 to receive retirement benefits. The application was ultimately dismissed by the Grand Chamber due to non-exhaustion of domestic remedies.[31] However, the question of legitimate expectations was controversial among the members of the Court, as shown by the joint concurring and dissenting opinions annexed to the decision.

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[28] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 89;

[29] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), Concurring Opinion *Wojtyczek*, para. 2 ("The Court's existing case law on legitimate expectations is difficult to understand, due to lack of precision and inconsistencies. [...] In particular, the notion of legitimate expectations on which the reasoning is based appears vague and obscure, and its relationship with the notions of right, claim and legally protected interest is not clear"); Sólnes, 'Institutional Changes to Property in the Context of the Strasbourg Court's Case-law on Article 1 of Protocol No. 1 of the European Convention on Human Rights', in Kjølbro, O'Leary and Tsirli (eds.), *Liber Amicorum Robert Spano* (Limal, 2022) 651 (655) ("vague distinction"); for an attempt at clarification, see *P.C. v Ireland* App no 26922/19 (ECtHR, 1 September 2022), para. 49, discussed below. For an in-depth discussion of the recent case law see Cousins, 'Legitimate Expectation and Social Security Law Under the European Convention of Human Rights' (2021) *EJSS* 24.

[30] *Azinas v Cyprus* App no 56679/00 (ECtHR, 20 June 2002), paras. 34 ff.

[31] *Azinas v Cyprus* App no 56679/00 (ECtHR [GC], 28 April 2004), paras. 41 f.

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In their concurring opinion, Judges Wildhaber, Rozakis, and Mularoni denied that Article 1 of Protocol No. 1 had been interfered with for the following reasons: The civil servant's pension was non-contributory and subject to the fulfilment of certain legal conditions. Entitlement to a pension was excluded where, as in the present case, a civil servant was dismissed as a punishment for serious professional misconduct. In such circumstances, the opinion concluded, the person concerned had no legitimate expectation of receiving a pension.

Judges Costa, Garlicki, and Ress responded in their dissenting opinion by referring to settled case law, according to which Article 1 of Protocol No. 1 no longer made a distinction as to whether a benefit was based on contributions or not. Furthermore, they argued that the civil servant had a legitimate expectation when he entered the civil service that he would one day receive a pension.

While the dissenting opinion correctly pointed to the fact that non-contributory claims are also protected by Article 1 of Protocol No. 1, it failed to recognise that the loss of a pension as a disciplinary sanction was enshrined in law and that there could therefore be no legitimate expectation of receiving a pension despite punishable misconduct. In contrast, the dissenting opinion considered it sufficient that the civil servant had relied on the general assumption that he would receive a pension upon retirement. This suggests a very broad understanding of legitimate expectation, detached from the actual legal framework.

This broad understanding was subsequently shared by unanimous opinions in *Apostolakis v Greece*[32] and *Philippou v Cyprus*.[33] These cases concerned the statutory loss of a pension, resulting from a criminal conviction (*Apostolakis*), respectively a disciplinary sanction (*Philippou*). In both cases, the imposed conviction or sanction was a statutory ground for exclusion from entitlement to a pension. Nonetheless, the Court unanimously found an interference with Article 1 of Protocol No. 1 in both cases, reaffirming a very broad understanding of legitimate expectation.

In the subsequent case law, the ECtHR, at times, even completely disregarded statutory eligibility requirements, which it found to be arbitrary. This enabled the Court to apply the full scope of Article 1 of Protocol No. 1, instead of having to examine the exclusion criterion solely on the basis of the principle of non-discrimination in Article 14 ECHR in conjunction with Article 1 of Protocol No. 1.

[32] *Apostolakis v Greece* App no 39574/07 (ECtHR, 22 October 2009), para. 29.

[33] *Philippou v Cyprus* App no 71148/10 (ECtHR, 14 June 2016), para. 62.

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For example, the case *Klein v Austria* concerned the loss of a lawyer's old-age pension from the Vienna Chamber of Lawyers (*Rechtsanwaltskammer Wien*) because he had been struck off the list of lawyers due to the opening of bankruptcy proceedings before reaching the retirement age and becoming eligible for receiving a pension.[34] The pertinent regulation at the time made the pension entitlement dependent on active membership in the Lawyers Chamber.

The ECtHR found that the lawyer's disqualification from receiving a pension violated Article 1 of Protocol No. 1, although the applicant had not complied with the requirements under domestic law for receiving the benefit. If, instead, the ECtHR had interpreted legitimate expectations as only applying when the applicant met the statutory requirements, the Court would have had to limit its review to the assessment of non-discrimination under Article 14 ECHR. In this case, the Court would have first needed to identify on which ground the applicant lawyer had been discriminated against. It is true that the ECtHR has ruled that the status of bankruptcy alone does not justify the loss of the right to vote,[35] but it seems uncertain whether this equally applies to pension claims against a bar association. This intricacy illustrates the crucial distinction in Convention law between a full right to property under Article 1 of Protocol No. 1 and mere freedom from discrimination under Article 14 ECHR.

The ECtHR was less generous in assuming a protected property right in the case of *Richardson v United Kingdom*.[36] The application challenged the fact that the retirement age for women had been gradually increased from 60 to 65 between 1995 and 2010 in order to align it with the retirement age for men. The applicant's cohort was the first to be subject to the age limit of 65. In 2008, at the age of 53, Ms Richardson lodged an application with the ECtHR. She argued that she had expected to be able to retire at 60 and that she had been discriminated against on grounds of sex and age. The ECtHR replied that the scope of Article 1 of Protocol No. 1 did not apply, because Ms Richardson could not claim her pension before reaching statutory retirement age. She therefore did not have a claim protected directly by the right to property. Instead, the ECtHR examined the alleged discrimination only under Article 14 ECHR in conjunction with Article 1 of Protocol No. 1.

It is understandable that, to the Court, the principle of non-discrimination appeared to be the pertinent fundamental right to decide the case of Ms Richardson. However,

[34] *Klein v Austria* App no 57028/00 (ECtHR, 3 March 2011), paras. 41 ff.

[35] *Campagnano v Italy* App no 77955/01 (ECtHR, 23 March 2006), paras. 48 f.

[36] *Richardson v United Kingdom* App no 26252/08 (ECtHR [dec], 10 April 2012), paras. 17 f.

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it is not clear why she was prevented from claiming a property right for not meeting the requirement of reaching the statutory pension age, while Mr Klein was able to claim a property right despite not meeting all the statutory requirements for receiving a pension either. The Court's ruling in *Richardson v United Kingdom* supports the view that it would have been more convincing if the Court had also decided Mr Klein's claim under Article 14 ECHR.

It comes as no surprise that the differing views on the bench regarding the appropriate scope of legitimate expectations, which were first displayed in the case of *Azinas v Greece*, resurfaced in *Belané Nagy v Hungary*. This case was ultimately decided by the Grand Chamber of the ECtHR and is a leading case to date.[37] The applicant had originally received an invalidity pension of around € 200 per month since 2001. Her entitlement was subject to both eligibility and health criteria, all of which the applicant initially met. However, she lost her entitlement in 2010 because her state of health was evaluated by using a new method of evaluation and thus was said to have improved. An expert witness consequently found that this "improvement" was only due to the change in the evaluation method and that her actual state of health had not improved at all. Nevertheless, Ms Nagy's claim was finally rejected by the competent Court in 2011 for lack of a sufficiently serious health impairment. On 1 January 2012, an amendment to the law came into force, introducing a new entitlement requirement, which Ms Nagy did not meet. Furthermore, she did not benefit from the cut-off date (31 December 2011) because she was no longer receiving the benefit at the relevant time.

The decisive question for the ECtHR was, therefore, whether Ms Nagy could nevertheless have a legitimate expectation of receiving a disability pension from 1 January 2012.[38] As a first step, the ECtHR found that her state of health had not significantly improved since 2007 and that she would have been able to receive a pension again from 2012 if the amendment had not entered into force.[39] According to the ECtHR, her ineligibility was therefore (only) due to the newly introduced eligibility criteria. This introduction, however, was not foreseeable for the applicant and would apply to her retroactively.[40] As she had always met the eligibility criteria up to that point, the ECtHR found that she had a legitimate expectation of being able to receive a disability

[37] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016); for an insightful discussion of the case, see e.g. Cousins, (2021) *EJSS* 24 (28 ff).

[38] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 95.

[39] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 97.

[40] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 104.

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pension again if her state of health deteriorated accordingly. As a result, the ECtHR found a violation of Article 1 of Protocol No. 1. This finding is consistent with the more lenient legal precedents established in *Azinas*, *Apostolakis*, and *Philippou*, according to which a legitimate expectation can effectively substitute the existence of a sufficiently established proprietary interest under national law.

Conversely, the dissenting opinion of Judges Nussberger, Hirvelä, Bianku, Yudivska, Mose, Lemmens, and O'Leary stressed that the scope of Article 1 of Protocol No. 1 did not apply if the applicant did not meet the statutory eligibility requirements.[41] Their reasoning resembled the Court's argument in the above-mentioned case of *Richardson v United Kingdom*.[42] They argued that the applicant might have had the legitimate expectation in 2001 that she would receive a disability pension as long as she met the legal requirements. However, after her pension was withdrawn in 2010, she could no longer have had a legitimate expectation.[43] From then on, she therefore no longer had a right protected by Article 1 of Protocol No. 1. The dissenting opinion concluded with the remark that "hard cases do not make good law".[44]

In the literature, the judgment in *Belané Nagy v Hungary* has been read as a (cautious) development towards a right to a dignified minimum subsistence, because the ECtHR was prepared to extend the scope of legitimate expectations within the meaning of Article 1 of Protocol No. 1 in order to prevent Ms Nagy from losing her means of subsistence.[45]

However, this expectation has not been met. On the one hand, the question of sufficient means was only decisive at the level of the proportionality analysis, but not for the assessment of the scope of protection of Article 1 of Protocol No. 1. Furthermore, the case law of the ECtHR since *Belané Nagy v Hungary* indicates that the

[41] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), Dissenting Opinion *Nussberger*, *Hirvelä*, *Bianku*, *Yudivska*, *Mose*, *Lemmens*, and *O'Leary*, para. 13.

[42] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), Dissenting Opinion *Nussberger*, *Hirvelä*, *Bianku*, *Yudivska*, *Mose*, *Lemmens*, and *O'Leary*, para. 6.

[43] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), Dissenting Opinion *Nussberger*, *Hirvelä*, *Bianku*, *Yudivska*, *Mose*, *Lemmens*, and *O'Leary*, para. 28.

[44] *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), Dissenting Opinion *Nussberger*, *Hirvelä*, *Bianku*, *Yudivska*, *Mose*, *Lemmens*, and *O'Leary*, para. 45.

[45] Leitjen, 'The right to minimum subsistence and property protection und the ECHR: Never the twain shall meet?' (2019) *EJSS*, 307 (310, 315).

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Court has adopted a more restrictive approach to legitimate expectations, which requires a more thorough evaluation of the actual legal framework of the benefits in question to determine whether there is a legitimate expectation.

For example, in the case of *Da Cunha Folhadela Moreira v Portugal*,[46] the Court adopted an approach similar to *Richardson v United Kingdom* and contrary to *Klein v Austria*. The applicant complained that his pension had been reduced based on the application of a Decree which entered into force approximately two years before he reached the retirement age. The Court held that he could not claim a legitimate expectation of receiving a certain (higher) amount of pension (which he claimed he would have received before the Decree entered into force). Rather, the Court went on to say, "the pension only materialised as a right to property once his retirement had been accepted and the amount of his pension had been set", and that the detrimental Decree had already been in force by that time.[47] The applicant could therefore only claim a right under Article 1 of Protocol No. 1 to receive a pension on the basis of the said Decree.

That the Court has increased the attention it pays to the actual legal framework is also illustrated by the recent case of *P.C. v Ireland*. Here, a prisoner unsuccessfully complained that he was being denied his (contributory) old-age pension because of a statutory provision that disqualified him from receiving a pension while in prison.[48] The imprisonment was a statutory ground for exclusion, which, according to the ECtHR, precluded a claim under Article 1 Protocol No. 1 during the period of imprisonment.[49] The ECtHR emphasised that the exclusion of benefits was due to a change in the applicant's "personal situation, not to a change in the law or its implementation".[50] The loss of the pension benefit could therefore only be examined on the grounds of possible discrimination against prisoners under Article 14 ECHR in conjunction with Article 1 of Protocol No. 1,[51] but not as an interference with Article 1 of Protocol of No. 1 alone.

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[46] *Da Cunha Folhadela Moreira v Portugal* App no 71418/14 (ECtHR [dec], 13 November 2018).

[47] *Da Cunha Folhadela Moreira v Portugal* App no 71418/14 (ECtHR [dec], 13 November 2018), para. 22.

[48] *P.C. v Ireland* App no 26922/19 (ECtHR, 1 September 2022), paras. 46 ff.

[49] *P.C. v Ireland* App no 26922/19 (ECtHR, 1 September 2022), para. 50.

[50] *P.C. v Ireland* App no 26922/19 (ECtHR, 1 September 2022), para. 47.

[51] *P.C. v Ireland* App no 26922/19 (ECtHR, 1 September 2022), paras. 51 ff.

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In its reasoning, the ECtHR omitted its previous case law on similar issues – namely *Apostolakis v Greece* and *Philippou v Cyprus* – in which the Court had reached a different conclusion and found an interference where the applicants lost pension payments as a result of a disciplinary or criminal punishment. It thus seems that the dissenting opinion in *Belané Nagy v Hungary* may, after all, have made an impact on the case law.

In the most recent case on the issue at hand, *Domenech Aradilla and Rodríguez González v Spain*, the ECtHR had to assess at what point in time a legitimate expectation of receiving a survivor's pension arises.[52] Two Catalan applicants had been living in a same-sex partnership when their respective partners died. In Catalonia, unlike in other parts of the country, it had not been necessary to formally register the partnership for it to be legally recognised. This was reflected in the legal requirements to receive a survivor's pension: Catalan partnerships did not need to be registered. However, the Spanish Constitutional Court ruled that this unequal regional treatment of partnerships was unconstitutional. The lower Courts then applied the new – disadvantageous – legal framework to the applicants, as their cases had not yet been finally decided before the Constitutional Court's decision had been announced. For this reason, the two applicants were denied a survivor's pension, for they were unable to meet the newly applicable requirement of having registered their partnership at least two years before their partner's death.

The ECtHR considered the death of the partner to be the relevant point in time for assessing whether the entitlement to a survivor's pension had materialised into a property right within the meaning of Article 1 Protocol No. 1. This meant that if the other part of the couple met the requirements for receiving a survivor's pension when the respective partner died, Article 1 Protocol No. 1 was applicable.[53] Therefore, the Court did not consider it detrimental to the applicants' claims that they did not meet an unforeseeable requirement of having to register the partnership at least two years before the death, especially as this change took effect only during their pending application procedure as a result of the judgment of the Constitutional Court.[54]

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[52] *Domenech Aradilla and Rodríguez González v Spain* App nos 32667/19 and 30807/20 (ECtHR, 19 January 2023).

[53] *Domenech Aradilla and Rodríguez González v Spain* App nos 32667/19 and 30807/20 (ECtHR, 19 January 2023), para. 92.

[54] *Domenech Aradilla and Rodríguez González v Spain* App nos 32667/19 and 30807/20 (ECtHR, 19 January 2023), para. 93.

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In the follow-up case of *Valverde Digon v Spain*, however, the applicant's partner had died after the relevant amendment had come into force.[55] At first sight, *Domenech Aradilla and Rodríguez* would have supported the view that Article 1 of Protocol No. 1 does not apply in this case because the relevant law on widowers' pensions was amended before the death occurred.

The Court nonetheless held that they had a legitimate expectation and that Article 1 of Protocol No. 1 had been violated. This surprising result is explained by the specifics of the case at hand: The applicants had been in a partnership since 2005 and formally registered being in a civil partnership in 2014, after the change in law came into effect. Thus, they promptly tried to comply with the new requirement shortly after the announcement of the judgment of the Constitutional Court. Yet they failed to meet two-year requirement only because the applicant's partner died just three days after having formalised the partnership.

