ECHR Decision B. against Switzerland, Case No78630/12 of 20.10.2020

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Zusammenfassung

Gemäss Art. 24 Abs. 2 AHVG entfällt der Anspruch auf eine Witwerrente, wenn das jüngste Kind das 18. Altersjahr erreicht. Witwen erhalten in der gleichen Situation die Rente weiterhin. Der EGMR sieht darin eine Verletzung von Art. 14 EMRK in Verbindung mit Art. 8 EMRK. Das Urteil wird über diesen Einzelfall hinaus Folgen haben. Der Gesetzgeber ist gefordert, solche Ungleichheiten zu beseitigen. Das Urteil ist nicht unumstritten. Kritisiert wird, der EGMR würde sich anmassen, die Rolle einer Europäischen Sozialversicherungsgerichts zu übernehmen. Eine Analyse des vorliegenden Entscheides in einem grösseren Kontext zeigt, dass es durchaus Gründe für eine «punktuelle Korrektur aus Strassburg» gibt. Dies führt weder zu einer finanziellen Belastung des schweizerischen Sozialversicherungssystems noch zu einer Unterhöhlung demokratischer Entscheidungen.

Résumé

En application de l'article 24, paragraphe 2, de la LAVS, le droit à une rente de veuf s'éteint lorsque le plus jeune enfant atteint l'âge de 18 ans. Les veuves continuent à percevoir la pension dans la même situation. La Cour européenne des droits de l'homme y voit une violation de l'article 14 en liaison avec l'article 8 de la CEDH. L'arrêt aura des conséquences au-delà de ce cas individuel. Le législateur est appelé à éliminer ces inégalités. Le jugement n'est pas sans controverse. La critique est que la Cour européenne des droits de l'homme présumerait assumer le rôle d'une Cour européenne de sécurité sociale. Une analyse du présent arrêt dans un contexte plus large montre qu'il y a certainement des raisons pour une « correction sélective depuis Strasbourg ». Cela n'entraînerait ni une charge financière pour le système de sécurité sociale suisse ni une remise en cause des décisions démocratiques.

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I. Facts, appeal and decision

After the death of his wife in 1994, Max Beeler, born in Appenzell in 1953, was entitled to a widower's pension. [1] He looks after his daughters full-time and received supplementary benefits in addition to the widower's pension. On 9.9.2010, the competent compensation fund, based on Art. 24 para. 2 AHVG,[2] decreed that the widower pension be discontinued. According to this provision, the entitlement to a widower's pension, unlike that to a widow's pension, ends "when the widower's last child reaches the age of 18". The entitlement to supplementary benefits also expired with the discontinuation of the widower's pension. The appeal lodged against this decision was dismissed by the Appenzell-Ausserrhoden Cantonal High Court in its decision of 22 June 2011. Max Beeler was also unsuccessful before the Federal Supreme Court; his appeal was dismissed on 4.5.2012.[3]

Before the Federal Supreme Court, the complainant complained of a violation of Article 14 in conjunction with Article 8 ECHR. The guarantees of the ECHR took precedence over national law. The Federal Supreme Court denied the applicability of the ECHR in the present case. The case-law of the ECHR on the non-discriminatory guarantee of social security benefits was not binding on Switzerland due to the lack of ratification of Additional Protocol No. 1 to the ECHR. [4] No entitlement to social security benefits can be derived from Article 8 ECHR[5] and Article 14 ECHR has no independent meaning. [6] However, the Federal Supreme Court emphasised that by adopting Article 4 para. 2 of the FederalConstitution (Art. 8 BV since 1.1.2000), the constitutional legislator had authoritatively stipulated that women and men must be considered substantially equal throughout the entire legal system and that, consequently, both the cantonal and federal legislators were prohibited from treating men and women unequally. Gender could only be considered as a valid criterion for legal differentiation if biological or functional differences based on gender justified this. The Federal Supreme Court also points out that outdated understanding of roles must be overcome. [7] The different regulation for widows and widowers could not be justified by biological or functional differences. The legislature was not prepared to eliminate this inequality in the context of the 11th AHV revision. The Federal Supreme Court thus concluded that Article 190 BV did not permit an assessment of the case that deviated from Article 24 para. 2 AHVG.[8]

On 19.11.2012, a complaint was lodged against Switzerland for violation of Art. 14 ECHR in conjunction with Art. 8 ECHR. On 20.10.2020, the third section of the ECHR ruled in favour of the complainant. [9] On the one hand, Switzerland must pay Max Beeler's legal fees (Euro 6380.-) and also pay him Euro 5000.- in satisfaction. The

judgment is not yet final. Switzerland has three months to refer the case to the Grand Chamber of the ECtHR.

