Aila Linnakangas

Oversight of social rights – social assistance as an example

Starting point

Economic and cultural rights are enshrined in our Constitution, which obliges the public authorities or the legislator to safeguard or promote them. As an exception to this (in addition to the basic education that is guaranteed as a right), however, something that is safeguarded in the form of an individual right is the indispensable subsistence and care necessary for a life of dignity and to which all who cannot themselves obtain the necessary means are entitled. Finland has undertaken a commitment to safeguard a certain minimum standard and to maintain and develop social security having acceded to several UN, Council of Europe and International Labour Organisation conventions. In Article 13 of the Revised European Social Charter, for example, Finland has undertaken "to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition". Thus the right to last-resort livelihood security is a fundamental and human right.

When the fundamental rights provisions of the Constitution were revised in 1995, it was stated that security of indispensable subsistence and care is not bound to any of the forms of support nowadays in force. However, the Constitutional Law Committee has pointed out that the income support system can under the legislation currently in force be regarded as being in practice a guarantee of the indispensable subsistence and care essential for a life of dignity insofar as security is provided in the form of cash payments.

In the social welfare category of cases, the greatest number of complaints to the Ombudsman have traditionally concerned social assistance. Some 350–370 decisions on complaints concerning social welfare, i.e. mostly the actions of municipal social welfare authorities, have been issued each year over the past decade, and nearly one-third of them have related to

social assistance. In 2008, for example, decisions on about a hundred complaints relating to social assistance were issued. Although social assistance-related complaints have accounted for a large share of all social welfare complaints, relatively few of them are made when one considers how many social assistance clients there are and how decisions are made in this sector. Statistics compiled by the National Institute for Health and Welfare (THL) indicate that an estimated 216,700 households were in receipt of social assistance in 2008. National statistics showing how many social assistance decisions are made are not compiled, but the total is probably several times that number. In Helsinki alone, the figure was over 220,000 in 2008. Despite there being so few of them relative to the number of clients, the complaints would appear to have related to precisely the issues that at any given time have been topical and problematic also more generally in the granting of social assistance.

I shall deal in the following with those problems in the social assistance system that have been the subject of many complaints to the Ombudsman in the past period of just over ten years. The right to social assistance is legislated for rather loosely and the regulations have made many kinds of interpretations possible over the years. This has been reflected in the Ombudsman's oversight of legality as well.

Are students and entrepreneurs entitled to social assistance?

Prior to the entry into force of the current Social Assistance Act on 1.3.1998, the right to this benefit was provided for in Section 30 of the Social Welfare Act and in a Government decision issued by virtue of this Act. The general prerequisites for eligibility to receive social assistance were stipulated in Section 30 of the Social Welfare Act in the same way as in Section 2 of the current Social Assistance Act. It states that: "All those in need of support and unable to make a living through paid work, self-employment or other benefits securing a living, or from other income or assets, by being cared for by persons liable to provide them with maintenance, or in some other way, are entitled to social assistance."

Students, especially those in third-level education, were quite rare among social assistance applicants up to the latter half of the 1980s, but became clients of social welfare offices after the economic recession began in the early 1990s. In 1991, a total of 23,678 students or families whose reference person was a student received social assistance benefits. The total trebled between 1985 and 1991. Students' relative share of all social assistance recipients was just over 10 per cent in 1991. The percentage had increased to 14.6 by 1996, since when it has stabilised at between 13 and 14.

The arrival of students on the scene as social assistance clients in the early 1990s was reflected also in complaints to the Ombudsman. It could be seen from them that when it came to obtaining social assistance, students were in very different positions depending on where they lived. The practices followed by the various provincial courts (administrative courts from 1.11.1999 onwards) likewise lacked consistency and were even mutually contradictory. Some provincial courts required that social assistance be granted to all students on the basis of income and outgoings in the month in which the application was made. In others, appeals by students were rejected in situations where longer-term social assistance would have been needed. The reason presented for this was that social assistance as a last-resort form of support was not intended to safeguard a student's livelihood other than temporarily and studies could not be financed through social assistance on a long-term basis. In these courts, the way in which the last-resort character of social assistance and equal treatment of applicants were understood was that also a student has an obligation in the final analysis to seek paid employment and, if none is available, to sign up for unemployment benefits. The applicants were often persons who were no longer receiving study grants because their studies had been too protracted or their performance in their studies had been inadequate and who had originally embarked on studies without making sure of their entitlement to a study grant or other means of livelihood for the duration of their studies.

A Deputy-Ombudsman found in a decision on a complaint made by the National Union of University Students in Finland in 1993 (1211/93) and in several other decisions concerning social assistance for students that the equality provision in the then Form of Government Act constitutional document and international conventions by which Finland was bound required that social assistance clients be treated on a basis of equality in legislation, courts and administrative authorities. A situation in which a student's right to social assistance was decided on in different ways in the jurisdictions of different provincial courts was contrary to the constitutional requirement of equal treatment. The right to social assistance as a subjective right is not realised if legislation is so loosely formulated that it allows interpretations that are diametrically opposed to each other. Indeed, the Deputy-Ombudsman recommended to the Ministry of Social Affairs and Health that it explicate Section 30 of the Social Welfare Act. A little later, he recommended to the Ministry that, unless the inclarities with respect to social assistance that had been reflected in administrative and judicial practices were resolved through legislative measures, consideration should be given to creating the possibility, based on a leave-to-appeal procedure, of appealing to the Supreme Administrative Court in matters concerning this benefit (1058/95).