Under these circumstances, despite not meeting all statutory requirements at the trigger event (the partner's death), the Court acknowledged their legitimate expectation of obtaining a survivor's pension. Referring to *Belané Nagy*, the Court reached this result by considering a "combination of elements" with reference to the principle of rule of law.[56] The Court first pointed out that the applicant and her partner had initially fulfilled all eligibility criteria before the change in law came into effect.[57] It then emphasised that the Spanish survivor's was a contributory benefit, not based on social solidarity.[58] Finally, the Court recalled that the requirement to register a civil partnership had been introduced only a few months before the death of the applicant's partner, making it impossible for the couple ever to meet the newly introduced eligibility criteria.[59]

This reasoning was rebutted by a joint dissenting opinion of Judges Ravarani, Ranzoni, and Guyomar, who had voted in favour of finding a violation in *Domenech Aradilla and Rodríguez González*. They argued that the applicant merely had "a prospect of eligibility" which had not yet materialised. Such a hope, the opinion continued, was not concrete enough for establishing a legitimate expectation. The opinion

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[55] *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023).

[56] *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023) para. 63.

[57] *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023) para. 59.

[58] *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023) para. 60.

[59] *Valverde Digon v Spain* App no 22386/19 (ECtHR, 26 January 2023) paras. 61 f.

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concluded by expressing concern that the majority's opinion might hamper the legislature's ability to reform pension systems.

This fear, however, appears to be an overstatement. Overall, the recent case law suggests, that the Court will pay more attention to the actual legal framework of the benefits in question before it determines whether there is a legitimate expectation. As a rule, only enforceable claims will amount to possessions protected by Article 1 of Protocol No 1. The concept of legitimate expectations therefore neither freezes the status quo of existing benefits nor protects potential beneficiaries from adverse changes in eligibility criteria. Exceptions to this rule, as in *Béláné Nagy* and *Domenech Aradilla and Rodríguez González*, are based on considerations of equity.

A further – albeit separate – issue arises when proceedings regarding a benefit are reopened or when a benefit that has been granted is subsequently reassessed. In the case of *Moskal v Poland*, the ECtHR ruled that a benefit that can be revoked can nonetheless create a right to property under Article 1 of Protocol No. 1.[60] The applicant had applied for and been granted an early retirement pension in good faith. After ten months, however, her pension was withdrawn following the discovery of an error in the initial processing of her case. Although the applicant did not have to repay the amount she had received in good faith, she suddenly lost her current income. The ECtHR therefore found a violation, particularly as the applicant, due to her age, no longer had good prospects of finding a new job.[61]

In the case of *Wieczorek v Poland*, a woman's invalidity pension, which she had received for over ten years, was reviewed following a new health check and was modified into a temporary pension subject to periodic review. Again, the Court considered that there had been an interference with Article 1 of Protocol No. 1; but, in this case, it concluded that it was proportionate.[62]

In the most recent case, *Dumitrescu v Romania*, the applicant had been receiving an invalidity pension from 2012 on the basis of a visual impairment. However, this benefit has been restricted to only those who are blind since 2015, following a ruling by the High Court of Cassation and Justice. As a result, individuals with a visual impairment no longer receive this benefit, as old cases were reopened. The applicant was

[60] *Moskal v Poland* App no 10373/05 (ECtHR, 15 September 2009), para. 40; *Lewandowski v Poland* App no 38459/03 (ECtHR, 2 October 2012); *Romeva v North Macedonia* App no 32141/10 (ECtHR, 12 December 2019), para. 39, with further references.

[61] *Moskal v Poland* App no 10373/05 (ECtHR, 15 September 2009), paras. 73 f.

[62] *Wieczorek v Poland* App no 18176/05 (ECtHR, 8 December 2009), paras. 61 ff.

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then obliged to repay the benefits he had received in good faith and lost his current pension payments. The ECtHR stressed that the decision to revoke the pension was not based on any new evidence, but merely on a re-evaluation of the same evidence from the first proceedings. Given these circumstances, the ECtHR considered the revocation to be a disproportionate interference with the right to property.[63]

The cases of *Moskal* and *Dumitrescu* appear to be straightforward in that they both concerned the re-examination of initial decisions to grant a benefit without any change in the personal situation of the applicant. Under such circumstances, it seems reasonable to assume that the applicant has acquired a right of property within the meaning of Article 1 of Protocol No. 1, when the competent authority originally granted the benefit applied for.

However, in the case of *Wieczorek* – which concerned the re-evaluation based on a new health check – it appears doubtful whether the applicant could still invoke a right to property in the light of the recent case law on legitimate expectations. As discussed above, the Court has since regularly held that there is no property right where the applicant no longer satisfies the conditions for entitlement to a benefit. To ensure consistency in case law, this reasoning should also be applied to reopening proceedings due to factual circumstances, such as an improvement in health condition.

2. Proportionality analysis

Where the scope of protection of Article 1 of Protocol No. 1 applies directly, a measure interfering with the right in question is assessed for its proportionality. Despite the proportionality test being heavily dependent on the individual case, some guiding principles can be identified in the case law:

In principle, the Contracting States are free to change benefits and entitlements over time, for example in response to societal change and altered perceptions of social need.[64] The ECtHR emphasises that the right to property does not imply a right to a certain level of payments and that modest reductions in benefits must generally be tolerated.[65] However, it has also made it clear that, for example, the complete loss of

[63] *Dumitrescu v Rumania* App no 36815/20 (ECtHR, 4 July 2023), paras. 27 ff.

[64] *Wieczorek v Poland* App no 18176/05 (ECtHR, 8 December 2009), para. 67; *Richardson v United Kingdom* App no 26252/08 (ECtHR [dec], 10 April 2012), para. 17; *Baczúr v Hungary* App no 8263/15 (ECtHR, 7 March 2017), para. 28.

[65] *Grudić v Serbia* App no 31925/08 (ECtHR, 17 April 2012), para. 72; *Stefanetti and others v Italy* App nos 21838/10 and others (ECtHR, 15 April 2014), para. 59; *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), paras. 83 f.

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a pension generally violates Article 1 of Protocol No. 1.[66] With regard to cuts, the ECtHR rejects a schematic assessment based purely on percentages.[67] Instead, it pursues a holistic approach, taking into account, for example, the aim of the reduction, budgetary constraints, whether the persons concerned continue to receive benefits (or lose their means of subsistence altogether), whether an undue burden is imposed on the persons concerned, and whether the changes take effect retroactively or only after a transitional period.[68]

In applying these principles, the ECtHR found a violation in the case of *Kjartan Ásmundsson v Iceland*. The applicant had been deprived of the invalidity pension he had been receiving for almost 20 years following an accident at work.[69] The reason for this was that, in the meantime, the basis for assessing invalidity had been changed so that it was no longer based on the inability to perform the same work, but on the inability to perform work in general. The Icelandic Supreme Court considered that the measure was justified by the financial difficulties of the pension fund. However, the ECtHR focused on the fact that the applicant belonged to the minority of 15 % of pensioners whose benefits had been completely reduced. In other words, they had been subjected to an undue burden.[70] In the cases of *Stefanetti and others v Italy* and *Baczúr v Hungary*, this verdict also applied to a reduction in pension benefits by two thirds.[71]

In the case of *Philippou v Cyprus*, on the other hand, the ECtHR found that even the complete loss of a civil servant's pension was justified as a disciplinary sanction: On the one hand, the applicant had been sentenced to five years imprisonment for

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[66] *Stefanetti and others v Italy* App nos 21838/10 and others (ECtHR, 15 April 2014), para. 59; *Philippou v Cyprus* App no 71148/10 (ECtHR, 14 June 2016), para. 68; *Béláné Nagy v Hungary* App no 53080/13 (ECtHR [GC], 13 December 2016), para. 117.

[67] Explicitly *Stefanetti and others v Italy* App nos 21838/10 and others (ECtHR, 15 April 2014), para. 59, with further references.

[68] *Yavaş and others v Turkey* App no 36366/06 (ECtHR, March 2019), paras. 47 ff; *Domenech Aradilla and Rodríguez González v Spain* App nos 32667/19 and 30807/20 (ECtHR, 19 January 2023), paras. 101 ff.

[69] *Kjartan Ásmundsson v Iceland* App no 60669/00 (ECtHR, 12 October 2004).

[70] *Kjartan Ásmundsson v Iceland* App no 60669/00 (ECtHR, 12 October 2004), para. 43 ("only a small minority [...] had to bear the most drastic measure of all"), para. 45 ("excessive and disproportionate burden").

[71] *Stefanetti and others v Italy* App nos 21838/10 and others (ECtHR, 15 April 2014); *Baczúr v Hungary* App no 8263/15 (ECtHR, 7 March 2017), paras. 29, 32.

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criminal offences, which was considered to be prejudicial to the applicant.[72] The ECtHR also took into account the fact that the applicant was not deprived of all means of subsistence because he continued to receive a social security pension. In this respect, his case differed from that of *Apostolakis v Greece*, where the applicant lost all pension and social security entitlements – and thus all means of subsistence – because of his conviction.[73]

3. Summary

The ECtHR has long recognized that social benefits may fall under the right to property in Article 1 of Protocol No. 1, regardless of whether they are based on prior contributions or not. This convincing conclusion was reached based on the argument that social benefits have become a significant aspect of the proprietary interests of their beneficiaries. Moreover, the differentiation between contributory and non-contributory benefits has become increasingly arbitrary as ever more benefits are funded by both taxes and contributions (or even exclusively through taxes).

In most cases, therefore, the central issue is not whether an abstract category of benefit can be considered a property right under Convention law, but rather whether a concrete claim has materialised into a property right protected by Article 1 of Protocol No. 1. This question is crucial, because claims which do not fall directly within the scope of Article 1 of Protocol No. 1 can only be assessed for non-discrimination under Article 14 ECHR in conjunction with Article 1 of Protocol No. 1. In such cases, the Court will not examine whether, for example, reductions in benefits constitute a disproportionate interference with the right to property, but only whether the applicant has suffered discrimination in relation to other beneficiaries.

In principle, Article 1 of Protocol No. 1 only applies if the applicant fulfils the legal conditions for entitlement. At times, however, the Court considered it sufficient that the applicant had relied on a general expectation that they would receive a certain benefit if a certain event occurred (e.g. that they would receive a pension when they reached retirement age). This suggested a very broad understanding of legitimate expectation, divorced from the actual legal framework. In recent case law, however, the Court has been more sensitive to the question of whether an applicant actually had a legitimate expectation of receiving a particular benefit. This (more restrictive) approach also appears to be in line with the Court's other case law on property rights, according to which future income does not fall under Article 1 of Protocol No. 1

[72] *Philippou v Cyprus* App no 71148/10 (ECtHR, 14 June 2016), para. 74.

[73] *Apostolakis v Greece* App no 39574/07 (ECtHR, 22 October 2009).

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unless it has already been earned or is definitely enforceable.[74] By way of exception, however, the Court is willing to extend the notion of legitimate expectation in individual cases for the sake of equity.

In summary, despite all the inconsistencies, it is possible to establish certain rules of thumb for assessing whether a claim falls directly within the scope of the right to property or whether a claim will only be examined under the principle of non-discrimination:

1) Anyone who satisfies the eligibility criteria and has become entitled to a certain benefit may challenge any subsequent termination or reduction of that benefit as an interference with Article 1 of Protocol No. 1.

2) Anyone who is not entitled to a benefit in the first place may (only) challenge an alleged discrimination in the conditions for obtaining a benefit under Article 14 ECHR in conjunction with Article 1 of Protocol No. 1.

3) Anyone who – despite initially satisfying the eligibility criteria – is subsequently disqualified due to a change in factual or personal circumstances (e.g. criminal conviction or improved health condition) can also only challenge an alleged discrimination under Article 14 ECHR in conjunction with Article 1 of Protocol No. 1 (but cannot rely directly on Article 1 of Protocol No. 1).

Thus, a measure interfering with the right in question will be assessed for its proportionality only where the scope of protection of Article 1 of Protocol No. 1 applies directly. With regard to cuts, the Court pursues a holistic approach, taking into account, for example, the aim of the reduction, budgetary constraints, whether the persons concerned continue to receive benefits (or lose their means of subsistence altogether), whether an undue burden is imposed on the persons concerned, and whether the changes take effect retroactively or only after a transitional period.

B. The case law of the VfGH

1. The protection of social benefits through the constitutional right to property

For a long time, the VfGH considered public law claims not to be covered by the constitutional protection of property rights at all. According to the settled case law of the VfGH, the right to property enshrined in Article 5 StGG does not apply to public

[74] *Denisov v Ukraine* App no 76639/11 (ECtHR [GC], 25 September 2018), para. 137, with further references.

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law claims.[75] The Court initially took the same view with regard to Article 1 of Protocol No. 1.[76]

However, the case law changed following the judgment of the ECtHR in *Gaygusuz v Austria*.[77] In this case, the ECtHR qualified the Austrian emergency assistance (*Notstandshilfe*), a form of unemployment benefit rooted in public law, as "property" within the meaning of Article 1 of Protocol No. 1, whereupon the VfGH followed this approach and abandoned its previous case law.[78] However, the VfGH has since emphasised that this protection of social security benefits is only triggered if the entitlement is "offset by a consideration (to be provided in advance) by the beneficiary".[79]

The VfGH seems to have maintained this holding even recently,[80] although the ECtHR has long extended the scope of Article 1 of Protocol No. 1 to cover non-contributory benefits too.[81] Even in cases where the applications explicitly referred to the recent case law of the ECtHR, the VfGH did not feel obliged to comment on it.[82] It was only in an decision of 28 November 2018 that the VfGH referred to *Stec v United Kingdom*, the leading case in question, for the first time, albeit only in passing in a pension law matter and without reference to any specific paragraph in the ECtHR's decision.[83] It can be concluded that the VfGH appears to be aware of the case law of the ECtHR. However, the VfGH has yet to draw any conclusions from it.

Thus, according to the case law of the VfGH, social benefits and subsidies that are not based on contributions are still not protected by the right to property in either Article 5 StGG or Article 1 of Protocol No. 1.

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[75] VfSlg. 12.180/1989, 13.130/1992, 15.661/1999, 18.446/2008; Korinek, 'Art. 5 StGG', in Korinek, Holoubek and others (eds.), *Österreichisches Bundesverfassungsrecht* (Vienna, 5th issue 2002) paras. 20 f.

[76] VfSlg. 4880/1964, 5658/1968, 6695/1972.

[77] *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 September 1996).

[78] VfSlg. 15.129/1998.

[79] VfSlg. 15.129/1998 (my translation); see also VfSlg. 15.448/1999, 16.292/2001, 18.885/2009.

[80] VfGH 30.11.2021, G 107/2021; 15.12.2021, G 369/2021, with reference to VfSlg. 15.129/1998.

[81] Berka, Binder and Kneihs, *Grundrechte* 450.

[82] VfSlg. 20.244/2018.

[83] VfGH 28.11.2018, G 87/2018 (unpublished); but see published VfGH 28.2.2023, G 192/2022.

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2. The protection of social benefits through the constitutional protection of reliance interests

In lieu of a right to property, however, the VfGH has developed a protection of reliance interests (*Vertrauensschutz*), which it derives from the right to equality in Article 7 B-VG.[84] This protection covers "vested rights" (*wohlerworbene Rechte*), which are understood to be legal claims or legal entitlements to which the beneficiaries had a reliance interest, as in the – paradigmatic – case of a pension benefit under social security law. In certain cases, therefore, the right to equality in Article 7 B-VG protects the beneficiaries from sudden, intensive interference with benefits, which they at least reasonably believed they could rely on. This protection has thus far covered, for example, the pensions of public officials ("politicians' pensions"[85]) and civil servants,[86] as well as accident pensions, which were taxed abruptly.[87]

This protection is not limited to retroactive reductions or restrictions. Unlike the protection provided by Article 1 of Protocol No. 1, the constitutional protection of reliance interests regularly applies to prospective benefits to which the applicants have contributed (*Anwartschaften*). This protection thus takes effect before the applicants have met all the legal requirements for actually enforcing a benefit (such as reaching the retirement age).[88]

The protection of reliance interests is similar to, yet different from, the protection of legitimate expectations under Article 1 of Protocol No. 1. The case law of the VfGH is best understood in the context of the rule of law principle.[89] Early on, the Court emphasised that legal norms aim to regulate human behaviour, and, therefore, a legal system could only fulfil its function if the persons subject to the law can orientate their

[84] VfSlg. 11.288/1987, 16.764/2002, 17.254/2004, 20.334/2019; Schäffer and Klaushofer, 'Zur Problematik sozialer Grundrechte', 761 (773 f); Eberhard, (2012) *ZÖR* 513 (527); Pfeil, 'Vertrauensschutz im Sozialrecht' (2015) *DRdA* 420; Siess-Scherz, 'Vertrauensschutz im Sozialrecht' (2015) *DRdA* 433; Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', in Korinek, Holoubek and others (eds.), *Österreichisches Bundesverfassungsrecht* (Vienna, 14th issue 2018) paras. 363 ff; Berka, Binder and Kneihs, *Grundrechte* 907; on the elevated standards of review regarding cuts of social benefits, see Pöschl, *Gleichheit vor dem Gesetz* (Vienna, 2008) 731 f.