II. Recitals

1. Admissibility of the appeal

Switzerland contested the admissibility of the appeal on the grounds that the AHV survivor's pension constitutes a replacement income intended to alleviate the financial consequences of the death of the breadwinner. Such a benefit was therefore not comparable to benefits which are specifically and directly aimed at promoting family life and the maintenance of children and whose costs are covered by the AHV orphan's pension. There was thus no connection with family life protected by Article 8 ECHR. The complainant could not show to what extent the loss of the pension due to the daughter coming of age affected the organisation of family life. [10] At this point, Switzerland also criticised the ECtHR decision Di Trizio v. Switzerland, no. 7186/09 of 2.2.2016,[11] and considers it problematic if the ECtHR, through the broad interpretation of Art. 8 ECHR, becomes to some extent a European Social Security Court.[12]

In paragraphs 34-41 of the judgment, the Court sets out the principles of applicability of Article 14 in conjunction with Article 8 ECHR. For the application of the (accessory) prohibition of discrimination enshrined in Art. 14 ECHR it is not necessary that a guarantee of the ECHR has been violated. It was sufficient if a situation fell within the scope of at least one of the provisions of the Convention or its Protocols. [13] The concept of family life protected by Article 8 ECHR was to be interpreted broadly, covering not only relationships of a social, moral or cultural nature, but also material interests. [14] The scope of protection of Art. 8 ECHR covers in particular measures that enable a parent to stay at home to care for his or her children. [15] Art. 8 ECHR protects not only family life but also private life. This term must also be interpreted broadly, the physical and social identity of a person would also form part of the private sphere protected by Art. 8. [16] The ECtHR also bases this on the two judgments Di Trizio[17] and Belli and Arquier-Martinez[18] against Switzerland. [19] Finally, the ECtHR recalls that the purpose of the Convention is to protect rights that are not theoretical or illusory, but concrete and effective. The particularities of the specific case and in particular the social and family circumstances of the applicant must therefore be taken into account.[20]

The Court considers that the widower's or widow's pension is intended to relieve the surviving spouse of the need to engage in gainful employment in order to have time to care for his or her children. In that regard, the Court considers that that benefit is clearly "family" in nature, since it has a real impact on the organisation of the applicant's family life. The widower's pension had a very concrete effect on the applicant. The scope of protection of Article 8 ECHR is therefore open to the ECtHR. [21] This made it possible to examine whether the unequal treatment between widowers and widowers is covered by Article 14 ECHR.

2. infringement of Article 14 ECHR

Following the presentation of the positions of the complainant[22] and the government[23] , the ECtHR refers to its case-law according to which discrimination exists when an individual or a group is treated less favourably than another without adequate justification. [24] Furthermore, Article 14 ECHR does not preclude different treatment if it is based on an objective assessment of substantially different factual circumstances and strikes a fair balance, having regard to the public interest, between safeguarding the interests of the Community and respect for the rights and freedoms guaranteed by the Convention. [25] The ECtHR recognises that the Contracting States have a margin of discretion in assessing differences in treatment in the light of Article 14 ECHR, the extent of that discretion varying according to circumstances, areas and context. [26] As far as gender equality is concerned, however, the ECtHR states that this leeway is very limited, referring inter alia to the famous Swiss cases "Burghartz" and "Schuler Zgraggen". [27] In particular, the reference to the traditions, general assumptions or majority social attitudes prevailing in a particular country would not be sufficient to justify different treatment based on sex.[28]

For the Court, it is not disputed that there is a difference in treatment on grounds of sex in the present situation, since widows, unlike widowers, continue to receive survivor's benefit even if the youngest child has reached the age of 18. The unequal treatment was based solely on the fact that the complainant was a man. [29] It therefore had to be examined whether the unequal treatment could be justified, i.e. whether there were objective and proportionate grounds for the unequal treatment. The argument of the Swiss government, according to which widows still need greater protection than widowers today, is accepted by the ECtHR as an objective reason for unequal treatment. [30] However, the proportionality would have to be examined particularly strictly. At this point, the Court refers to the character of the ECHR as a "living instrument", which requires a modern interpretation. The Court stated that recourse to the gender-stereotypical "breadwinner concept" could no longer justify unequal treatment on grounds of sex.[31]

For the ECtHR, the fact that the Federal Supreme Court is bound by federal laws under Article 190 of the Federal Constitution does not justify unequal treatment. The Swiss government is reminded that Art. 1 ECHR obliges the contracting states to implement the guarantees of the ECHR. Overall, there is no adequate justification for unequal treatment. Accordingly, the Court concludes that Art. 14 in conjunction with Art. 8 ECHR has been violated.[32]

