Does property protection entail a right to obtain social benefits under the ECHR?

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It goes without saying that a supranational court's engagement with national social policy is a sensitive endeavour. This is all the more so when the norms this court is protecting are of a 'classic', rather than of a socio-economic kind. In the recent case of *Béláné Nagy v. Hungary* the European Court of Human Rights seemingly recognises a right to obtain social security benefits under Article 1 of Protocol No. 1 to the European Convention on Human Rights, which contains the right to protection of property. The case was decided by a three to four vote and hence might be referred to the Grand Chamber. Yet it is especially the strong and diverging conclusions of the majority and the minority on a sensitive issue like the protection of social security *qua* property rights issue, that make this judgment worth elaborating upon.

Béláné Nagy concerned a women who was granted a disability pension in 2001. Pursuant to a modification of the method of determining the level of disability, but apparently without any substantial change in her health, her entitlement to this pension was withdrawn in 2010. In 2012 a new law on disability allowances entered into force, introducing additional applicability criteria. Ms Béláné Nagy submitted a request for an allowance, and after her condition was reassessed it was considered to meet the requisite level for entitlement. However, as she had not been in receipt of a disability pension on 31 December 2011 and had not accumulated the requisite number of days covered by social security required by the new law, she was not granted the benefit.

The ECtHR, not having temporal jurisdiction to review the 2010 withdrawal, concludes that the refusal of the new request in 2012 amounted to an 'excessive and disproportionate individual burden'. According to the Court, as of 2001, the applicant had a 'legitimate expectation to receive a disability pension/allowance as and when her medical condition would so necessitate', and this was reason for her interest to be covered by the 'possessions' protected by Article 1 P1. In this regard the ECtHR also refers to the ILO Convention on Social Security—while noting that it has not been ratified by Hungary or by the majority of Council of Europe Member States—and to the fact that during her employment the applicant had contributed to the social security system. It recognises that States have a certain margin of appreciation in regulating citizens' access to disability benefits, yet they cannot deprive entitlements of 'their very essence'. Moreover, as a 'matter of the rule of law', the ECtHR emphasised 'the principle of *impossibilium nulla obligatio est* … [since] the applicant was *ex post* reproached for not having made in the past sufficient contributions as determined by the new legislation—a condition she could not possibly meet' (para. 53). This was reason to conclude on a breach of Article 1 P1.

Generally, there is a lot to say in favour of providing 'essential', or 'minimum core' socio-economic rights protection, *i.e.*, of recognizing the link between basic social provisions and the Convention. (See, *e.g.*, my article on the German right to an *Existenzminimum* and the possibility of minimum core socio-economic rights protection under the ECHR, forthcoming in the next issue of the *German Law Journal*.) However, whereas this may suggest that a right to respect for one's private life (Article 8 ECHR), or the prohibition of inhuman treatment (Article 3 ECHR), may translate into positive minimum guarantees in the fields of health care, social benefits, or housing, in the case of the right to the protection of *property* this is less obvious. After all, the phrasing of this right ('to the peaceful enjoyment of his possessions') requires that one can speak of a 'proprietary interest' before Article 1 P1 can be taken as the starting point for deciding whether a given 'interference' with someone's possessions was justified or not. Needless to say, the link between property rights and social security is an intricate one, and constrains the possibilities of the ECtHR to create a right to minimum socio-economic protection under Article 1 P1.

In line with this, it is not so much the way the majority deals with the proportionality of the issue, but rather the way it handles the preliminary issue of interpreting 'possessions' that is criticized by the three dissenters, Judges Keller, Spano and Kjølbro. By not being able to obtain any disability allowance whatsoever, one could say that the applicant was indeed divested of a core social entitlement. However, the dissenting judges note that

> *Article 1 of Protocol No. 1 to the Convention has never, before today, been interpreted by this Court as obliging member States to provide persons with the right to social security benefits, in the form of disability pensions, independently of their having an assertable right to such a pension under domestic law. The majority have thus expanded the scope of the right to property under the Convention in a manner that is flatly inconsistent with this Court's case-law and the object and purpose of Article 1 of Protocol No. 1. As the right to property under the European Convention on Human Rights is not an autonomous repository for economic and social rights not granted by the member States, we respectfully dissent. (para. 1)*

According to the dissenters the majority in this case for the first time holds that if someone once had a right to a disability pension, he indefinitely retains a legitimate expectation to this (or a similar) allowance, at least when his medical condition does not change. They regret that it did not do so openly, and emphasise that thus far, a legitimate expectation could only arise once it was 'based on some normative legal source at domestic level that can reasonably confer a property right on him or her' (par. 10). Since the ECtHR could only review the refusal of the 2012 request, at which point the applicant clearly did not meet the legal requirements set for obtaining a disability allowance, the interpretation of the majority is considered to be in conflict with what it held in earlier case law, namely that there is no interference with the rights under Article 1 P1 is someone does not satisfy, *or ceases to satisfy*, the conditions set by national law (*e.g.*, *Damjanac v. Croatia*, para. 86).

The dilemma concerned here ties in with the broader debate on (the need for a limited) interpretation of fundamental rights. In times in which proportionality/balancing and 'rights inflation' are omnipresent (*e.g.* Möller 2012), it is asked whether we should not simply have a general 'right to proportionality', rather than a guarantee that interferences *with our rights* can only take place once they are proportional. (*Cf.* the debate between Tremblay and Klatt in the latest issue of I-CON, and in particular also Mathews' recapitulation on I-CONnect.) It can indeed be said that the issue at stake in *Béláné Nagy* clearly was very serious and that the course of events the applicant was confronted with signals certain shortcomings on the part of the State. However, I would argue that we need rights, *i.e.*, that a (supranational) court should not 'start from scratch' and determine whether what occurred was proportional or not. The dissenters rightly stress that in the context of *a particular norm* like the right to protection of property, a (supranational) court should make a convincing case for why the individual interest concerned is *prima facie* protected, before it can assume the power to review the issue on hand. As this case shows, failing to lay down transparent and consistent limits to the interpretation of *prima facie* rights would create the possibility to discern far-reaching positive, socio-economic guarantees, which especially for a supranational court like the ECtHR does not seem a very promising approach.

SUGGESTED CITATION Leijten, Ingrid: *Does property protection entail a right to obtain social benefits under the ECHR?, VerfBlog,* 2015/2/25, http://verfassungsblog.de/does-property-protection-entail-a-right-to-obtain-social-benefits-under-the-echr/.

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