[85] VfSlg. 11.309/1987.

[86] VfSlg. 11.665/1988.

[87] VfSlg. 16.754/2002.

[88] See Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', paras. 395, 397.

[89] For further discussion, see Pöschl, *Gleichheit* 820 f; Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', para. 363 ff.

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behaviour to the applicable legal framework.[90] This is particularly evident in the case of retroactive legislation.[91]

However, as mentioned above, the VfGH has also extended the constitutional protection of reliance interests to prospective benefits that have not yet materialised. The VfGH is therefore generally said to have adopted a stricter approach than the ECtHR regarding the protection of pension rights.[92]

For instance, the VfGH considered reductions of pensions for notaries who were about to retire of around 20-26 % to be an intrusive interference with vested rights contrary to Article 7 B-VG.[93] In contrast, the ECtHR held that there was no legitimate expectation protected by Article 1 of Protocol No. 1 in the case of *Da Cunha Folhadela Moreira v Portugal*, discussed above, which also concerned the reduction of the prospective pension approximately two years before the applicant reached the retirement age.

With regard to increasing the retirement age of women to that of men, the VfGH explicitly clarified that the legislator cannot immediately and entirely equalise the retirement age, as this would violate the protection of reliance interests regarding a statutory differentiation that had been in force for decades.[94]

The situation is, however, different with regard to non-contributory benefits. The protection of reliance interests only covers benefits that are redeemed in advance by a contribution or other payment by the beneficiary.[95] Budget-financed transfer payments such as the basic social assistance, the family allowance, and the care allowance are therefore not subject to any protection of reliance interests, which is why the VfGH exercises restraint regarding these benefits.[96]

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[90] VfSlg. 12.186/1989.

[91] For a classic account, see Fuller, *The Morality of Law*, 2nd edn. (New Haven and London, 1969) 53.

[92] For further discussion, see Siess-Scherz, (2015) *DRdA* 433 (440 ff).

[93] VfSlg. 17.254/2004.

[94] VfSlg. 12.568/1990, 14.090/1995, 16.292/2001.

[95] VfSlg. 19.411/2011, 20.359/2019, 20.397/2020; cf. Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', para. 395.

[96] Regarding the family allowance, see e.g. VfSlg. 8605/1979, 16.542/2002; on study support, see e.g. VfSlg. 18.638/2008, 19.105/2010; on childcare allowance, see e.g. VfSlg. 18.705/2009; on housing allowance, see e.g. VfSlg. 20.199/2017; on social assistance, see e.g. VfSlg. 20.359/2019; cf. Eberhard, (2012) *ZÖR* 513 (527); Pöschl, 'Gleichheitsrechte', in Merten, Papier and Kucscko-Stadlmayer (eds.),

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For example, the Court had no constitutional objections when the age limit for receiving family allowance – a benefit granted to alleviate the financial burden on families – was lowered by two years, thereby shortening the period for receiving the benefit. The VfGH stated that the legislator was free to raise or lower the age limit up to which family allowance is granted for reasons of family and budgetary policy, in apparent contrast to its case law on the retirement age. For the same reasons, even the complete abolition of a special payment ("13th family allowance") was constitutional without the Court demanding a reasonable justification for such a measure.[97]

The lack of protection of reliance interests was also evident in a decision of the VfGH on the care allowance – a lump sum payment for care-related expenses.[98] On 30 December 2010, the Federal legislature announced that access to care allowance would be made more difficult for new applications as of the next day, 1 January 2011: The monthly care requirement for the granting of the care allowance was increased by 10 hours in each of the first two care levels. The VfGH did not disapprove of this sudden restriction and simply stated that the legislature was free to make access to tax-financed transfer payments more difficult in order to relieve the public budget. Since this discretionary power of the legislator also existed, to some extent, in the case of contributory benefits, it must – according to the VfGH – be assumed all the more in the case of non-contributory benefits. However, the VfGH has not yet had to answer the question of whether a complete abolition of, for example, the family or care allowance would also be constitutional with regard to the right to equality and property.[99]

An even more illustrative example is the case concerning the decision of Lower Austria in 2016 to exclude beneficiaries of subsidiary protection from full social assistance and to limit their support to the lower level of basic support (*Grundversorgung*), which is primarily intended for foreigners whose application for international protection is still pending. The VfGH did not have any constitutional concerns about this sudden and substantial loss of basic benefits coming into force without a transitional

Handbuch der Grundrechte in Deutschland und Europa, vol. VII/1, 2nd edn. (Vienna, 2014) para. 64.

[97] VfSlg. 19.411/2011, 19.413/2011.

[98] VfSlg. 19.434/2011; see § 1 Bundespflegegeldgesetz (BPGG), BGBl. 110/1993, as amended by BGBl. I 58/2011.

[99] In any case, the VfGH seems to assume a special constitutional responsibility of the state to alleviate the financial burden on families, see VfSlg. 12.940/1991, 12.941/1991, 14.992/1997, 16.226/2001.

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period, due to its settled case law on the lack of reliance interests when it comes to non-contributory benefits.[100]

3. Summary

For a long time, the case law of the VfGH excluded public law claims entirely from the constitutional protection of property rights. However, following the judgment of the ECtHR in *Gaygusuz v Austria*, the case law has changed. Since then, the VfGH has applied the right to property to cases of social benefits. Nonetheless, the Court still emphasises that the protection of social security benefits on the basis of the right to property in Article 5 StGG and Article 1 of Protocol No. 1 is triggered only if the entitlement is based on contributions. Non-contributory benefits, on the other hand, are not covered by the jurisprudence of the VfGH on the right to property.

To review public law claims, the VfGH has developed a constitutional protection of reliance interests derived from the right to equality in Article 7 B-VG. This innovation has proven to offer a robust protection of pension claims. However, it is important to note that the protection of reliance interests only applies to contributory benefits. As a result, the VfGH exercises restraint when it comes to budget-financed transfer payments, such as basic social assistance, family allowance, and care allowance, as they are not covered by the protection of reliance interests.

C. Comparative results

The most striking difference in the jurisprudence of the ECtHR and the VfGH concerns the divergent understanding of protected interests. The broad applicability of Article 1 of Protocol No. 1 to public law claims of all kinds has led the ECtHR to conclude that the limitation and reduction of existing benefits constitute interferences with property-like interests and are therefore subject to a proportionality test. Although the ECtHR generally leaves a wide margin of appreciation to the Contracting States, especially in the case of minor reductions, it nevertheless pays particular attention to cases where vulnerable groups are either unduly burdened (e.g. because they are disproportionately affected) or where those concerned risk losing a significant part of their means of subsistence. In this regard, the Court has two main concerns: firstly, to prevent certain beneficiaries from being unfairly burdened compared to

[100] VfSlg. 20.177/2017.

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others, and secondly, to ensure that the minimum subsistence level remains an essential threshold for a reduction of existing benefits.[101]

In contrast, the VfGH assumes a protected property right only if the benefit is part of a *quid pro quo*, e.g., is based on prior contribution payments. Non-contributory benefits, in contrast, do not enjoy special constitutional protection. The protection of reliance interests developed by the VfGH under Article 7 B-VG also only covers contributory benefits. The Court therefore does not challenge the legislature when eligibility requirements or the amounts of benefits change – even surprisingly – from one day to the next. The VfGH will only assess an interference with reliance interests where a benefit is offset by prior contributions paid.

In the area of non-contributory social benefits, therefore, the level of protection in the case law of the VfGH is generally lower than that of the ECtHR, although this discrepancy has not yet come to the fore in a specific case, probably also due to the fact that Austria generally has a comprehensive social welfare system.[102] Furthermore, the right to equality in Article 7 B-VG also contains a principle of equalisation of burdens (*Lastengleichheit*). This principle requires a special justification for any undue burdens (*Sonderopfer*), thus aligning the scope of protection to that of the ECtHR.[103] Nevertheless, it would be sensible on the part of the VfGH to bear the case law of the ECtHR in mind in its own jurisprudence.[104]

Where, on the other hand, contributions are paid, the VfGH readily extends the protection to prospective benefits which have not actually materialised. For instance, the VfGH has examined pension cuts that affect (only) future beneficiaries and increases in the retirement age, whereas the ECtHR dismissed such cases due to a lack of legitimate interest and only tested the non-discriminatory nature of the measures in question.

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[101] See, albeit focussing on austerity measures, Kagiaros, 'Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?' (2019) *EPL* 535 (539 ff).

[102] For a recent study, see Rocha-Akis, Silva and others, *Umverteilung durch den Staat in Österreich 2019 und Entwicklungen von 2005 bis 2019* (2023), accessible online via <wifo.ac.at/news/umverteilung_durch_den_staat_in_oesterreich> accessed 30 November 2023.

[103] See Korinek, 'Art. 5 StGG', paras. 44 f; Pöschl, *Gleichheit* 572 f, 594 f.

[104] That the VfGH generally keeps in line with the guidelines set by the ECtHR, is discussed, e.g., by Struth, 'Der Rechtsprechungsdialog zwischen dem österreichischen VfGH und dem EGMR als Faktor von Rechtsschutzgewährung und Rechtsfortbildung im europäischen Grundrechtsschutz' (2019) *GVRZ* 12.

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Regarding the approach of the ECtHR, it has therefore been argued that the concept of legitimate expectation should be clarified to include the protection of reliance interests.[105] For such an endeavour, the Austrian example could offer a source of inspiration. This development could be based on rule of law considerations, which both the VfGH and the ECtHR have referred to when examining the question of reliance interests and legitimate expectations.

In any case, there appears to be a correlation between the extent of protection and its robustness. The ECtHR has chosen to provide broad protection, which includes non-contributory benefits, but has limited its level of scrutiny to allow States a wide margin of appreciation. In contrast, the VfGH has limited the scope of protection from the beginning. However, when it applies the protection of reliance interests, it usually applies higher standards of review than the ECtHR.

The VfGH's strict distinction, however, creates a two-tiered system of protection that fails to adequately reflect the individual interests at stake and does not take into account that most benefits, including pensions, are substantially subsidised by the public.[106] On the other hand, the extended protection of reliance interests, which also covers future benefits that have not yet materialised in the individual case at hand, significantly limits the legislator's room for manoeuvre, for example, to modify past pension commitments that may no longer be feasible due to demographic changes.

Given the judicial restraint in protecting certain levels of (non-contributory) benefits, it is all the more important to ensure at least non-discriminatory access to existing benefits (III).

[105] Cousins, (2021) *EJSS* 24 (38 f).

[106] The expenditure on federal pensions is projected to increase steadily to € 35.23 billion by 2027. Of this amount, € 20.7 billion will be allocated to the statutory pension insurance scheme and € 14.54 billion to civil servant pensions. The share of expenditure for statutory pension insurance in total government expenditure is expected to rise from approximately 12.1 % in 2023 to 16.2 % in 2027, see Parlamentskorrespondenz Nr. 1202, 16 November 2023, *Budgetentwurf 2024 beschert Sozialministerium deutliches Budgetplus. Mehr Geld für Pflege und Armutsbekämpfung, auch Pensionsausgaben steigen*, <www.parlament.gv.at/aktuelles/pk/jahr_2023/pk1202> accessed 16 January 2024.

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III. The right to equal access to social benefits

A. The case law of the ECtHR

1. The principle of non-discrimination and social benefits

Derivative claims to a right are of particular practical importance, as they guarantee the right to receive benefits on an equal basis with others. According to the case law of the ECtHR, such rights may arise from the prohibition of discrimination under Article 14 ECHR in conjunction with Article 1 of Protocol No. 1. Thus, the ECtHR has consistently held that, although Article 1 of Protocol No. 1 does not guarantee a right to a pension, if there is a pension scheme, it must be non-discriminatory.[107] This principle extends to the social welfare system as such.

This supplementary protection against discrimination does not require an interference with property rights. It is sufficient that the "ambit" of Article 1 of Protocol No. 1 is affected,[108] regardless of whether the benefits are mandated by Convention law.[109] Applicants may therefore rely on Article 14 ECHR in conjunction with Article 1 of Protocol No. 1 if – hypothetically – they would be entitled to the benefit in case of the allegedly discriminatory criterion being abolished.[110]

Occasionally, the ECtHR considers the ambit of other Convention guarantees to be affected by social benefits in addition to Article 1 of Protocol No. 1. For example, depending on the subject matter, Article 8 ECHR may be relevant in the case of family and child allowances[111] or housing assistance.[112] In the case of school fees, the

[107] *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 180, with further references.

[108] Leitjen, (2019) *EJSS* 307 (319).

[109] *Fábián v Hungary* App no 78117/13 (ECtHR [GC], 5 September 2017), para. 112 ("It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide").

[110] *Šaltinytė v Lithuania* App no 32934/19 (ECtHR, 26 October 2021), para. 59 ("the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question").

[111] *Petrovic v Austria* App no 20458/92 (ECtHR, 27 March 1998), para. 27; *Niedzwiecki v Germany* App no 58453/00 (ECtHR, 25 October 2005); *Okpisz v Germany* App no 59140/00 (ECtHR, 25 October 2005); *Konstantin Markin v Russia* App no 30078/06 (ECtHR [GC], 22 March 2012); *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014), para. 41.

[112] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011).

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ECtHR considered the right to non-discriminatory access to education under Article 2 of Protocol No. 1 to be affected.[113]

At times, the ECtHR has interpreted the scope of Article 8 ECHR in a very broad manner. In two cases, for example, it was sufficient for the benefits to have an indirect effect on the conduct of life and the family in order to fall within the ambit of Article 8 ECHR.[114] Admittedly, these cases concerned Switzerland, which had not ratified Protocol No. 1. For this reason, the ECtHR could rely on the right to non-discrimination in Article 14 ECHR only in conjunction with another Convention guarantee apart from Article 1 of Protocol No. 1.

Since then, however, the Grand Chamber of the ECtHR has had the opportunity to harmonise the conflicting case law in *Beeler v Switzerland*.[115] The Court clarified that the ambit of Article 8 ECHR is only affected if the benefits are intended to promote family life and have a direct effect on it. In the case *Beeler v Switzerland*, these criteria applied to a widow's pension, which enabled the surviving parent to look after the children without getting into financial difficulties.[116]

Conversely, the ECtHR recently denied the applicability of Article 8 ECHR in a case concerning child allowance, which – similar to the Austrian family allowance – was granted as a general support benefit regardless of need and without being tied to a specific purpose.[117]

It follows that, in line with *Beeler v Switzerland*, the ECtHR will henceforth assess most cases raising the issue of equal treatment on the basis of Article 14 ECHR in conjunction with Article 1 of Protocol No. 1. Only in exceptional cases, where a direct impact on family life can be established, will Article 8 ECHR come into play.

2. Unequal treatment of different categories of migrants

On the merits, the ECtHR's review of non-discrimination leaves a wide margin of appreciation to the States because it considers national authorities generally better placed to assess what is in the best public interest in terms of social or economic

[113] *Ponomaryovi v Bulgaria* App no 5335/05 (ECtHR, 21 June 2011), para. 49.

[114] *Di Trizio v Switzerland* App no 7186/09 (ECtHR, 21 February 2016), paras. 62, 64; *Belli and Arquier-Martinez v Switzerland* App no 65550/13 (ECtHR, 11 December 2018), para. 66.

[115] *Beeler v Switzerland* App no 78630/12 (ECtHR [GC], 11 October 2022), paras. 66 ff.

[116] *Beeler v Switzerland* App no 78630/12 (ECtHR [GC], 11 October 2022), para. 77.