3. No compensation, but satisfaction

As a result of the loss of the widower's pension and the related loss of supplementary benefits, the complainant has suffered damages in the amount of CHF 189355. However, the ECtHR rejects a corresponding claim for damages. Together with the Swiss government, it is of the opinion that thanks to the possibility provided for under Swiss law of initiating a reopening of the original proceedings following a successful appeal before the ECtHR, the judgment could be effectively implemented. [33] The complainant justified his demand for a settlement of just under CHF 20000 on the grounds, among other things, of the need to apply to the social security office for financial support. [34] The Court rejected this demand, arguing that there was no causal link between the ECHR violation and the demand for satisfaction. On the

basis of the liability for equity enshrined in Article 41 ECHR, the complainant was nevertheless granted satisfaction, albeit to a lesser extent (Euro 5000.-).[35]

4. Special opinion of Judge Keller[36]

As in the "Di Trizio" case, the Swiss judge Helen Keller expressed a dissenting opinion in the present case, which is published in the annex to the judgement. Helen Keller states that although she voted by a majority,[37] she considers that the appeal in the present case is essentially financial in nature and falls within the scope of Article 1 of Protocol No. 1 and not Article 8 ECHR. It is true that the ECHR and its Protocols must be read as a whole. However, this does not mean that Article 8 of the Convention should be understood as fully incorporating the obligations arising from Article 1 of Protocol No. 1. The main argument against an excessive reference to the protocols for the interpretation of the ECHR would be principles of international treaty law. [38] Helen Keller argues that the broad interpretation calls into question the legitimacy of the Convention system. The Court is assuming the role of a Supreme Social Security Court.

III. Remarks

1. Effects of the judgment

In the first place, the ECHR decision affects the complainant's situation. If no further appeal is made to the Grand Chamber or if the Grand Chamber decides in the same way as the lower instance, Max Beeler will be awarded a widower's pension in the context of the resumption of the original proceedings. The legislature is also called upon to make Article 24 para. 2 AHVG gender-neutral. Either the entitlement to the survivor's benefit will be cancelled for both widowers and widowers after the youngest child has reached the age of 18, or both sexes will continue to be entitled to the survivor's benefit for the period thereafter. This decision is solely a matter for the Swiss legislator. The ECtHR's statement that the government should not interpret the decision as an encouragement to abolish the existing widows' entitlement does not change this.

It was not the subject of the proceedings whether Article 24.1 of the AHVG also violated the ECHR. Unlike widowers, widows are entitled to a widow's pension if at the time of widowhood they have no children or foster children within the meaning of Article 23, but have reached the age of 45 and have been married for at least five years. It is doubtful whether this unequal treatment would stand up to Art 14 ECHR. The provision harbours a real danger that gender stereotypical role models will be reinforced. In view of the ECtHR's previous case-law on Articles 8 and 14 ECHR, it is to be assumed that the ECtHR would also establish a sufficient link between the provisions on the organisation of family life with regard to Article 24 (1) AHVG.

No problems arise from this decision in the area of occupational pensions. The BVG provisions on widows' and widowers' pensions are gender-neutral. The situation is different in the area of statutory accident insurance. According to Art. 29 para. 3 UVG, a widow is entitled to a widow's pension if, at the time of widowhood, she has children who are no longer entitled to a pension or if she has reached the age of 45 and the marriage has lasted five years. Widowers are not entitled to these benefits. It

can be assumed that the regulation would also be qualified as discriminatory by the ECtHR.

It could also be problematic that the surviving partners in a registered partnership are treated equally to widowers (and not to widows) with regard to survivor benefits. In BGer 9C_871/2017, the complainant of a surviving partner asserted that there was unequal treatment of partners with married women and at the same time discrimination on the basis of lifestyle and sexual orientation. The Federal Supreme Court found in this regard that the legislature deliberately wanted to place persons in registered partnerships on an equal footing with widowers and not with widows. However, the Federal Supreme Court is aware that Articles 23 and 24 AHVG violate the principle of equality between men and women. With reference to Art. 190 BV, the appeal was dismissed. Whether this provision would stand up before the Court seems rather doubtful.