[117] *X and others v Ireland* App nos 23851/20 and 24360/20 (ECtHR, 22 June 2023), paras. 73 f.

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policy.[118] When called upon to assess the justification for a difference of treatment in this area, the ECtHR will only intervene if the distinction appears to be "manifestly without reasonable foundation".[119]

Only if the differentiation is based on innate or immutable personal characteristics, such as gender or ethnic attributes ("race"),[120] must there be compelling reasons to justify unequal treatment.[121] Nationality – or, more precisely, the lack of citizenship – is also generally qualified as an improper ground to justify different treatment according to settled case law.[122]

However, if the difference in treatment is not directly linked to nationality or citizenship, but to residence status, the level of scrutiny is significantly reduced.[123] While the ECtHR considers the residence status to be an "other status" within the meaning of Article 14 ECHR,[124] it emphasises that this is not an innate or immutable characteristic, but to some extent based on free choice.[125] In principle, therefore, the ECtHR does not consider itself competent to examine the justification for differentiating between different types of residence permits.[126]

Unfortunately, the case law in this area remains rather fragmentary and somewhat erratic. In particular, the Court has not yet explicitly set any criteria for distinguishing

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[118] *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 183.

[119] *Stec and others v United Kingdom* App nos 65731/01 and 65900/01 (ECtHR [GC] [dec], 6 July 2005), para. 52; *Andrejeva v Latvia* App no 55707/00 (ECtHR [GC], 18 February 2009), para. 83; *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 183.

[120] On differential treatment on grounds of age, see *Šaltinytė v Lithuania* App no 32934/19 (ECtHR, 26 October 2021), paras. 62 ff.

[121] *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 183, with further references.

[122] *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 September 1996), para. 42; *Koua Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003), para. 46; *Andrejeva v Latvia* App no 55707/00 (ECtHR [GC], 18 February 2009), para. 87; *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 183.

[123] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 47; *Savickis and others v Latvia* App no 49270/11 (ECtHR [GC], 9 June 2022), para. 183, with further references.

[124] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 46.

[125] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 47.

[126] *Niedzwiecki v Germany* App no 58453/00 (ECtHR, 25 October 2005), para. 33; *Okpisz v Germany* App no 59140/00 (ECtHR, 25 October 2005), para. 34.

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prohibited discrimination on grounds of nationality from a mere differentiation between different residence permits. It is also unclear to what extent indirect discrimination based on nationality could raise issues under Article 14 ECHR.[127] Although it is therefore not easy to draw a coherent overall picture and framework from the Strasbourg jurisprudence, it is worth trying:

As noted above, it is particularly difficult to justify unequal treatment of foreigners solely because of their lack of citizenship. The leading case is *Gaygusuz v Austria*, where the ECtHR found that Austria had violated the Convention by making the emergency assistance, an unemployment benefit, explicitly conditional on Austrian citizenship, thus excluding a Turkish applicant from receiving assistance solely because of his nationality, even though he had contributed to unemployment insurance.[128]

Subsequently, the Court also found a violation in the case of *Koua Poirrez v France.*[129] The applicant had applied for a non-contributory disability benefit in addition to the general social assistance to which he was entitled. Although he was legally resident in France, the French authorities refused to grant him the disability allowance on the ground that he was not a French citizen. Since this refusal was based solely on his nationality, and since Mr Poirrez would otherwise have fulfilled all the requirements for receiving the benefit, the ECtHR found a violation of Article 14 ECHR in conjunction with Article 1 of Protocol No. 1.[130] For similar reasons, the Court also found a violation of Article 14 in conjunction with Article 8 ECHR in the case of *Weller v Hungary.*[131] This case concerned the refusal of Hungarian authorities to grant a maternity benefit to a Romanian citizen. The ECtHR stressed that there was no indication the mother had abused or at least intended to misuse the Hungarian social security system.[132]

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[127] Farcy, 'Equality in Immigration Law: An Impossible Quest?' (2020) *HRLR* 725 (734 f).

[128] *Gaygusuz v Austria* App no 17371/90 (ECtHR, 16 September 1996), para. 50; regarding discrimination based on nationality in the social security law of farmers, see *Luczak v Poland* App no 77782/01 (ECtHR, 27 November 2007).

[129] *Koua Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003).

[130] *Koua Poirrez v France* App no 40892/98 (ECtHR, 30 September 2003), paras. 47 f.

[131] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009).

[132] *Weller v Hungary* App no 44399/05 (ECtHR, 31 March 2009), para. 36.

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This line of case law was upheld in *Dhahbi v Italy*.[133] The Tunisian applicant was legally resident in Italy and in gainful employment covered by social security but was nevertheless denied a family allowance for large families on the sole ground of nationality. The ECtHR held that Mr Dhahbi was not a short-term or illegal resident; nor did he belong to the category of persons who had not contributed to the financing of the social security system.[134] The Court therefore held that he had been discriminated against in violation of Article 14 in conjunction with Article 8 ECHR.

However, the scope of these judgments should not be overestimated. It has already been aptly noted that social systems today hardly differentiate on the basis of nationality alone.[135] Rather, the dividing line is often drawn between different types of residence status. However, the rationale of the *Gaygusuz* jurisprudence does not apply to the many cases in which non-citizens are treated differently based on their respective residence status or title rather than solely and directly on the basis of nationality.

In the subsequent case law, only one significant innovation in non-discrimination cases appears to be closely related to *Gaygusuz*: In *Andrejeva v Latvia*, the ECtHR extended the underlying considerations of *Gaygusuz* to stateless persons.[136] Ms Andrejeva was born in Kazakhstan and moved to the Latvian Soviet Republic in 1954, where she lived after Latvia's independence as a stateless person with the status of "permanently resident non-citizen" ("nepilsone"). As such, Latvia denied her a non-contributory pension reserved for Latvian citizens. The ECtHR considered this to be unjustified discrimination on the basis of (lack of) nationality. It emphasised that Latvia was the only State with which the stateless Ms Andrejeva had a close relationship and therefore the only State which could be responsible for her social security.[137]

This reasoning equally applies to people who cannot return to their country of origin, because they are refugees and would face persecution if they returned.[138] In this vein, the cases of *Fawsie v Greece* and *Saidoun v Greece* concerned the entitlement of refugees to family allowance for large families, which under Greek law were restricted

[133] *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014).

[134] *Dhahbi v Italy* App no 17120/09 (ECtHR, 8 April 2014), para. 52.

[135] Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) *HRLR* 689 (716).

[136] *Andrejeva v Latvia* App no 55707/00 (ECtHR [GC], 18 February 2009).

[137] *Andrejeva v Latvia* App no 55707/00 (ECtHR [GC], 18 February 2009), para. 88.

[138] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 47.

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to nationals and EU citizens.[139] In both cases, the ECtHR concluded that there was no justification for excluding refugees from this type of entitlement. The ECtHR also referred to Article 23 of the 1951 Geneva Convention relating to the Status of Refugees,[140] which provides that refugees shall be entitled to treatment equal to that of nationals of the State in respect of public relief and assistance.[141]

The assessment becomes more intricate, however, when the unequal treatment is not solely based on nationality or blatantly discriminates against refugees and stateless persons but differentiates between different types of residence permits. Consider a system of different types and levels of benefits depending on the residence status. Such a model has been adopted, for example, by the EU with regard to EU citizens in other Member States who enjoy equal treatment in terms of social assistance and benefits, depending on the length of their stay and whether they are economically active.[142] It is unclear how far the principle of non-discrimination under Article 14 ECHR applies when such (rather) subtle and graduated forms of unequal treatment are challenged before the ECtHR.

In this context, it is worth noting *Niedzwiecki v Germany* and *Okpisz v Germany*. In both cases, the ECtHR found that Germany had violated Article 14 in conjunction with Article 8 ECHR by restricting childcare allowance (*Kindergeld*) to certain types of permanent residence permits.[143] The applicants' asylum claims had been unsuccessful, and they only had a temporary residence permit (*Aufenthaltsbefugnis*) because they could not be deported, e.g. for reasons of international law or humanitarian reasons. This meant that the applicants had a legal but not a permanent residence status.

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[139] *Fawsie v Greece* App no 40080/07 (ECtHR, 28 October 2010); *Saidoun v Greece* App no 40083/07 (28 October 2010).

[140] United Nations, Treaty Series, vol. 189, p. 137.

[141] For criticism of this line of reasoning, see *Fawsie v Greece* App no 40080/07 (ECtHR, 28 October 2010), Concurring Opinion *Vajić*; but see, in the affirmative, the case law of the CJEU, CJEU (GC) Cases C-443/14 and C-444/14 *Alo and Osso*, 1 March 2016, para. 51; CJEU Case C-713/17 *Ayubi*, 21 November 2018, paras. 24 ff; see also Janda, 'Zugang zu Sozialleistungen für Drittstaatsangehörige', in Wollenschläger (ed.) *Enzyklopädie Europarecht Band 10: Europäischer Freizügigkeitsraum – Unionsbürgerschaft und Migrationsrecht* (Baden-Baden, 2021) 923 (933 f).

[142] See Article 24 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158/77.

[143] *Niedzwiecki v Germany* App no 58453/00 (ECtHR, 25 October 2005); *Okpisz v Germany* App no 59140/00 (ECtHR, 25 October 2005).

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The ECtHR's reasons for finding a violation in both cases remained, however, elusive. The decisive factor seems to have been that the German Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG) had declared this unequal treatment unconstitutional just one year before the ECtHR's decision. The BVerfG stated that the reasons for granting such a residence permit are "not typically of a temporary nature" and that "the [temporary] residence permit is a possible precursor to permanent residence".[144] The formal type of residence permit alone was therefore not considered suitable for predicting the actual duration of residence.

However, the fact that the ECtHR based its judgment primarily on this ruling of the BVerfG does not imply that it wanted to adopt the standards of the German Basic Law (*Grundgesetz*) for the ECHR. For one, the BVerfG's review can certainly be seen as far-reaching and entrenching a very robust claim to equal treatment.[145] Moreover, it is telling that the ECtHR's reasoning is limited to stating that it agrees with the BVerfG on the specific cases before it, giving the impression that the Court was primarily inclined to settle the applications, without having to elaborate much or even, in the hypothetical case of finding no violation, to explain why it reached a different conclusion from the BVerfG.

In this light, the essence of *Niedzwiecki* and *Okpisz* rather lies in the fact that the ECtHR declared that it does not, in principle, consider itself called upon to review whether a differentiation according to residence status is justified in the area of social benefits,[146] with the two cases mentioned being the exception to the rule given the judgment of the BVerfG.

This is also suggested by *Bah v United Kingdom*, which was decided some two years later.[147] In this case, the ECtHR had to decide whether the applicant and her minor son could be lawfully excluded from priority allocation of social housing on the basis of their residence status. The applicant already had a long-term residence permit, but her son's residence status was subject to the condition that he did not require social

[144] BVerfG, Beschluss des Ersten Senats vom 6. Juli 2004, 1 BvL 4/97, paras. 1-71, <www.bverfg.de/e/ls20040706_1bvl000497.html> accessed 30 November 2023 (my translation); for further discussion, see Janda, 'Migration und Familienleistungen', in Rolfs (ed.), *Migration und Sozialstaat* (Berlin, 2018) 55 (69 f); Janda, 'Diskriminierungsschutz und Migration', in Mangold and Payandeh (eds.), Handbuch Antidiskriminierungsrecht. Strukturen, Rechtsfiguren und Konzepte (Tübingen, 2022) 1003 (1030 ff).

[145] Thym, 'Ungleichheit als Markenzeichen des Migrationsrechts' (2019) *ZÖR* 905 (912).

[146] *Niedzwiecki v Germany* App no 58453/00 (ECtHR, 25 October 2005), para. 33; *Okpisz v Germany* App no 59140/00 (ECtHR, 25 October 2005), para. 34.

[147] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011).

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assistance. After her private landlord evicted Ms Bah, she applied for priority allocation of social housing for herself and her son. In fact, under national law, single parents of minors were among the primary beneficiaries of prioritised social housing. However, Ms Bah's application was rejected because of her son's limited residence status.

The ECtHR did not consider this to be discriminatory. On the one hand, the Government convinced the Court that scarce social housing may be allocated with priority given to people with a permanent right of residence.[148] On the other hand, Ms Bah had reunited with her son on the basis of a residence title that explicitly did not entitle him to social benefits.[149] The ECtHR therefore also highlighted that the nature and scope of the residence status influences the degree of discretion with regard to the access to social assistance.[150] Since it is up to the States to define the nature and scope of immigration statuses, they also have considerable leeway in defining statuses that cover varying degrees of social entitlements.

The case law is particularly clear when it comes to irregular or merely temporary stays rather than lawful ones. The most recent case on this point is *X and others v Ireland*, in which the Court reaffirmed that the requirement of a lawful residence for social benefits is compatible with the ECHR.[151] The case centred on whether it was justified that childcare allowance in Ireland could only be paid to parents who were lawfully resident in the State, the applicants being mothers who at the relevant time were awaiting a decision on their immigration status (specifically their claim for asylum). The Court replied that it was not discriminatory to make the granting of a general social benefit such as child or family allowance conditional on the person being lawfully resident. It argued that this requirement of lawful residence was a corollary of the essentially national character of social systems.[152] The judgment also referred to the ESC, which allows a prescribed period of residence before granting social benefits, and finally recalled its settled case law, according to which it is for the states to decide to whom they grant a right of residence.[153] This, in turn, reflects the assumption

[148] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 48.

[149] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 50.

[150] *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), para. 47.

[151] *X and others v Ireland* App nos 23851/20 and 24360/20 (ECtHR, 22 June 2023).

[152] *X and others v Ireland* App nos 23851/20 and 24360/20 (ECtHR, 22 June 2023), paras. 97, 98 ("the Court observes that this criterion is a necessary corollary of the essentially national character of social security systems").

[153] *X and others v Ireland* App nos 23851/20 and 24360/20 (ECtHR, 22 June 2023), paras. 97, 99.

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that everyone is in principle free to return to their country of origin in order to receive assistance there.

The ECtHR therefore considers it legitimate to exclude short-term or irregular migrants from certain welfare measures, especially as they generally have not yet contributed to the financing of the social welfare system.[154] The Court also stressed that there may be valid reasons for granting special (favourable) treatment to persons whose connection with a country derives from birth in that country or who otherwise have a special connection to it.[155]

A controversial issue arises when States treat beneficiaries of subsidiary protection less favourably than refugees under the 1951 Refugee Convention. For instance, as will be discussed in more detail below (III.B.2.), Austria has decided that only refugees are provided with the full social assistance, whereas beneficiaries of subsidiary protection are afforded only the lower basic support, which is deemed necessary to cover the most basic needs only.

The ECtHR has not yet been called upon to evaluate whether this kind of unequal treatment within beneficiaries of international protection is compatible with Article 14 ECHR. However, in the case of *M.T. v Sweden*, the Court had to assess the temporary suspension of family reunification, which only affected beneficiaries of subsidiary protection, but not refugees. The arguments in this case may be indicative of a forthcoming judgement on unequal treatment in relation to social benefits.

In the case of *M.T. v Sweden*, the ECtHR accepted the assumption that beneficiaries of subsidiary protection have a more "temporary" need for protection than refugees.[156] It also assumed that civil wars and indiscriminate violence usually cause many people to flee within a short period of time, so that host countries are suddenly faced with large numbers of people in need of protection.[157] The ECtHR also noted that the unequal treatment was covered by EU law;[158] and that there was no European consensus on the issue.[159] Against this background, the ECtHR accepted the argument

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[154] *Ponomaryovi v Bulgaria* App no 5335/05 (ECtHR, 21 June 2011), para. 54; *Bah v United Kingdom* App no 56328/07 (ECtHR, 27 September 2011), paras. 49 f.

[155] *Savickis and others v Latvia* App no 49270/11 (ECtHR [GK], 9 June 2022), para. 207, with further references.

[156] *M.T. and others v Sweden* App no 22105/18 (ECtHR, 20 October 2022), para. 98.

[157] *M.T. and others v Sweden* App no 22105/18 (ECtHR, 20 October 2022), paras. 99 f.

[158] *M.T. and others v Sweden* App no 22105/18 (ECtHR, 20 October 2022), paras. 102 f.

[159] *M.T. and others v Sweden* App no 22105/18 (ECtHR, 20 October 2022), para. 107.