The Federal Supreme Court also refers to BGer 9C_737/2019, where it concluded that there is no discrimination on the basis of gender if self-employed mothers do not receive a company allowance in addition to maternity compensation, while self-employed service providers in the army and civil defence (predominantly men) do. The discrimination is denied on the grounds that there are no comparable facts. Again, the question is whether the judges in Strasbourg would judge this in the same way.[39]

2. (No) scope for gender inequality

Social security regulations often provide for differentiations which are problematic in the light of the prohibition of discrimination under Article 14 ECHR. According to case law, the application of Art. 14 ECHR presupposes that different treatment is given in similar or comparable situations and that this distinction is discriminatory.[40]

A distinction is discriminatory if it lacks an objective and reasonable justification. The existence of such justification must be assessed in relation to the aim and effects of the measure in question, taking into account the principles generally applicable in democratic societies. A difference of treatment in the exercise of a right enshrined in the Convention must not only pursue a legitimate aim; Article 14 is also infringed if it is clearly established that there is no appropriate relationship (proportionality) between the means employed and the aim pursued. [41] In numerous decisions, the ECtHR has held that the Contracting States have a certain margin of discretion in deciding whether and to what extent differences between situations that are otherwise similar justify different treatment. The extent of this discretion varies according to the specific circumstances of the individual case, the subject matter and the context.[42]

In the area of gender-based inequalities, the scope for action by States is very limited. [43] Already in the "Schuler-Zraggen" decision in 1993, the ECtHR stated that progress towards gender equality would be an important objective of the member states of the Council of Europe and that only very strong reasons could lead to such unequal treatment being considered compatible with the Convention. [44] The "Di Trizio" judgment stated that references to traditions, general assumptions or prevailing social attitudes in a particular country would not constitute sufficient justification for differences of treatment based on sex. States were not allowed to

impose traditions derived from the primary role of men and the secondary role of women in the family.[45]

In the "Markin" case, the ECtHR ruled that parental leave which was granted to Russian women soldiers but not to male soldiers was contrary to Article 14 in conjunction with Article 14 ECHR. [46] The Court held that the different treatment of women and men could not be justified by reference to traditional role models and gender stereotypes. Just as regulations based on stereotypes concerning origin, sexual orientation or skin colour, unequal treatment of women and men based solely on the idea of the man as the main breadwinner of the family and the woman as the carer of the children are not permissible. In the Court's view, such distinctions contribute to perpetuating gender stereotypes, with negative consequences both for women's professional careers and for men's family life.[47]

Given this starting point, it is anything but surprising that the ECtHR in the present decision rejected the Swiss government's attempts at justification. In the case of gender-specific differentiation, the discretionary scope of the states is very limited. It will be interesting to see how the Court will decide the pending appeal "Kung against Switzerland". The complainant was qualified as unfit for service in 2005 and has since been required to pay the military service levy. Since women are not subject to such a levy, Mr. Kung believes that he is discriminated against on the basis of sex. [48] In this case, too, the reference to an ECHR law is not readily apparent. However, in the "Glor" case, the ECtHR has recognised the obligation to pay a military levy on a person with a disability as an interference with the private life protected by Article 8 ECHR. [49] Although Art. 8 ECHR was not itself violated, it was sufficiently affected to open up the scope of application of the prohibition of discrimination in Art. 14 ECHR.[50]

3. Social security issues and ECHR

Actually, (almost) everyone agrees that the unequal treatment of widows and widowers is no longer up to date. This applies not only to the provision in Art. 24 para. 2 AHVG relevant in the present case, according to which the entitlement to a widower's pension ends at the age of 18 of the youngest child, whereas that of a widow does not. Article 24.1 AHVG also provides for unequal treatment between widows and widowers. Only widows are entitled to a widow's pension if they have no children or foster children at the time of widowhood, but have reached the age of 45 and have been married for at least five years. Widowers are not entitled to such a pension. Such regulations should be abolished. However, the legislator has not yet complied with this "imperative of the hour" and, in view of the stalled debate on the reform of old-age provision, it is not to be expected that the overdue legislative decisions will be taken in the foreseeable future.

With regard to Art. 190 BV, the Federal Supreme Court did not feel that it had the authority to correct the legislature in these matters, because the ECHR was not relevant here. [51] This position is taken over in a special vote by Helen Keller. It is not, or hardly ever, disputed that the current legal situation is permissible in terms of discrimination law(Art. 14 ECHR) (it is not). Rather, it is questionable whether the accessory prohibition of discrimination in Art. 14 ECHR applies at all. The precondition is that a state act does not violate one of the rights enshrined in the ECHR, but sufficiently affects it. [52] Helen Keller and with her also a part of the

doctrine[53] criticise that the granting or not of a social security benefit is covered by the provisions of the ECHR. One of the reasons given for this is that although social security claims are not covered by the ECHR itself, they would fall under the protection of the guarantee of property in Additional Protocol No. 1. [54] As is well known, Switzerland is one of the very few states not to have ratified this Additional Protocol[55] . [56] It is also worth mentioning here that Additional Protocol No. 12 provides for a general and not merely an accessory ban on discrimination. Switzerland - like many other states[57] - has not ratified this protocol either.[58]

The focus of criticism in this case is the very broad interpretation of the term "family life" in the widower case and in many other cases, notably in the "Di Trizio" case. For the European Court of Human Rights, the broad interpretation of Article 8 of the ECHR is a means of helping the accessory ban on discrimination under Article 14 of the ECHR to achieve a breakthrough in social security law proceedings as well. This approach of the ECtHR, which has been criticised in part, requires further analysis.