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that there were both factual and legal grounds for assuming that beneficiaries of subsidiary protection were not in a situation comparable to that of refugees.[160]

It is noteworthy, however, that the ECtHR nevertheless emphasised that an unequal treatment must be assessed in the light of the specific context and legal framework: For example, the ECtHR mentioned that beneficiaries of subsidiary protection may be in a similar situation to those entitled to asylum in terms of their need for housing, basic care, and medical treatment.[161]

With this in mind, the crucial question from a human rights perspective is that of proportionality. It therefore is essential to assess whether the permanent exclusion of beneficiaries of subsidiary protection from the basic social assistance on an equal footing with citizens and refugees can be considered proportionate.[162]

For this assessment, we must bear in mind that beneficiaries of subsidiary protection receive a renewable residence permit valid only for one year that can subsequently be renewed for two years each.[163] In contrast, the residence permit for persons entitled to asylum is initially valid for three years and is then renewed for an indefinite period.[164] The "provisional nature" of subsidiary protection is thus reflected in temporary residence permits.[165]

It has, however, been correctly pointed out that all beneficiaries of international protection are, in general, entitled to have their residence permit renewed until the need for protection ceases to exist, regardless of whether they were granted asylum or subsidiary protection.[166] Therefore, all forms of international protection may be considered initially provisional but potentially permanent.

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[160] *M.T. and others v Sweden* App no 22105/18 (ECtHR, 20 October 2022), para. 105.

[161] *M.T. and others v Sweden* App no 22105/18 (ECtHR, 20 October 2022), para. 109.

[162] On the EU law perspective, see Windisch-Graetz, 'Gleiche Sozialhilfe (gleich) für alle?' (2023) *juridikum* 406 (412), with further references.

[163] § 8(1) Asylgesetz 2005 (AsylG 2005), BGBl. I 100/2005, as amended by BGBl. I 145/2017; Article 24(2) of Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9.

[164] § 3(4) AsylG 2005, BGBl. I 100/2005, as amended by BGBl. I 24/2016; Article 24(1) of Directive 2011/95/EU.

[165] Cf. VwGH 31.5.2021, Ra 2020/01/0284-0288, para. 29.

[166] See Bast, von Harbou and Wessels, *Human Rights Challenges to European Migration Policy. The REMAP Study* 169, concluding that "there is no objective justification for the difference in treatment

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Yet, the unequal treatment of persons entitled to asylum and beneficiaries of subsidiary protection in social welfare is explicitly provided for under EU law. According to Article 29(2) of Directive 2011/95/EU, Member States may limit social assistance for beneficiaries of subsidiary protection to "core benefits".[167] Although the exact scope of these "core benefits" has remained unclear,[168] a certain degree of less favourable treatment is, apparently, inherent in the status of beneficiaries of subsidiary protection. It thus can be considered relevant that subsidiary protection is a status created by EU law, and EU law itself envisages – to some extent – unequal treatment in the area of social benefits.[169]

It seems, however, undisputable, that, at a certain point in time, it can no longer be said that the stay of beneficiaries of subsidiary protection is merely of a "provisional nature".[170] It also seems excessive to uphold this presumption for the mere possibility of a later revocation, since even the more permanent status of refugee can be revoked if, for example, the persecution ceases to occur.[171] In any case, at the latest when the residence has become entrenched for reasons related to Article 8 ECHR, unequal treatment compared to persons entitled to asylum can no longer be justified. Therefore, when beneficiaries of subsidiary protection have resided in a country for such a long period that a return decision becomes inadmissible on the basis of Article 8 ECHR, they should have equal access to social benefits, irrespective of the formal type of their residence permit.

For this reason, a blanket and permanent exclusion from the right to receive basic social assistance on an equal footing with citizens and refugees is disproportionate. Instead, there must at least be an opening clause, allowing full social assistance to be granted in individual cases as soon as the initial assumption of a merely "provisional" residence proves untenable.

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between refugees and persons enjoying subsidiary protection, in respect of either social assistance or family reunification".

[167] Cf. VwGH 29.11.2018, Ra 2017/10/0134.

[168] See recently Windisch-Graetz, (2023) *juridikum* 406 (412), with further references.

[169] Cf. CJEU Case C-713/17 *Ayubi*, 21 November 2018, para. 20; CJEU Case C-662/17 *E.G. v Slovenia*, 18 October 2018, para. 42.

[170] For an argument along this line, see also Hasel and Salomon, 'Differenzierungen zwischen Flüchtlingen und subsidiär Schutzberechtigten: Zu einem einheitlichen Schutzstatus', in Salomon (ed.), *Der Status im europäischen Asylrecht* (Baden-Baden, 2020), 113 (144).

[171] Article 1(C)(5) of the 1951 Geneva Convention relating to the Status of Refugees.

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3. Summary

Article 14 ECHR in conjunction with Article 1 of Protocol No. 1 offers a supplementary protection against discrimination that does not require an interference with property rights. Rather, it is sufficient that the "ambit" of Article 1 of Protocol No. 1 is affected, regardless of whether the benefits are mandated by Convention law. This extends the principle of non-discrimination to vast areas of social security law. In summary, the Court's jurisprudence on social benefits for migrants can be divided into three tiers of cases to which the ECtHR applies different standards of review.

1) Higher standards of review apply to legal residents who are discriminated against solely on the basis of their non-citizenship (*Gaygusuz, Koua Poirrez, Dhahbi*, *Andrejeva*); a presumption in favour of treatment equal to that of citizens also applies to refugees under the 1951 Refugee Convention (*Fawsie*, *Saidoun*).

2) The Court accepts that persons without a long-term lawful residence are excluded from receiving social assistance on an equal footing with legal residents and citizens (*X and others*).

3) In between lie various cases in which a distinction has been made on the basis to the respective residence status, which in some cases has been found to comply with the Convention (*Bah*), and in others to be contrary to the Convention (*Niedzwiecki*, *Okpisz*). As a rule, however, the ECtHR will not intervene unless it finds that the distinction made is manifestly without reasonable foundation.[172]

B. The case law of the VfGH

1. The principle of non-discrimination and social benefits

Article 7 B-VG enshrines a right to equality before the law which is not dependent on another fundamental right being affected. It contains a stand-alone guarantee to equal treatment and prohibits discrimination on the basis of birth, sex, status, class, religion, and disability.[173] The right to equality guarantees that benefits are granted in

[172] Cf. Caicedo Camacho, 'Social Rights and Migrants before the European Court of Human Rights', in Moya and Milios (eds.), *Aliens before the European Court of Human Rights. Ensuring Minimum Standards of Human Rights Protection* (Leiden, 2021) 191 (202 f), arguing that the contribution to public funds serves as a criterion for the Court that places the migrant in a comparable position with respect to nationals; for criticism of the restrained jurisprudence, see Farcy, (2020) *HRLR* 725.

[173] Strict scrutiny also applies to comparable categories such as sexual orientation; see e.g. VfSlg. 20.225/2017; cf. Pöschl, *Gleichheit* 468 ff; Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', paras. 58, 65 f, 109, 125.

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a non-discriminatory manner. By invoking the principle of equality, individuals can thus demand that existing benefits be granted to them on equal terms with others.[174]

This provision has proven to be an effective tool to combat discrimination in the area of social benefits. The Court's most notable decision was the declaration of the different retirement ages for men and women as unconstitutional in 1990.[175] In its decision, the VfGH emphasised that contested provisions differentiated solely on the basis of sex. Moreover, setting a different retirement age for women and men, the Court went on to state, was not suited to take account of the differences in the social roles of women and men.

Subsequently, the Court also found a constitutional violation in the case of unequal treatment of same-sex couples in social security law.[176] In the case in question, the applicant was living in a homosexual relationship and was denied the opportunity to have his partner covered by his social security ("co-insurance") due to the relevant provision in force at the time which restricted co-insurance to persons of the opposite sex.

The VfGH ruled that individuals living in a homosexual relationship must be treated equally to heterosexual couples in social security law and therefore annulled the provision as unconstitutional. In its reasoning, the Court referred in particular to the principles set out by the ECtHR in its landmark judgment *Karner v Austria*. Here, the ECtHR held that unequal treatment based on sexual orientation requires particularly serious reasons for justification and declared the unequal treatment of same-sex couples with regard to the surviving partner's right to succeed to the tenancy to violate Article 14 in conjunction with Article 8 ECHR.[177]

Additionally to Article 7 B-VG and Article 14 ECHR, Austria also passed a Federal Constitutional Act on Elimination of Racial Discrimination in implementation of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination.[178]

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[174] See Pöschl, *Gleichheit* 672 ff; Schäffer and Klaushofer, 'Zur Problematik sozialer Grundrechte', 761 (772); Berka, Binder and Kneihs, *Grundrechte* 907; Kaspar, *Mindestsicherung* 151 ff.

[175] VfSlg. 12.568/1990.

[176] VfSlg. 17.659/2005.

[177] *Karner v Austria* App no 40016/98 (ECtHR, 24 July 2003).

[178] *Bundesverfassungsgesetz vom 3. Juli 1973 zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung* – BVG-RD, BGBl. No. 390/1973; United Nations, Treaty Series, vol. 660, p. 195.

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Article I(1) of this Act prohibits "[a]ny form of racial discrimination". Article I(2), however, explicitly enables "granting special rights to Austrian citizens or imposing special obligations on them."[179] The VfGH has interpreted this provision to include the general right of non-citizens to be treated equally to other non-citizens (so-called equal treatment of non-citizens *inter se*),[180] but it is commonly understood that this does not include a guarantee to be treated like Austrian citizens.[181]

Given this, it comes as no surprise that the VfGH has tended to exercise restraint regarding the equal treatment of non-citizens in the area of social welfare.

2. Unequal treatment of different categories of migrants

With regards to Austrian citizens residing in Austria, the VfGH held that the State is generally obliged to provide social benefits, regardless of their period of residence. The Court has thus found it unconstitutional to differentiate the amount of social assistance according to Austrian citizens' period of residence.[182] In this context, the Court emphasised that citizens are always part of the Austrian society, for whom social assistance must be equally provided.[183]

In the same vein, the VfGH found it unlawful to deny social assistance to a minor child of Austrian nationality simply because his mother (and legal guardian) was a third-country national with only temporary residence status.[184] The Court also declared unconstitutional the discrimination against children in households with more than one child which the Court found to be the case in a regulation limiting social assistance for the third or later child in a family to 5 % of the benefit in question.[185]

On the other hand, according to well-established case law, there are no constitutional objections to making the payment of benefits conditional on permanent residence in

[179] Translation provided by the Austrian Federal Chancellery (*Bundeskanzleramt*), available online <ris.bka.gv.at/Dokument.wxe?Abfrage=Erv&Dokumentnummer=ERV_1973_390> accessed 9 January 2024.

[180] VfSlg. 13.836/1994, 14.650/1996, 16.080/2001, 17.026/2003.

[181] For further discussion, see Pöschl, 'Gleichheitsrechte', paras. 20 ff; see also Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', paras. 89 ff, with further references, arguing for an extension of the general right to equality to the relationship between citizens and non-citizens, albeit not denying that Article I(2) BVG-RD enables special rights and obligations for citizens.

[182] VfSlg. 20.244/2018; VfGH 3.10.2023, G 238/2023.

[183] VfSlg. 20.244/2018.

[184] VfSlg. 20.270/2018.

[185] VfSlg. 20.359/2019.

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Austria.[186] Like the ECtHR, the VfGH considers that EU citizens and third-country nationals can, in principle, return to their respective country of origin to receive the social assistance they need.[187] Therefore, differentiations based on the quality and duration of residence status do not generally raise constitutional concerns.[188]

Referring, inter alia, to the case law of the ECtHR in *Fawsie* and *Saidoun*, the VfGH has, nonetheless, recognised that refugees generally have the right to treatment equal to that of citizens in the area of social welfare.[189] This is because refugees have been forced to leave their country of origin due to a well-founded fear of persecution. Therefore, unlike EU citizens or other third-country nationals, they cannot claim social benefits in their country of origin. This is in line with the above-mentioned Article 23 of the 1951 Refugee Convention, which provides that refugees shall be entitled to treatment equal to that of nationals of the State with respect of public relief and assistance.

The VfGH also ruled that the same reasoning applies to stateless persons, as they are also unable to return to their country of origin and there is no question of exporting cash benefits abroad.[190] Notably, this reasoning too is in line with the requirements of international law, since Article 23 of the 1954 Convention relating to the Status of Stateless Persons requires States Parties to provide stateless persons lawfully within their territory with the same treatment in respect of public relief and assistance as that accorded to their own nationals.[191]

However, this strict principle of equal treatment does not extend to beneficiaries of subsidiary protection. In their case, the VfGH considers it justified to grant them only the lower basic support (*Grundversorgung*) instead of regular social assistance.[192] The Court argued that the basic support would in any case cover the needs required for a dignified life. In addition, the VfGH maintained that subsidiary protection – unlike the status as refugee – was "provisional in nature from the outset". This is, the VfGH argued, because the circumstances that give rise to subsidiary protection, such as a

[186] VfSlg. 16.380/2001 (*Familienbeihilfe*), 19.964/2015, 20.035/2015 (*Sozialhilfe*); VfGH 28.2.2023, G 291/2022 (*Kinderbetreuungsgeld*).

[187] VfSlg. 20.297/2018; VfGH 27.11.2019, E 1273/2019.

[188] VfSlg. 20.270/2018, with further references.

[189] VfSlg. 20.244/2018, 20.297/2018.

[190] VfGH 27.11.2019, E 1273/2019.

[191] United Nations, Treaty Series, vol. 360, p. 117.

[192] VfSlg. 20.177/2016; see also VfGH 28.2.2023, G 291/2022.

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precarious security situation or civil war-like conditions, tend to be of a more temporary nature than persecution within the scope of the 1951 Refugee Convention.

This decision was met with considerable criticism from the legal community:[193] Contrary to the VfGH's assumption, the stay of persons entitled to subsidiary protection is, in fact, often permanent; and, like refugees, persons entitled to subsidiary protection also have no possibility of returning to their country of origin in order to receive social welfare benefits there. Furthermore, the Court did not explain how it came to the conclusion that precarious security situations or civil war-like conditions (e.g. Iraq, Afghanistan or Syria) are empirically more temporary that acts of persecution.

The above-mentioned judgment of the ECtHR in the case of *M.T. v Sweden* might be seen as indication that the ECtHR would not contradict the VfGH's conclusion regarding Austria's policy of providing less social assistance to beneficiaries of subsidiary protection. As elaborated above, the case of *M.T.* concerned the temporary suspension of family reunification for beneficiaries of subsidiary protection, and the ECtHR's judgment reflects key parts of the VfGH's opinion. For reasons also discussed above, however, a blanket and permanent exclusion from the right to receive basic social assistance on an equal footing with citizens and refugees is disproportionate and thus not objectively justified.

3. Summary

The Austrian Constitution guarantees the equality of its citizens in Article 7 B-VG. In addition, Article 14 ECHR comes into play whenever a fundamental right of the ECHR is affected. Last but not least, Article I(1) BVG-RD guarantees the equal treatment of non-citizens in relation to other non-citizens.

The case law of the VfGH has firmly established the principle of non-discrimination in social security law. For example, the Court has ruled that the different retirement ages for men and women are unconstitutional and that same-sex couples are unconstitutionally discriminated against when they are denied co-insurance.

When it comes to unequal treatment of migrants with regard to social benefits, the VfGH has taken a more cautious approach, but has nevertheless referred to the case law of the ECtHR on relevant issues. First, it adopted the ECtHR's reasoning in

[193] Kaspar, *Mindestsicherung* 211 ff; Pfeil, 'Aktuelle verfassungsrechtliche Fragen der Mindestsicherung (oder doch wieder der Sozialhilfe)', in Kietaibl, Mosler and Pacic (eds.) *Gedenkschrift Robert Rebhahn* (Vienna, 2019) 447 (459); cf. also Hasel and Salomon, 'Differenzierungen', 113; Mosing, 'Strukturfragen der Grundversorgung', in Auer-Mayer and others (eds.), *Festschrift für Walter J. Pfeil* (Vienna, 2022) 491 (498).

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Gaygusuz v Austria to declare an unequal treatment in the unemployment insurance scheme based solely on nationality as contrary to Article 14 ECHR in conjunction with Article 1 of Protocol No. 1. A higher standard of review is thus applied if the difference in treatment is based solely on the lack of citizenship, which in practice has become very rare.