The ECHR explicitly does not contain any right to social security or other social rights. [59] Rather, these are found in the European Social Charter, the UN Covenant on Economic, Social and Cultural Rights and International Labour Organisation (ILO) conventions. [60] The division of human rights protection into civil liberties and social rights, however, contradicts the fundamental idea of the inseparability of human rights,[61] as already expressed in the Atlantic Charter of the Allies of 1941,[62] The basis of the Universal Declaration of Human Rights of 1948 was[63] and in 1993 was incorporated into the Vienna Declaration of Human Rights. [64] The division into rights of freedom, which demand direct applicability, i.e. can be enforced in court, and merely programmatic social rights took place in connection with the political tensions between West and East during the Cold War. Consequently, in Europe, the ECHR was designed as the place and guarantor of civil liberties with the possibility of an appeal procedure and the creation of a court of justice, whereas the enforcement of social rights in the European Social Charter is only carried out by means of a reporting procedure and a collective action procedure. [65] For a long time, the ECHR therefore played little role in the field of social security.[66]

There are several reasons why social security disputes have increasingly been decided by the ECtHR. The ECtHR understands the ECHR as a "living instrument" and the rights enshrined in the ECHR are not merely theoretical but practical in nature and should be implemented effectively; the ratifying states have a corresponding obligation. [67] The ECtHR is based on Art. 1 of the ECHR, which explicitly obliges the States Parties to grant the Convention rights. [68] Furthermore, the ECtHR has in individual cases already derived social benefits from Art. 8 ECHR, as far as the protection of human dignity was concerned. [69] The case-law of the ECtHR on the protection of social security claims in accordance with the protection of property enshrined in the First Additional Protocol has already been mentioned.[70]

Moreover, it is not immediately obvious that the procedural rights enshrined in Art. 6 ECHR with regard to "civil law claims and obligations" also apply in social security proceedings. Switzerland also had to acknowledge this in the "Schuler Zraggen" case in 1993. [71] As a reminder: Mrs. Schuler Zraggen's IV pension was cancelled after the birth of her child because it was assumed that as a woman she would have given up gainful employment anyway after the birth. The Swiss government unsuccessfully argued that Art. 6 ECHR was not applicable to the IV procedure in

view of the public law nature of social security benefits. [72] The Court concluded that Art. 14 in conjunction with Art. 6 ECHR was violated.[73]

It is also worth mentioning that the extension of the ECHR through the case law of the ECtHR also covers labour law. Thus, the ECtHR derives a comprehensive state duty of protection from Art. 8 ECHR, which also includes protection against employment discrimination and discriminatory dismissal. [74] In addition, the ECtHR interprets the ECHR in an evolutionary and integrative way, i.e. it takes account of social change and draws on other instruments of international law, including the Social Charter and ILO conventions, to interpret the ECHR. [75] In order to justify the content of ECHR rights, he draws not only on other international conventions, but also on the rulings of the monitoring bodies and even non-binding recommendations and resolutions. In the leading decision on the right to strike "Demir and Baykara against Turkey"[76] , the ECtHR explains and justifies this procedure, also referred to in the literature as the "consensus method", as follows: "When the Court defines the meaning of terms and understandings in the text of the Convention, it can and must take into account international legal instruments beyond the Convention, their interpretation by the competent organs and the practice of the European States in which their common values are expressed. The consensus which emerges from specific instruments of international law and the practice of the States Parties may constitute an essential consideration for the Court when interpreting the Convention provision in specific cases".[77]

In the light of the foregoing, it is clear that the subsumption of a survivor's benefit under social security law under the protection of private and family life enshrined in Article 8 ECHR is not surprising. The Court of Justice is not seeking to impose a social law obligation on the ratifying states under Art. 8 ECHR. The aim is rather to help the European consensus on equal treatment of the sexes to achieve a breakthrough. The broad interpretation of the scope of protection of Art. 8 ECHR is thus only a means to an end. Such an approach is certainly not flawless from a legal-dogmatic point of view, but[78] is justified by the result. Nor does such a decision turn the ECtHR into a European social security court, as Helen Keller criticises in her special vote. It would not only lack the legitimacy, but also the necessary powers. Looking at the effects of earlier Swiss cases on social security law, such as "Schuler-Zraggen", "Di Trizio" or also "Vukota Bojic",[79] , it becomes clear that the direct effects are relatively manageable. Neither did the social security institutions get into trouble because of a verdict from Strasbourg, nor was internal democracy undermined. On the contrary - the Strasbourg decisions rather brought (a little) dynamism to reforms that were long overdue, also domestically (mixed method, creation of sufficient legal bases for covert observation). It stands to reason that the "latest coup" by the Court of Justice will also help the necessary "à-jour" bringing of the widower and widow's pension issue to a breakthrough. The ECtHR did not have to decide on "what" and "how exactly". That is the task of the legislator - and that is a good thing.

1. 1 Verschiedene Zeitungen und Zeitschriften haben über den Fall berichtet, dabei wurde auch der Name des Beschwerdeführers erwähnt, siehe z.B. https://www.beobachter.ch/politik/witwer-klagt-erfolgreich-gegen-die-schweiz-manner-sollten-die-gleiche-rente-erhalten-wie (Zuletzt besucht am 27.11.2020).
2. 2 Bundesgesetz über die Alters- und Hinterlassenenversicherung (AHVG) vom 20.12.1946, SR 831.10.

3. 3 BGer Urteil vom 4.5.2012, 9C_617/2011.
4. 4 BGer Urteil vom 4.5.2012, 9C_617/2011, E. 3.1.
5. 5 BGer Urteil vom 4.5.2012, 9C_617/2011, E. 3.3.
6. 6 BGer Urteil vom 4.5.2012, 9C_617/2011, E. 3.2.
7. 7 BGer Urteil vom 4.5.2012, 9C_617/2011, E. 3.4.
8. 8 BGer Urteil vom 4.5.2012, 9C_617/2011, E. 3.5.
9. 9 Die Schweiz machte Nichteintreten geltend, was vom Gerichtshof zurückgewiesen wurde, siehe EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 23–33 (Gründe der Schweiz, Gegenargumente des Beschwerdeführers) und § 34–46 Entscheid und Begründung des EGMR.
10. 10 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 24, 26.
11. 11 (Il [le Gouvernement] partage l'avis exprimé par les juges de la minorité, selon un critère d'application de l'article 8 aussi souple est problématique), siehe § 25 des Urteils.
12. 12 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 27.
13. 13 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 34.
14. 14 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 36.
15. 15 EGMR vom 20.10.2020, Nr. 78630/12, B. gegen die Schweiz, Rz. 37, mit Verweisen auf Petrovic V. Österreich, 27.3.1998, § 27, Nr. 30078/06, § 130, Weller gegen Ungarn, Nr. 44399/05, § 29, 31.3.2009, und Dhahbi gegen Italien, Nr. 17120/09, § 41, 8.4.2014.
16. 16 EGMR vom 20.10.2020, Nr. 78630/12, B. gegen die Schweiz, § 38, mit Verweisen auf die Urteile Glor gegen die Schweiz, Nr. 13444/04, § 52, EMRK 2009, Mikulić gegen Kroatien, Nr. 53176/99, § 53, EMRK 2002 -I, und Otgon gegen die Republik Moldau, Nr. 22743/07, 25.10.2016).
17. 17 EGMR vom 2.2.2016, Nr. 7186/09, Di Trizio gegen die Schweiz.
18. 18 EGMR vom 11.12.2018, Nr. 65550/13, Belli und Arquier Martinez gegen die Schweiz.
19. 19 § 39–40.
20. 20 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 40.
21. 21 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 41–46.
22. 22 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 47–53.
23. 23 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 54–60.
24. 24 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 61–63 mit Verweisen auf Abdulaziz, Cabales und Balkandali gegen das Vereinigte Königreich, 28.5.1985, § 82, Serie A Nr. 94).
25. 25 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 63, mit Verweisen u.a. auf das Urteil G.M.B. und K.M. gegen die Schweiz, Nr. 36797/97, 27.9.2001.
26. 26 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 64, mit Verweisen u.a. auf die Urteile Gaygusuz gegen Österreich, 16.9.1996, § 42, Rasmussen gegen Dänemark, 28.11.1984, § 40 und Inze gegen Dänemark, 28.11.1984, § 40.
27. 27 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 65.
28. 28 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 65.
29. 29 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 66–70.
30. 30 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 71–72.
31. 31 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 73–75.
32. 32 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 77–78.
33. 33 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 80–84.
34. 34 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 85–87.