In line with the case law of the ECtHR, the VfGH also ruled that refugees within the meaning of the 1951 Refugee Convention are generally entitled to social benefits on the same basis as citizens. Furthermore, the Court extended this case law to statelessness persons as well.

In the case of other non-citizens, however, a differentiation according to the type and duration of the right of residence is generally considered constitutional. With reference to the "provisional nature" of subsidiary protection, the VfGH, in particular, has allowed beneficiaries of subsidiary protection to be treated differently from refugees in the area of social assistance.

C. Comparative results

Equal treatment with regard to social benefits and derivative claims to a right are firmly established in the case law of both Courts. Although Article 1 of Protocol No. 1 does not oblige the Contracting Parties to establish a social security system, the ECtHR has consistently held that, where a social security system exists, it must be non-discriminatory for the purposes of Article 14 ECHR. The VfGH, for its part, has also regularly scrutinised differential treatment in provisions relating to social benefits, taking into account the principle of equality enshrined in Article 7 B-VG and Article I BVG-RD as well as Article 14 ECHR.

Both Courts have applied elevated standards of review when the unequal treatment was based on innate or immutable personal characteristics, such as gender or sexual orientation. Moreover, following the ECtHR's judgment in *Gaygusuz v Austria*, the VfGH has aligned with the ECtHR in holding that nationality is also a suspect category for differentiation in the area of social welfare.

Similarly, both Courts have exercised judicial restraint when assessing unequal treatment based on immigration status rather than nationality. The Strasbourg Court has emphasised that residence status is not an innate or immutable characteristic, but rather based on free choice to some extent, leaving the States with a wide margin of appreciation when they treat different categories of immigrants differently.

The case law of the VfGH paints a similar picture. Similar to the ECtHR, the VfGH is of the opinion that EU citizens and third-country nationals can, in principle, return

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to their respective country of origin to receive the necessary social assistance. Therefore, differentiations based on the quality and duration of residence status generally do not raise constitutional concerns. In particular, both Courts have accepted that the requirement of lawful residence does not amount to discrimination.

However, where this rationale of "free choice" does not apply, both Courts have also required equal treatment of migrants in relation to social benefits. In line with the case law of the ECtHR in *Fawsie* and *Saidoun*, the VfGH has, in particular, recognised that refugees are generally entitled to social assistance on the same terms as citizens. This is because refugees have been forced to leave their country of origin due to a well-founded fear of persecution. Therefore, unlike EU citizens or other third-country nationals, they cannot claim social assistance in their country of origin.

The issue of whether beneficiaries of subsidiary protection, like refugees, should enjoy treatment equal to that of citizens has been a topic of debate. The VfGH ruled that it is not discriminatory to provide beneficiaries of subsidiary protection with only basic support, rather than regular social assistance. The Court argued that the basic support would cover the needs required for a dignified life and that subsidiary protection, unlike refugee status, is temporary in nature.

It is uncertain whether this reasoning would be hold up in a proceeding before the ECtHR. In the case of *M.T. v Sweden*, the ECtHR endorsed a comparable argument about the provisional nature of subsidiary protection when assessing the unequal treatment of refugees and beneficiaries of subsidiary protection regarding family reunification. Nonetheless, the ECtHR emphasised that an unequal treatment must be assessed in the light of the specific context and legal framework, noting that beneficiaries of subsidiary protection may be in a similar situation to those entitled to asylum in terms of their need for housing, basic care and medical treatment. It could thus be argued that a categorical and permanent unequal treatment of beneficiaries of subsidiary protection compared to refugees would be *prima facie* in violation of Article 14 ECHR in conjunction with Article 1 of Protocol No. 1. In particular, the VfGH's argument overlooks the fact that the stay of beneficiaries of subsidiary protection may in fact be permanent, at least in individual cases. Thus, if the stay of beneficiaries of subsidiary protection turns out to be indeed permanent, there is no longer any significant difference to persons entitled to asylum regarding the necessary means of subsistence, rendering unequal treatment unjustified.

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IV. The right to a dignified minimum subsistence

A. The concept of the right to a dignified minimum subsistence

The concept of a dignified minimum subsistence is closely linked to the right to human dignity.[194] For example, the Supreme Court of Israel has established that human dignity encompasses the right to a minimum dignified subsistence.[195] The Court referred to the 1992 Basic Law: Human Dignity and Liberty,[196] and held that "[t]he right to a minimum dignified subsistence is at the heart and core of human dignity".

The Court argued that "[a] minimum dignified subsistence is a condition not only for preserving and protecting human dignity, but also for exercising other human rights", and concluded that "[w]ithout minimal material conditions, a person cannot create, aspire, make his own choices and exercise his liberties."[197] In that sense, the right to a dignified minimum subsistence is fundamental to actual self-determination. However, it is not absolute or unconditional, but subject to a proportionality test according to the limitations clause in section 8 of the Basic Law: Human Dignity and Liberty.[198]

The right to a dignified minimum subsistence is also well known in German constitutional law:[199] The German Constitutional Court derives it from the guarantee of human dignity in Article 1 GG in conjunction with the welfare state principle (*Sozialstaatsprinzip*) in Article 20(1) GG.[200]

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[194] For a comparative perspective, e.g. Bendor and Sachs, 'The Constitutional Status of Human Dignity in Germany and Israel' (2011) *Israel Law Review* 25; Vonk and Olivier, 'The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)' (2019) *EJSS* 219.

[195] See HCJ 366/03 *Commitment to Peace and Social Justice Society v Minister of Finance* (Supreme Court of Israel, 12 December 2005); HCJ 10662/04 *Hassan v National Insurance Institute* (Supreme Court of Israel, 28 February 2012). English translations are available at <https://versa.cardozo.yu.edu/> accessed 12 January 2024.

[196] An English translation is provided by Legislature of Israel (the *Knesset*), available at <https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawLiberty.pdf> accessed 12 January 2024.

[197] HCJ 10662/04 *Hassan v National Insurance Institute* (Supreme Court of Israel, 28 February 2012), para. 35.

[198] HCJ 10662/04 *Hassan v National Insurance Institute* (Supreme Court of Israel, 28 February 2012), paras. 52 ff.

[199] For an introduction in English, see Leitjen, 'The German Right to *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection' (2015) *GLJ* 23.

[200] BVerfG, Urteil des Ersten Senats vom 9. Februar 2010, 1 BvL 1/09, paras. 1-220 (133 ff), <www.bverfg.de/e/ls20100209_1bvl000109.html> accessed 17 January 2024; for a discussion of this

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The Court's concept of *Existenzminimum* encompasses both physical needs, i.e. food, housing, and health, as well as socio-cultural needs, such as maintaining interpersonal relationships and participating in social, cultural, and political life at a minimum level.[201] Accordingly, social assistance must be continuously adapted in line with increasing living expenses in order to actually ensure a dignified existence.[202] The first step in the BVerfG's review is to determine whether the benefits are "manifestly inadequate", which is the case if the benefits as a whole are not sufficient to ensure a dignified existence.[203] Then, the BVerfG examines whether the amount of the benefit is determined in a comprehensible and reasonable manner, which requires that the benefits are based on reliable figures and conclusive calculations.[204] Simultaneously, the BVerfG clarified that the right to a dignified minimum does not equate to an unconditional basic income, but is tied to actual need of help.[205]

In 2012, the BVerfG declared unconstitutional the payments provided for in the Asylum Seekers' Benefits Act (*Asylbewerberleistungsgesetz* – AsylbLG), which applied to asylum seekers, war refugees, victims of human trafficking, and people with a tolerated residence status (*Geduldete*), among others.[206] This, firstly, was due to the fact that the payments under the AsylbLG had not been increased since 1993, despite a price inflation of more than 30 %, leaving a gap of up to a third compared to regular

case, see Bittner, 'Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010' (2011) *GLJ* 1941; Egidy, 'The Fundamental Right to Guarantee of a Subsistence Minimum in the *Hartz IV* Decision of the German Federal Constitutional Court' (2011) *GLJ* 1961; cf. recently BVerfG, Beschluss des Ersten Senats vom 19. Oktober 2022, 1 BvL 3/21, paras. 1-99 (52 ff), <www.bverfg.de/e/ls20221019_1bvl000321.html> accessed 17 January 2024.

[201] BVerfG, Urteil des Ersten Senats vom 9. Februar 2010, 1 BvL 1/09, para. 135; in contrast the Supreme Court of Israel appears to have reduced the *Existenzminimum* to "the most essential conditions of his survival", although it also explicitly mentions education, see HCJ 10662/04 *Hassan v National Insurance Institute* (Supreme Court of Israel, 28 February 2012), para. 36 f.

[202] BVerfG, Beschluss des Ersten Senats vom 19. Oktober 2022, 1 BvL 3/21, para. 53.

[203] BVerfG, Beschluss des Ersten Senats vom 19. Oktober 2022, 1 BvL 3/21, para. 58.

[204] BVerfG, Beschluss des Ersten Senats vom 19. Oktober 2022, 1 BvL 3/21, para. 59.

[205] BVerfG, Beschluss des Ersten Senats vom 19. Oktober 2022, 1 BvL 3/21, paras. 60 ff, referring to the principle of subsidiarity of social assistance, which prioritises existing opportunities for self-sufficiency over state welfare.

[206] BVerfG, Urteil des Ersten Senats vom 18. Juli 2012, 1 BvL 10/10, paras. 1-114, <www.bverfg.de/e/ls20120718_1bvl001010.html> accessed 30 November 2023.

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social assistance. For this reason, the Court found that the benefits were "manifestly inadequate" to guarantee a dignified minimum subsistence.[207]

Secondly, the BVerfG held that the right to a dignified minimum subsistence precluded the legislature from making broad distinctions solely based on the formal type of residence status. The Court thus required a non-discriminatory statutory scheme. In particular, it criticised that there was no plausible evidence that the beneficiaries of the AsylbLG typically only stayed for a short time, as the majority of those affected had been in Germany for more than six years.[208] Furthermore, the BVerfG clarified that even a short period of residence or lacking prospects of a continued residence in Germany cannot justify a restriction of the right to a dignified minimum subsistence, which must rather be realised from the beginning of the stay.[209] Finally, the Court declared that human dignity must not be relativized in the context of migration policy.[210]

Although, unlike the Israeli and German Basic Laws, neither the Austrian Constitution nor the ECHR contain an explicit guarantee of human dignity, both the VfGH and the ECtHR have alluded to human dignity in their decisions.[211] This raises the question of how both Courts approach the question of whether there is a right to a dignified minimum subsistence.

B. The case law of the ECtHR

The ECtHR regularly points out that the Convention does not guarantee any socio-economic rights, i.e. no right to work, free housing, free medical care or a certain

[207] BVerfG, Urteil des Ersten Senats vom 18. Juli 2012, 1 BvL 10/10, para. 83.

[208] BVerfG, Urteil des Ersten Senats vom 18. Juli 2012, 1 BvL 10/10, paras. 92 f

[209] BVerfG, Urteil des Ersten Senats vom 18. Juli 2012, 1 BvL 10/10, para. 94.

[210] BVerfG, Urteil des Ersten Senats vom 18. Juli 2012, 1 BvL 10/10, para. 95.

[211] From the case law of the VfGH, see recently, VfSlg. 20.433/2020, on the right to die with dignity; from the case law of the ECtHR, see *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002), para. 65 ("[t]he very essence of the Convention is respect for human dignity and human freedom"); for an empirical survey of the ECtHR's case law, e.g. Fikfak and Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights' (2022) *HRLR* 3, 1.

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standard of living.[212] On one occasion, the ECtHR even stated that these concerns were a matter for a political, not judicial, decision.[213]

As far as the ECHR is concerned, it is – in principle – entirely up to the States to provide social benefits. Even where social benefits are provided, the ECtHR does not consider itself called upon to judge whether the level of benefits provided is appropriate.[214] The ECtHR therefore, contrary to the BVerfG, generally does not examine whether the benefits are "manifestly inadequate" or have been determined in a comprehensible and reasonable manner.

Nonetheless, some 20 years ago, the Court made notable exceptions to this rule, first in the *Larioshina* case[215] in 2002, and similarly the *Budina* case in 2009.[216] In these cases, the ECtHR ruled that a wholly inadequate level of state support could amount to a violation of Article 3 ECHR, which prohibits inhumane or degrading treatment. The ECtHR set a high threshold for a finding of a violation, making it clear that this could only be conceivable where a person who is totally dependent on state support is not (adequately) supported despite suffering severe, inhumane hardship.

However, this was of no benefit to the parties involved in the respective case. Ms Larioshina received a pension and other social benefits of 653 roubles (about € 20 at the time) per month and claimed that this was not enough to cover her living expenses. Ms Budina also claimed that she did not have sufficient means of subsistence, although she received higher benefits than Ms Larioshina, totalling some 2,460 roubles (about € 80 at the time), and enjoyed additional state benefits and discounts. In both cases, the ECtHR dismissed the respective application as manifestly ill-founded because the applicants had failed to show that the financial difficulties had resulted in

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[212] *Pančenko v Latvia* App no 40772/98 (ECtHR [dec], 28 October 1999); see also *Jonasson v Sweden* App no 59403/00 (ECtHR [dec], 30 March 2004); *Sarmina and Sarmin v Russia* App no 58830/00 (ECtHR [dec], 22 November 2005); *K v The Netherlands* App no 33403/11 (ECtHR [dec], 25 September 2012), para. 46; *A v The Netherlands* App no 60538/13 (ECtHR [dec], 12 November 2013); *A.H. and J.K. v Cyprus* App no 41903/10 and 41911/10 (ECtHR, 21 July 2015), para. 145.

[213] *Chapman v United Kingdom* App no 27238/95 (ECtHR [GC], 18 January 2001), para. 99 ("Whether the State provides funds to enable everyone to have a home is a matter for political not judicial decision").

[214] *Larioshina v Russia* App no 56869/00 (ECtHR [dec], 23 April 2002), para. 3; *Denisenkov v Russia* App no 40642/02 (ECtHR, 22 September 2005), para. 58; *Parkhomov v Russia* App no 19589/02 (ECtHR, 20 October 2005), para. 37; *Khaziyev v Russia* App no 15193/03 (ECtHR [dec], 10 November 2005), para. 2; *Puzinas v Lithuania* App no 63767/00 (ECtHR, 13 December 2005), para. 3; *Šeiko v Lithuania* App no 82968/17 (ECtHR, 11 February 2020), para. 32.

[215] *Larioshina v Russia* App no 56869/00 (ECtHR [dec], 23 April 2002).

[216] *Budina v Russia* App no 45603/05 (ECtHR [dec], 18 June 2009).

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concrete suffering exceeding the threshold of Article 3 of the ECHR ("minimum level of severity"/"high threshold").

However, it would be wrong to conclude that the threshold criteria render all cases futile beforehand. Having to endure a situation of extreme poverty without any support from the state may very well amount to a violation of the Convention in certain circumstances. This was first illustrated in the case of *Moldovan and others v Romania (no. 2)*,[217] where villagers, including the local police chief, deliberately set fire to 13 Roma houses following the death of a villager in a dispute with Roma. Following this incident, the Roma were expelled from the village and forced to live in cramped and degrading conditions (e.g. in cellars and stables) for ten years. The ECtHR ruled that the severely overcrowded and unhygienic accommodation and the health problems that it caused violated human dignity in view of the long duration of the situation and the discriminatory attitude of the authorities.[218] In addition to their hopeless life in poverty, the victims had also been subjected to ten years of racially motivated indifference on the part of the authorities. The culmination of these factors led the ECtHR to find a violation of Article 3 ECHR.

The ECtHR also found such an exceptional situation in the case of *M.S.S. v Belgium and Greece* in 2011, a leading case to this date.[219] First, the ECtHR reiterated that Article 3 ECHR does not contain a general obligation to provide refugees with financial support to enable them to maintain a certain standard of living.[220] In a second step, however, the ECtHR noted that secondary law of the EU provides for a right to assistance and that asylum seekers constitute a particularly vulnerable group.[221] In a third step, the ECtHR finally turned to the specific conditions in which the applicant found himself: He had to endure extreme poverty for months – without prospect of improvement – and was unable to meet his basic needs for food, hygiene and a place

[217] *Moldovan and others v Romania (no. 2)* App nos 41138/98 und 64320/01 (ECtHR, 12 July 2005).