35. 35 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 88.
36. 36 Opion concordante de la Juge Keller, Anhang zum Urteil, § 1–8.
37. 37 § 1 der Opion concordante.
38. 38 § 5 und 6 der Opion concordante.
39. 39 Siehe zu diesem Urteil Aline Schefer, AJP 2020, S. 1189.
40. 40 EGMR vom 23.10.1997, National & Provincial Building Society, Leeds Permanent Building Society und Yorkshire Building Society gegen das Vereinigte Königreich, Reports 1997-VII, § 88, und vom 20.6.2006, Nr.17209/02, Zarb Adami gegen Malta, § 71.
41. 41 EGMR vom 30.4.2009, Nr. 13444/04, Glor gegen die Schweiz, § 73.
42. 42 Siehe z.B. EGMR vom 12.6.2001, Nr. 36515/97, Frette gegen Frankreich, § 40.
43. 43 Eine Urteilsübersicht inkl. Kurzzusammenfassungen findet sich hier: https://www.echr.coe.int/Documents/FS_Gender_Equality_ENG.pdf (zuletzt besucht am 30.11.2020).
44. 44 EGMR vom 24.6.1993, Nr. 19930624_14518_89, Schuler-Zgraggen gegen Schweiz, § 67.
45. 45 EGMR vom 2.2.2016, Nr. 7186/09, Di Trizio gegen die Schweiz, § 83.
46. 46 EGMR vom 22.3.2012, Nr. 30078/06, Markin gegen Russland.
47. 47 EGMR vom 22.3.2012, Nr. 30078/06, Markin gegen Russland, § 141–143.
48. 48 Vom dem EGMR seit dem 15.05. 2018 hängige Rechtssache Nr. 73307/17, Kung gegen die Schweiz.
49. 49 EGMR vom 30.4.2009, Nr. 13444/04, Glor gegen die Schweiz, § 54 (Die grosse Kammer trat auf die Beschwerde der Schweiz nicht ein).
50. 50 EGMR vom 30.4.2009, Nr. 13444/04, Glor gegen die Schweiz, § 55.
51. 51 BGer Urteil vom 4.5.2012, 9C_617/2011, E. 3.2.
52. 52 Anne Peters/Doris König, Das Diskriminierungsverbot, in: Dörr/Grote/Marau (Hrsg.), EMRK/GG, Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz, 2. Aufl., Tübingen, 2013, S. 1301 ff, Rz. 31.
53. 53 Gächter Thomas/Meier Michael E., Die Entscheidung «Di Trizio»: Wirklich eine Rechtssache für den EGMR, HAVE 2016, S. 480 ff.
54. 54 Opion concordante Keller, § 2 f.
55. 55 45 europäische Staaten haben das Zusatzprotokoll Nr. 1 ratifiziert, siehe https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=XCAIlyFs.
56. 56 Verschiedene parlamentarische Vorstösse für die Ratifikation waren nicht erfolgreich, siehe u.a. Motion 98.3396, 13.1039 Anfrage «Die Schweiz und die Ratifikation des 1. EMRK-Zusatzprotokolls und der Sozialcharta», 13.3075 Interpellation Europarat. Ratifizierung des ersten Zusatzprotokolls zur Konvention zum Schutze der Menschenrechte und Grundfreiheiten
57. 57 Zusatzprotokoll Nr. 12 wurde bis 2020 von 20 Staaten ratifiziert, siehe https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures.
58. 58 Siehe zu den nicht erfolgreichen parlamentarischen Vorstössen die Geschäfte Nr. 00.3723 (Nabholz) und 00.3674 (Teuscher).
59. 59 Der Schutz sozialversicherungsrechtlicher Ansprüche durch die EMRK basiert vorwiegend auf der Rechtsprechung des EGMR zum Zusatzprotokoll Nr. 1 (Eigentumsschutz), siehe dazu: Mel Cousins, The European Convention on Human Rights and Social Security Law, Antwerpen/Oxford/Portland, 2008, S. 17–45, Anna Tsetoura, Deteriorating Social Security Protection, European

Journal of Social Security, 2013, S. 55–78, Ingrid Leijten, Social Security as a Human Rights Issue in Europe – Ramaer and Van Willigen and the Development of Property Protection and Non-Discrimination under the ECHR, S. 177 ff. Zum Ganzen umfassend: Angelika Schmidt, Europäische Menschenrechtskonvention und Sozialrecht, München 2002.

60. 60 Für eine Übersicht siehe Thomas Gächter/Stephanie Burch, Nationale und internationale Rechtsquellen, in: Steiger-Sackmann/Mosimann (Hrsg.), Recht der Sozialen Sicherheit, Basel, 2014, S. 11 ff.
61. 61 Claudia Mahler/Georg Lohmann, Zur Unteilbarkeit der Menschenrechte – Anmerkungen aus juristischer, insbesondere völkerrechtlicher Sicht, in: Die Menschenrechte: unteilbar und gleichwertig? Potsdam, 2005, S. 39 ff.
62. 62 Kolja Möller, Die Europäische Sozialunion – Idee, Hindernisse, Fragmente, in: Liebert/Wolff (Hrsg.), Interdisziplinäre Europastudien, Wiesbaden, 2015, S. 294 (wirtschaftlicher Ausgleich und Schutz der Arbeitenden wurden in der Charta als Mittel zu Erreichung des Friedens anerkannt).
63. 63 Lutz Leisering, Gibt es einen Weltwohlfahrtsstaat?, in: Albert/Stichweh (Hrsg) Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung, Wiesbaden, 2007, S. 185–204.
64. 64 Siehe Ziffer 5 der Erklärung, Quelle (u.a.): https://www.menschenrechtsabkommen.de/weltmenschenrechtskonferenz-1298/ (zuletzt besucht am 29.11.2020).
65. 65 Kurt Pärli/Edgar Imhof, Die Vereinbarkeit der schweizerischen Rechtsordnung mit der (revidierten) Europäischen Sozialcharta, Jusletter vom 6.7.2009, Rz. 16. Zur langwierigen Geschichte der (vorläufigen) Nichtratifikation siehe https://avenirsocial.ch/wp-content/uploads/2019/05/PP354_SozialchartaCH_18_Projektbericht.pdf (zuletzt besucht am 29.11.2020).
66. 66 Klaus Kapuy, Social Security and the European Convention on Human Rights: How an Odd Couple Has Become Presentable First Published Sep 1, 2007; S. 222, pp. 221–241 European Journal of Social Security.
67. 67 Siehe bereit EGMR, Urteil Airey gegen Irland vom 9.10.1979, Nr. 6289/73, § 24: «The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.».
68. 68 EGMR vom 20.10.2020, Nr. 78630/12 B. gegen die Schweiz, § 88.
69. 69 EGMR Okpisz gegen Deutschland, Nr. 59140/00 und Niedzwiecki gegen Deutschland, Nr. 58453/00; beide vom 25.10.2005 betreffend fehlendes Recht auf Kindergeld für Ausländer), siehe dazu umfassend die Stefanie Schmahl/Tobias Winkler, Schutz vor Armut in der EMRK?, Archiv des Völkerrechts Archiv des Völkerrechts 48. Bd., No. 4 (Dezember 2010), S. 405–430.
70. 70 Siehe die weiterführenden Hinweise in Fn. 59.
71. 71 EGMR vom 24.6.1993, Nr. 19930624_14518_89, Schuler-Zgraggen gegen Schweiz.
72. 72 EGMR vom 24.6.1993, Nr. 19930624_14518_89, Schuler-graggen gegen Schweiz, § 45.
73. 73 EGMR vom 24.6.1993, Nr. 19930624_14518_89, Schuler-Zgraggen gegen Schweiz, § 67.
74. 74 Kurt Pärli, Die unterschätzte Bedeutung der EMRK und der Rechtsprechung des EGMR für das Arbeitsrecht. Aktuelle Juristische Praxis (12), S. 1671–1701.

75. 75 Eylem Demir, Die internationale Dimension des Arbeitsrechts, in: Pärli et. al., Arbeitsrecht im internationalen Kontext, Zürich, 2016, S. 163 f.
76. 76 EGMR vom 12.11.2008, Nr. 34503/97, Demir und Baykara gegen die Türkei.
77. 77 EGMR vom 12.11.2008, Demir und Baykara, Nr. 34503/9, Demir und Baykara gegen die Türkei, § 85 (Im Original in englischer Sprache, Übersetzung durch den Verfasser).
78. 78 Die Ausdehnung der EMRK auf Arbeits- und Sozialrechte und gerade erwähnte Konsensmethode ist alles andere als unumstritten, siehe etwa: Antje Ungern-Sternberg, Die Konsensmethode des EGMR: Eine kritische Bewertung mit Blick auf das völkerrechtliche Konsens- und das innerstaatliche Demokratieprinzip, Archiv des Völkerrechts, September 2013, 51. Bd., No. 3 (September 2013), S. 312–338.
79. 79 EGMR vom 18.10.2016, Nr. 61838/10, Vukota-Boijc gegen die Schweiz.