[218] *Moldovan and others v Romania (no. 2)* App nos 41138/98 und 64320/01 (ECtHR, 12 July 2005), paras. 110, 113.

[219] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, [GC], 21 January 2011); see also *Tarakhel v Switzerland* App no 29217/12 (ECtHR [GC], 4 November 2014); *N.H. and others v France* App nos 28820/13 and others (ECtHR, 2 July 2020); *R.R. and others v Hungary* App no 36037/17 (ECtHR, 2 March 2021).

[220] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, [GC], 21 January 2011), para. 249; *Tarakhel v Switzerland* App no 29217/12 (ECtHR [GC], 4 November 2014), para. 95.

[221] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, [GC], 21 January 2011), paras. 250 f.

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to live. He also lived in constant fear of being attacked and robbed. Due to this concurrence of circumstances, the ECtHR considered that the threshold of Article 3 ECHR had been exceeded.[222]

On the other hand, in its analysis under Article 3 ECHR, the ECtHR also takes into account the extent to which the applicant is responsible for the situation in which she or he finds her- or himself. In *O'Rourke v the United Kingdom*, where a homeless person complained that his situation was detrimental to his health and in violation of the Convention, the Court pointed out that he had refused all temporary accommodation and two offers of accommodation from public authorities.[223] He was therefore himself responsible for the aggravated situation following his eviction and consequently had not suffered a violation of Article 3 ECHR.

To sum up, the ECtHR does not consider itself competent to review the actual level of social benefits granted under domestic law. In particular, the Court does not assess whether benefits are "manifestly inadequate" or determined in a comprehensible and reasonable manner. Its review, thus, is limited to cases in which a person is in a hopeless, inhumane situation and has been denied the necessary state assistance. In making this assessment, the ECtHR will consider the applicant's vulnerability and discriminatory motives on part of the authorities, as well as the individual's personal responsibility for his or her situation. The ECtHR, therefore, does not examine the adequacy of benefits in *in abstracto*, but rather the personal situation and the State's response in the respective case.[224]

The right to a dignified minimum subsistence is therefore limited to state support in extreme cases of helplessness and vulnerability.[225] The ECtHR does not require the Contracting States to provide a general system of adequate social assistance – as long as they (merely) respond appropriately in individual cases to relieve people of in situations that would be incompatible with Article 3 ECHR.

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[222] *M.S.S. v Belgium and Greece* App no 30696/09 (ECtHR, [GC], 21 January 2011), para. 263.

[223] *O'Rourke v United Kingdom* App no 39022/97 (ECtHR [dec], 26 June 2001).

[224] *Chapman v United Kingdom* App no 27238/95 (ECtHR [GC], 18 January 2001), para. 77 ("The Court considers that it cannot examine legislation and policy in the abstract, its task rather being to examine the application of specific measures or policies to the facts of each individual case."); cf. *Animal Defenders International v United Kingdom* App no 48876/08 (ECtHR [GC], 22 April 2013), paras. 106 ff, regarding "general measures"; *S.A.S. v France* App no 43835/11 (ECtHR [GC], 1 July 2014), para. 129, regarding "matters of general policy".

[225] Cf. Kagiaros, (2019) *EPL* 535 (549 ff).

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The same applies to Article 8 ECHR, which encompasses, in special cases, a "right to housing" and access to clean drinking water. In the above-mentioned case of *Moldovan and others v Romania (no. 2)*, the ECtHR held that not only Article 3 but also Article 8 ECHR had been violated because the applicants had been forced to live in inhumane accommodation for ten years as a result of the authorities' failure to act properly.[226] This is remarkable, given that the ECHR does not contain a "right to housing". Nevertheless, the ECtHR considered the scope of Article 8 ECHR to be "clearly applicable".[227] However, as with Article 3 ECHR, this view is explained by the fact that the ECtHR focused on specific living conditions and not on an abstract "right to housing".

This approach is also consistent with the case law on Article 8 ECHR in general. For example, the ECtHR has also recognised that noxious emissions, including noise,[228] may affect the well-being of residents in such a way as to prevent them from using their homes, thereby interfering with their private and family life.[229] Thus, in the case of *Moldovan and others v Romania (no. 2)*, it seems consistent to take into account, under Article 8 ECHR, similarly severe effects of extreme poverty on housing.

Access to clean water, to take another example, was considered in the case of *Hudorovič and others v Slovenia*.[230] Here, too, the ECtHR made it clear at the outset that access to clean drinking water is not in itself guaranteed by Article 8 ECHR.[231] But the ECtHR went on to emphasise that people could not survive without water, and therefore a persistent lack of access to clean drinking water and the related consequences for health and human dignity would undermine the core of Article 8 ECHR. In the case in question, however, the ECtHR held that there had been no

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[226] *Moldovan and others v Romania (no. 2)* App nos 41138/98 und 64320/01 (ECtHR, 12 July 2005), paras. 102 ff.

[227] *Moldovan and others v Romania (no. 2)* App nos 41138/98 und 64320/01 (ECtHR, 12 July 2005), para. 105.

[228] *Hatton and others v United Kingdom* App no 360022/97 (ECtHR [GK], 8 July 2003), para. 96; *Moreno Gómez v Spain* App no 4143/02 (ECtHR, 16 November 2004), para. 60.

[229] *López Ostra v Spain* App no 16798/00 (ECtHR, 9 December 1994), para. 51; *Guerra and others v Italy* App no 14967/89 (ECtHR, 19 February 1998), para. 57; *Grimkovskaya v Ukraine* App no 38182/03 (ECtHR, 21 July 2011), para. 58; *Kolyadenko and others v Russia* App nos 17423/05 and others (ECtHR, 28 February 2012) (victims of flood).

[230] *Hudorovič and others v Slovenia* App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020).

[231] *Hudorovič and others v Slovenia* App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020), para. 116.

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violation because, among other reasons, the applicants received social assistance and there was no evidence that their health and dignity had been affected negatively.[232]

The emphasis on human dignity as the basis for a right to a dignified minimum subsistence may, at first sight, suggest an alignment with the case law of the BVerfG. However, the factual constellations underlying the case law make it clear that the ECtHR is concerned exclusively with providing help in extreme situations, rather than with the establishment of a general system for securing a minimum standard of living. Specifically in situations of extreme poverty, thus, the ECtHR has acknowledged the existence of positive obligations in order to ensure that the guarantees of Article 3 and 8 ECHR are effective; it does not, however, go beyond this. The Court appears to be particularly concerned with cases where the State has caused harm to the applicants in terms of their living conditions (*Moldovan*) or has turned a blind eye to the needs of the most vulnerable (*M.S.S.*). The bar for Article 3 ECHR is thus very high.

C. The case law of the VfGH

Beginning in 2012, the VfGH has insinuated that the right to equality guarantees a right to a dignified minimum subsistence (*menschenwürdiges Existenzminimum*), without, however, detailing its configuration.[233]

This is partly due to the case law of the ECtHR concerning the support for refugees and displaced persons. As mentioned above, the VfGH has ruled that the exclusion of beneficiaries of subsidiary protection from regular social assistance was constitutional and not a violation of the right equality. However, the judgment emphasises at the outset that the persons concerned received basic support that "in any case covers the basic needs necessary for a dignified life" and that Austria has therefore granted

[232] *Hudorovič and others v Slovenia* App nos 24816/14 and 25140/14 (ECtHR, 10 March 2020), paras. 149, 158.

[233] VfSlg. 19.698/2012, 20.177/2017, 20.244/2017, 20. 297/2018; see, in general, Cargnelli-Weichselbaum, 'Bedeutung der Menschenwürde in der Rechtsprechung des VfGH zur Mindestsicherung', in Hladschik and Steinert (eds.), *Menschenrechten Gestalt und Wirksamkeit verleihen. Making Human Rights Work. Festschrift Manfred Nowak/Hannes Tretter* (Vienna, 2019) 525; Orator, 'Die Bedarfsorientierte Mindestsicherung am verfassungsgerichtlichen Prüfstand', in Baumgartner (ed.), *Jahrbuch Öffentliches Recht 2019* (Vienna, 2019) 187 (192 f).

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the necessary benefits "in order to prevent the persons concerned from finding themselves in a situation contrary to Article 3 ECHR".[234]

This judgment of the VfGH can be understood as a sign that it will take the obligations to provide for non-citizens arising from Article 3 ECHR and the case law of the ECtHR seriously. It would be a stretch, though, to assume that the VfGH has thereby established a general right to a basic standard of living.[235]

However, the situation might be considered somewhat different regarding citizens and their right to equality under Article 7 B-VG. This right to equality includes a principle of reasonableness (*Sachlichkeitsgebot*) that applies irrespective of a comparability test. In what is now settled case law, the VfGH has held that social assistance must not fail to achieve its purpose of ensuring the minimum subsistence of its recipients.[236] According to this case law, it would be unreasonable and therefore contrary to the right to equality, if the benefits provided were "manifestly unsuitable" for the purpose of securing a livelihood (which at least semantically suggests a convergence, albeit cautious, with the case law of the BVerfG described above).

This case law is remarkable in several respects. It originated in a case relating to the province of Carinthia. In 2010, the minimum benefit (*Mindestsicherung*) – the precursor of what is now (again) called social assistance – was suddenly reduced by around 20 %. This was well below the amount previously set as the minimum subsistence level, which is why the VfGH declared the reduction unconstitutional for lack of reasonable justification.[237]

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[234] VfSlg. 20.177/2017 (my translation); see also VfSlg. 20.244/2017, reaffirming that beneficiaries of subsidiary protection are guaranteed a dignified life within the framework of the basic support, and therefore their exclusion from (full) social assistance is left to the discretion of the legislator.

[235] Orator, 'Verfassungs- und unionsrechtliche Strukturvorgaben für die Mindestsicherung' (2017) *ZAS* 236 (239); Orator, 'Die Bedarfsorientierte Mindestsicherung am verfassungsgerichtlichen Prüfstand', 187 (192); on the consequences of interpreting Article 3 ECHR as a guarantee to minimum subsistence, see Cassese, 'Can the Notion of Inhuman and Degrading Treatment be Applied to Socio-Economic Conditions?' (1991) *EJIL* 141 (144) ("if it were true that Article 3 guarantees the right of everybody to have their most basic social needs met, this would imply that Contracting States are duty-bound to provide basic social benefits to everybody under their jurisdiction"); Wiederin, (2005) *VVDStRL* 53 (71 f) ("wenn Ausländer ein Recht auf Existenzsicherung haben, dann kann dieses Recht Inländern nicht vorenthalten werden").

[236] VfSlg. 19.698/2012, 20.244/2017, 20. 297/2018.

[237] VfSlg. 19.698/2012.

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First, it is interesting to note how the reduction came about in the first place. Until 2009, a total of € 632,50 was provided for living and housing needs for a single person, consisting of € 506 for living needs and € 126,50 for housing needs. Following an amendment, a uniform minimum standard of € 632,50 was introduced in 2010. 75 % (€ 474,37) of this amount was allocated to living expenses and 25 % (€ 158,13) to housing needs. The reduction of the amount provided by around 20 % was the result of a combination of several factors. Around € 30 were deducted from the amount provided for living expenses and redistributed to the budget granted for housing needs. Electricity and heating costs were also transferred from housing to living expenses. The amount received to cover living expenses was thus slightly reduced; at the same time, the money provided had to be used for more expenses. In addition, a housing allowance paid in accordance with the Housing Assistance Act (*Wohnbauförderungsgesetz*) could be deducted from the general social assistance. Most importantly, there was a reduction in benefits because the future minimum standard was to be paid only 12 times a year instead of 14 times. The previously existing special payments were thus abolished.

Ten years earlier, the VfGH had already been confronted with a comparable reduction in payments, which it declared unconstitutional: As a cost-cutting measure, the special payments for legal trainees (*Rechtspraktikanten*) were abolished in 1997, which led to a reduction in their remuneration of around 14 %.[238] However, as a non-contributory social benefit that was not offset by a personal contribution, the social assistance was not covered by the protection of reliance interests.[239] The VfGH therefore could not refer to this line of its case law in the Carinthian case. The core of the Carinthian case thus revolved around the question of whether the new social assistance could fall below the previous minimum subsistence level regardless of transitional periods.

The VfGH found such a reduction below the minimum subsistence level to be unreasonable, as otherwise the social assistance system would fail to fulfil its purpose. At the same time, the VfGH confirmed that a reduction below the minimum subsistence level may be permissible if there is an objective justification; for example, sanctions that are linked to a lack of willingness to work come to mind. In such cases,

[238] VfSlg. 15.936/2000

[239] VfSlg. 19.698/2012 was nevertheless interpreted in the literature as an expression of the protection of reliance interests, see Pöschl, 'Gleichheitsrechte', para. 78; Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', para. 248.

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there would be no constitutional objections if benefits were reduced below the statutory minimum subsistence level.

In later cases, the VfGH applied the same reasoning to the capping of benefits for households above a certain size, regardless of the actual need of the household members.[240] As far as children were concerned, the latter also violated the right to respect the best interests of the child in Article I of the Federal Constitutional Law on the Rights of Children (*BVG Kinderrechte*),[241] which was based upon Article 3 of the Convention on the Rights of the Child[242] and Article 24 of the Charter of Fundamental Rights of the EU.[243]

The VfGH thus uses the principle of reasonableness of Article 7 B-VG (sometimes in conjunction with Article I BVG Kinderrechte) to examine whether social assistance benefits actually fulfil their purpose of ensuring a minimum subsistence level.[244]

With this detour, the right to a dignified minimum subsistence has indirectly found its way into Austrian constitutional law. At first glance, this right is therefore not an autonomous right to a dignified minimum subsistence, but merely the side-effect of the principle of reasonableness within an existing legal framework that aims to ensure a dignified minimum subsistence.[245] Consequently, there would be no objection to abolishing an appropriate system of social assistance altogether, because it could be argued that the right to equal treatment is not violated if everyone is equally worse off.

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[240] VfSlg. 20.244/2017, 20. 297/2018.

[241] *Bundesverfassungsgesetz über die Rechte von Kindern.*

[242] United Nations, Treaty Series, vol. 1577, p. 3.

[243] VfSlg. 20.297/2017, 20.359/2019; Öhner, 'Jedes fünfte Kind ist von Armut bedroht' (2022) *juridikum* 183 (189 f).

[244] Cf. Merli, 'Zweck verfehlt. Die Entscheidung des österreichischen Verfassungsgerichtshofs zum Sozialhilfe-Grundsatzgesetz' (*Verfassungsblog*; 8 January 2020) <https://verfassungsblog.de/zweck-verfehlt/>.

[245] Cf. Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', para. 78 n 188, para. 248; for a more cautious assessment of the existing case law, see Holoubek and Bezemek, 'Die Grundrechte', in Studiengesellschaft für Wirtschaft und Recht (ed.), *Selbstverantwortung versus Solidarität im Wirtschaftsrecht* (Vienna, 2014) 61 (72); Holoubek, *Grundrechtsschutz vor neuen Herausforderungen*, Verhandlungen des 21. Österreichischen Juristentages, vol. I/1 (Vienna, 2022) 124 n 646 ("Der VfGH formuliert systemimmanent und lässt offen, ob er irgendeine Form von staatlicher Unterstützung von Menschen in sozialer Notlage für verfassungsrechtlich/gleichheitsrechtlich geboten erachtet"); for an even more cautious assessment, see Hiesel, 'Die Rechtsprechung des VfGH zur Bedarfsorientierten Mindestsicherung' (2016) *ZAS* 216 (217).

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This raised the question of whether a right to a dignified minimum existence could still be said to exist if the legislature changed the purpose of social assistance so that it was no longer aimed at ensuring a dignified existence.[246] In such a case, it was thought, it could no longer be said that falling below the subsistence level was contrary to the purpose of the social assistance legislation.[247]

In 2019, the Federal legislator brought the Court's jurisprudence to the test. In a new Basic Social Assistance Act (*Sozialhilfe-Grundsatzgesetz*), it standardised the social assistance for living and housing needs across all provinces (*Länder*) and set binding maximum (not minimum!) rates to be adhered to by the provinces. The aim of this was no longer to ensure a dignified life, but merely to "support" living and housing needs.[248]

The VfGH's response was ambivalent. On the one hand, the Court declared, on its own initiative, that Vienna's refusal to lower its rates to the binding level set by the Basic Social Assistance Act was unconstitutional.[249] The Federal legislator thus trumped the provinces in determining the appropriate level of assistance for a dignified minimum subsistence. On the other hand, the VfGH reaffirmed its case law and found it unconstitutional to cap benefits for households above a certain size, regardless of the actual need of the household members, especially when children were affected.[250] Furthermore, the Court found it unconstitutional that the Basic Social Assistance Act initially stipulated that only basic assistance could be provided in the form of cash benefits, while any additional housing assistance, as well as any other additional benefits, had to be provided exclusively in the form of benefits in kind.[251]

However, what has not yet been explicitly raised in any of the cases brought before the VfGH is the fact that the Basic Social Assistance Act bears striking resemblance to the Carinthian amendment, which the VfGH had declared unconstitutional only ten years earlier. The Basic Social Assistance Act, similar to the Carinthian amend-

[246] See Orator, 'Die Bedarfsorientierte Mindestsicherung am verfassungsgerichtlichen Prüfstand', 187 (205).

[247] See Pfeil, 'Sozialhilfe neu - viele Verschärfungen, aber wenig Vereinheitlichung' (2019) *ÖZPR* 26.

[248] § 1(1) Sozialhilfegrundsatzgesetz, BGBl. I 41/2019.

[249] VfGH 15.3.2023, G 270/2022, V 223/2022.

[250] VfSlg. 20.359/2019.

[251] VfGH 15.3.2023, G 270/2022, V 223/2022.

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ment, cut special payments that had been implemented in some provinces (e.g. Vienna and Tirol).[252] In addition, the Act provided for the deduction from social assistance of housing allowances granted under the law of the provinces (*Landesrecht*).[253] These two restrictions effectively forced some provinces to reduce the annual payments for certain recipients by around 15 %.[254] Whether this is constitutional has not yet been decided by the VfGH.[255]

In summary, the VfGH has continued to refer to its case law on the prohibition of failing to ensure a dignified minimum subsistence, regardless of the Federal legislator's attempt to reshape the statutory framework.[256] In particular, the VfGH has continued to apply the principle of reasonableness strictly.

This raises the question of how to explain this perseverance, especially as the VfGH's case law on the right to a dignified minimum subsistence has not yet been thoroughly theorised. As mentioned above, it is believed to be derived from the principle of reasonableness, which requires that social assistance schemes actually fulfil their aim to guarantee a minimum subsistence level.

It might, however, be argued that, in fact, a right to a dignified minimum subsistence derives directly from the right to equality, irrespective of the legislative framework and regardless of the specific aims of the social assistance laws. Such an argument could be made along the following lines: The right to equality in the Austrian constitution is generally understood to include both comparative and non-comparative rights. In particular, it has been forcefully argued that the core of the right to equality entails a right to equal consideration and respect.[257]

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[252] Compare § 5(1) SH-GG ("zwölf Mal im Jahr") with § 8(4) Wiener Mindestsicherungsgesetz (WMG), LGBl. 38/2010, as amended by LGBl. 19/2023, providing for two special payments per year for certain groups of beneficiaries, and § 5(3) Tiroler Mindestsicherungsgesetz (TMSG), LGBl. 99/2010, as amended by LGBl. 79/2023, providing for quarterly special payments of 9 % for certain groups of beneficiaries.

[253] § 2(5) SH-GG.

[254] As Vienna provides for 14 payments for certain beneficiaries, the termination of two of those payments already amounts to a reduction in total of 16.6 % annually.

[255] § 2(5) (on the deduction of housing allowances) and § 5(1) SH-GG (setting a maximum of 12 annual payments) were not challenged by the application in VfSlg. 20.359/2019, which is why the VfGH was not called upon to rule on their constitutionality.

[256] See most recently VfGH 15.3.2023, G 270/2022, V 223/2022.

[257] See e.g. Pöschl, *Gleichheit* 162 f and 461 f; Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', paras. 57 ff.

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Seen in this light, the right to equality requires us to treat others as equally valuable, and to acknowledge individuals for who they are, rather than disregarding their identity. The VfGH has recently invoked a similar theory of equality to develop a right to free self-determination, which includes a right to die with dignity.[258]

It would thus not seem far-fetched if the Court were to also recognise a right (in the proper sense) to a life in dignity which requires a minimum level of subsistence. Refusing to provide the necessary assistance effectively neglects the individual's plight and denies them equal concern and respect. Legislation that fails to provide for a dignified minimum subsistence does not treat individuals in need as equally valuable, but disregards their existence.

If the Court were to develop such a stand-alone right to a dignified minimum subsistence, it would have to apply to citizens and non-citizens residing in Austria alike. This is because Article I BVG-RD extends the general right to equality of Article 7 B-VG to non-citizens *inter se*.[259] This development would put the Austrian system on a par with those jurisdictions that already have an autonomous right to a dignified minimum subsistence.

D. Comparative results

Both Courts exercise restraint when it comes to positive claims to a right. Neither the ECtHR nor the VfGH consider poverty, in and of itself, to be a fundamental rights issue. The ECtHR only deems it objectionable when poverty leads to concrete suffering that exceeds the high threshold of Article 3 ECHR. It pays particular attention to cases where the State is implicated in the hardship suffered by individuals.

Similarly, the case law of the VfGH thus far protects the minimum subsistence level only as an exception, namely through the principle of reasonableness contained in Article 7 B-VG and Article I BVG-RD. The VfGH assumes that social assistance serves the purpose of ensuring a dignified minimum subsistence. Any social assistance regulation that contradicts this purpose would be deemed unreasonable and in conflict with this case law.

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[258] VfSlg. 20.433/2020, referring also to Articles 2 and 8 ECHR, besides Article 7 B-VG, and quoting Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', paras. 62 ff, who – in contrast to Pöschl, *Gleichheit* – derives from the right to equality also a right to self-determination and freedom to act (*Handlungsfreiheit).*

[259] For further reflections, see Holoubek, 'Art. 7 Abs. 1 Sätze 1 und 2 B-VG', para. 78 n 188 and para. 91, arguing, however, that a differentiation between citizens and non-citizens may be justified with reference to the difference in their status.

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However, the Court has not gone as far as declaring a stand-alone right to a dignified minimum subsistence. The VfGH has confined itself to assess a contested social assistance provision according to parameters which are set by the legislator. The Court is thus primarily concerned with maintaining a coherent system of social assistance, without however laying down detailed rules for calculating the appropriate amount of benefits or setting a figure for the payments required for a dignified minimum subsistence. This reflects the wide discretion granted to the legislator in matters of social need.

In summary, the domestic constitutional standards set by the VfGH extend beyond the mere application of Article 3 ECHR in accordance with the Strasbourg case law, which is concerned solely with the individual circumstances of the individual applicants. Rather, the VfGH demands that the legislator establishes a reasonable system of social assistance. However, the implementation of the Basic Social Assistance Act in 2019 has raised concerns about whether the VfGH will maintain the legal precedents set in the 2012 Carinthian case. This is also due to the fact that the VfGH has never provided a detailed account of the purported right to dignified minimum subsistence. Nevertheless, the Court has frequently intervened to strike down social assistance legislation that it considered unjustified. The principle of reasonableness has therefore been a powerful tool for judicial review in the field of welfare benefits. Given the VfGH's understanding of the right to equality as encompassing not only comparative, but also non-comparative rights, even a stand-alone right to a dignified minimum existence becomes conceivable within the current constitutional framework.

V. Conclusion

Returning to Ely's comment in the introduction, this article concludes that the ECtHR and the VfGH have recognised social rights as both important *and* fundamental.

The case law of both Courts demonstrated that even conventional fundamental rights guarantees, such as the right to property and equality, can be used to protect social benefits. Thus, the traditional division between civil and political rights, considered the "first generation" of human rights, and socioeconomic rights, considered the "second generation", has lost its relevance, if it ever had any.[260]

[260] See *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), arguing that "[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers [...] that the mere fact that an interpretation of the

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Both Courts find themselves in a similar starting position in cases concerning the protection of fundamental rights in relation to social benefits: both lack a catalogue of fundamental rights, which explicitly guarantees social rights. And yet, both Courts have developed a fundamental rights protection for social rights.

The main difference concerns the differing scope of protected interests. The wide-ranging scope of Article 1 of Protocol No. 1 in relation to public law claims has led the ECtHR to determine that terminations, reductions in benefits and the introduction of new eligibility criteria for current beneficiaries are considered interferences with property-like interests and are therefore subject to a proportionality test.

The ECtHR has abandoned the distinction between contributory and non-contributory benefits, which is a step that the VfGH has yet to take. However, this does not imply that individuals can successfully claim any benefits at any given time. Article 1 of Protocol No. 1 only applies if the applicant meets all legal requirements for entitlement. This is because the ECtHR, as a rule, acknowledges a property right only if an entitlement has materialised and has become enforceable in domestic law. Otherwise, the Court will deny the existence of a legitimate expectation of receiving a specific benefit.

While the older case law was occasionally lenient in evaluating the existence of a legitimate interest, the Court has now returned to a more rigorous approach. In recent cases, the ECtHR appears to have given greater consideration to the actual legal framework. For instance, if an applicant is disqualified based on a statutory ground for exclusion, the Court will dismiss a challenge under Article 1 of Protocol No. 1 for lack of a legitimate interest in receiving a benefit. On the other hand, if the eligibility criteria are restricted after the applicant has already become eligible to receive a benefit (regardless of whether they are actually receiving the benefit), the Court will assess the denial, restriction or reduction of such a benefit for its proportionality.

Although the ECtHR generally grants a wide margin of appreciation to the Contracting States, especially in cases of minor reductions, it nevertheless pays close attention to situations where vulnerable groups are unduly burdened or when those affected risk losing a significant amount of their means of subsistence. The Court essentially

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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"; HCJ 10662/04 *Hassan v National Insurance Institute* (Supreme Court of Israel, 28 February 2012), concluding "that there is no basis for distinguishing clearly and unequivocally between social rights and political rights based on the positive or negative obligations of the state or based on the question of allocating resources"; see also Berka, Binder and Kneihs, *Grundrechte* 879 ff.

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has two main concerns in assessing the proportionality of restrictions: firstly, to prevent certain beneficiaries from being unfairly burdened compared to others, and secondly, to ensure that the minimum subsistence level remains an essential threshold for a reduction of existing benefits.

In contrast, the VfGH assumes a protected property right only if the benefit is part of a *quid pro quo*, e.g., is based on prior contribution payments. This case law was based on a narrow reading of *Gaygusuz v Austria*. Although this case prompted the VfGH to extend the property protection to claims rooted in public law, it remained limited to contributory benefits under social security law. To compensate for the absence of property protection of public law claims, the VfGH initially established a constitutional protection of reliance interests based on the right to equality in Article 7 B-VG. Nevertheless, this protection also only covers contributory benefits. The Court therefore does not challenge the legislature when eligibility requirements or the amount of benefits change – even surprisingly – from one day to the next. This lack of protection is particularly evident in the case of tax-financed transfer benefits such as care allowance, family allowance or social assistance.

In the area of non-contributory social benefits, therefore, the level of protection in the case law of the VfGH might be considered lower than that of the ECtHR. This discrepancy has, however, not yet been manifested in a specific case, probably also due to the fact that Austria generally has a comprehensive social welfare system.

Moreover, according to settled case law of the VfGH, the legislator is obliged to take the minimum subsistence level into account when regulating social assistance, which is considered the last social safety net. This case law provides a level of protection that is greater than that of Article 1 of Protocol No. 1, at least with regard to social assistance. Furthermore, according to the VfGH's case law, the right to equality also contains a principle of equalisation of burdens, which demands a special justification for undue burdens similar to the ECtHR's jurisprudence under Article 1 of Protocol No. 1.

Nonetheless, it would appear appropriate for the VfGH to take into account the case law of the ECtHR more regularly, if only for the sake of consistency and predictability. This would also be in line with the VfGH's general tendency to take the ECtHR's jurisprudence into account in matters related to the protection of fundamental rights. In particular, the VfGH has previously cited Strasbourg case law in challenges related to alleged discrimination in social (security) law, especially but not exclusively in the context of migration.

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According to the case law of the ECtHR, differentiations within the system of social benefits must not be discriminatory in order to comply with Article 14 ECHR in conjunction with Article 1 of Protocol No. 1. The VfGH arrives at the same conclusion with reference to the right to equality.

In applying the principle of non-discrimination, both Courts held that refugees within the meaning of the 1951 Refugee Convention are generally entitled to welfare benefits on the same basis as citizens. In the case of other non-citizens, however, a differentiation according to the type and duration of the right of residence is generally permissible. A higher standard of review is applied only if the difference in treatment is based solely on the lack of citizenship, which, in practice, will only occur in very few cases. Both Courts thus tend to exercise judicial restraint when called upon to assess a differentiation between different types of residence status.

With reference to the "provisional nature" of subsidiary protection, the VfGH has even explicitly allowed beneficiaries of subsidiary protection to be treated worse than refugees in the area of social assistance. The ECtHR has not yet had to decide to what extent such an unequal treatment is compatible with the requirements of Article 14 ECHR. The judgement of the VfGH, however, overlooks the fact that the stay of beneficiaries of subsidiary protection may in fact be permanent, at least in individual cases. Thus, if the stay of beneficiaries of subsidiary protection turns out to indeed be permanent, there is no longer any significant difference to persons entitled to asylum regarding the necessary means of subsistence, rendering unequal treatment unjustified.

Both Courts are also cautious when it comes to positive claims to a right. The right to property does not entail a right to acquire property; and if all are worse off equally, one might conclude that the right to equality has been satisfied as well. From this perspective, it comes to no surprise, that poverty itself has not been a fundamental rights issue for either the ECtHR or the VfGH. Neither Court has declared a stand-alone right to a dignified minimum subsistence.

The ECtHR considers it objectionable only when poverty leads to concrete suffering that exceeds the high threshold of Article 3 ECHR. This case law mainly concerned cases where the State has either inflicted harm to the applicants or has wilfully turned a blind eye to the needs of the most vulnerable. The threshold for Article 3 ECHR to be engaged is thus set very high.

The case law of the VfGH also protects the minimum subsistence level only by way of an exception, namely via the principle of reasonableness contained in Article 7 B-VG and Article I BVG-RD. In particular, the VfGH assumes that the purpose of

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social assistance is to guarantee a dignified minimum subsistence. A social assistance regulation that runs counter to this purpose would violate the right to equality due to its lack of reasonableness. The principle of reasonableness has the potential to offer robust fundamental rights protection. In fact, the VfGH adjudicates a majority of challenges, including in other areas of law, by applying the principle of reasonableness. Whether this approach is based on sound doctrinal reasoning can, however, be debated.

In particular, the VfGH has not yet answered the question of whether it acknowledges a stand-alone right to a dignified minimum subsistence (or only derivative claims based on the purpose of a statute). As argued above, the Court might construe a stand-alone right to a dignified minimum existence by referring to the non-comparative limb of the constitutional right to equality. This aspect of the right to equality requires treating others as equally valuable and not blatantly disregarding their needs, in order to enable them a self-determined and dignified life. Such a development would be consistent with the Court's expansive case law on the right to equality, which has recently even been interpreted by the Court to include a right to die with dignity. A right not only to die, but also to live with dignity thus no longer appears beyond the Court's reach.

Finally, it is worth noting that neither Court has yet addressed the question of whether poverty or socioeconomic disadvantage could be considered a prohibited ground of discrimination.[261] Thus, despite all the developments, there is still uncharted territory for the progression of fundamental rights protection in the area of social welfare.

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[261] For a critical perspective, see Pöschl, 'Armut und Gleichheit' (2016) *JRP* 121; Altwicker, 'Sozio-ökonomische Ungleichheit und konventionsrechtliche Diskriminierungsverbote' (2019) *juridikum* 236; see also the Report of the Special Rapporteur on extreme poverty and human rights, De Schutter, *Banning discrimination on grounds of socioeconomic disadvantage: an essential tool in the fight against poverty*, 13 July 2022, A/77/157; for the framework of the ECHR see, in particular, *Garib v The Netherlands* App no 43494/09 (ECtHR [GC], 6 November 2017), Dissenting Opinion of *Pinto de Albuquerque* joined by *Vehabović,* paras. 25 f.

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