Besides students, the same question about the last-resort character of social assistance and the openness to interpretation of the regulations applied also to self-employed persons seeking the benefit. They were usually entrepreneurs who for a long time had been unable to obtain a livelihood for themselves and their families from their unprofitable entrepreneurial activities, but who did not wish to give up their businesses and register as unemployed job-seekers. According to the interpretation adopted by the labour authorities, discontinuing entrepreneurial activities was, namely, a prerequisite for being accepted as an unemployed job-seeker and becoming eligible for unemployment benefits. It was stated in the Deputy-Ombudsman's decisions that social assistance was a last-resort benefit that guaranteed subsistence also for self-employed persons. However, Section 30 of the Social Welfare Act left it open whether a self-employed person could be refused social assistance in such a situation on the ground that he or she had not taken steps to obtain the necessary subsistence in other ways in the meaning of the regulation, i.e. through paid employment or in the event of it not being available, in the final instance with the aid of unemployment benefits. For this reason, the Deputy-Ombudsman could not find refusal of social assistance unlawful (inter alia 1768/96).

The Ministry of Social Affairs and Health has published, at intervals of a few years, handbooks intended for the authorities that administer social assistance. No clear stance on the granting of social assistance is adopted in these, either. However, one thing that is underscored in them is the right of all persons who lack a factual livelihood to receive social assistance. On the other hand, it is stated in the handbooks that, in the view of the Ministry, protracted studies should not, a priori, be financed through social assistance and that it is in general not purposeful for the income of a person conducting clearly unprofitable entrepreneurial activity to be safeguarded over the long term through social assistance.

In complaints made after the entry into force of the fundamental rights provisions on 1.8.1995 self-employed persons who had applied for social assistance invoked especially the safeguarding of indispensable subsistence and care. The Deputy-Ombudsman pointed out that when deciding on social assistance applications the social welfare authorities were obliged under the fundamental rights provision to take account of the fact that the right to indispensable subsistence is guaranteed to all who are incapable of themselves obtaining a livelihood. However, the right to indispensable subsistence that is guaranteed to everyone as a fundamental right is intended to be secondary and becomes applicable only if a person is unable to secure a livelihood through his or her own activity or obtains one from other social welfare systems or through the support of other persons. When a person had already been granted social assistance for several months and his opportunity to seek benefits that are considered the primary means of safeguarding a livelihood had thereby been ensured, refus-

ing social assistance to a person who had continued to engage in unprofitable entrepreneurial activity could not, according to the Deputy-Ombudman's decisions, be deemed to be in conflict with the fundamental rights that the Eduskunta has defined (inter alia 1768/96).

The entry into force of the Social Assistance Act on 1.3.1998 did not provide a solution to the interpretation problems mentioned in the foregoing; the general conditions for receiving assistance that are set forth in its Section 2 are similar and just as open to interpretation as those in Section 30 of the earlier Social Welfare Act. However, the Constitutional Law Committee did not see a problem in the matter, but noted in its statement on the Bill that its Section 2 contained sufficiently precise regulations on persons entitled to social assistance.

With effect from the beginning of 1999, it became possible through a leave-to-appeal procedure to appeal to the Supreme Administrative Court against decisions by an administrative court concerning the granting and amount of social assistance in cases deemed important from the perspective of uniformity of application of the law or administration of justice. Thus making it possible to appeal to this superior court became the solution to the openness to interpretation of the social assistance regulations.

In June 2001 the Supreme Administrative Court issued three decisions with a significant steering effect on interpretation of the law. Its annual report decision KHO:2001:35 involved a student who had not received financial aid for students owing to inadequate study performance, but on the other hand had also not obtained a livelihood in another primary way in the meaning of Section 2 of the Social Assistance Act. The issue in decisions 1344/2001 and 1472/2001 was self-employed persons who had not obtained a livelihood from their businesses for a long time, but had failed to discontinue their entrepreneurial activities and sign on at an employment office as unemployed job-seekers.

The Supreme Administrative Court noted first of all that the provisions of the Act on the right to receive social assistance in such situations were open to interpretation and that the documents produced when the Act was being deliberated by the Eduskunta did not help interpretation. The Court concluded that when interpreting Section 2 of the Act it could be inferred from inter alia the regulations on reducing the basic component and requiring repayment of assistance received that assistance could not be refused entirely to a student or self-employed person on the ground that he or she had not sought a livelihood in a manner in the meaning of Section 2 of the Act. Also in this situation, the right of a student or self-employed person to receive social assistance had to be decided on the basis of his or her economic circumstances at the time the application was made. The procedure could, however, possibly be equated with a situation in which the student or self-employed person has through his or

her negligence made it impossible for work or a measure under labour policy to be offered to him or her, whereby the basic component of the social assistance could be reduced subject to the preconditions specified in Section 10 of the Act.

After the Supreme Administrative Court's decision, the Act was explicated with effect from 1.9.2001 so that, inter alia, a full-time student or person in paid employment or self-employed is not required to sign on at an employment office as a job-seeker. This means in practice that the basic component of the social assistance paid to a full-time student or self-employed person can not be reduced on the ground of failure to sign on as an unemployed job-seeker.

The provision clarified interpretation of the Act, although a question that it still left open to interpretation was who is to be considered a full-time student or working self-employed person. Questions that have been asked in complaints include whether someone studying for a second qualification or doing postgraduate studies at a university is a full-time student in the meaning of the Act.

The Ombudsman has not adopted a stance on these questions of interpretation, stressing instead that social assistance can not be entirely refused on the ground that the person in question has not signed on as an unemployed job-seeker; the only consequence of this can be a reduction of the basic component or possibly a demand that the assistance be repaid (inter alia 2098/06).

Parents' responsibility for the costs of education

Another question that caused interpretation problems and has been a theme of complaints is the relationship between the obligation to support children that is imposed on parents in the Social Assistance Act and the duty that the Child Maintenance Act requires them to meet. The former obliges parents only to support an underage child, whereas under the latter parents are required, with certain provisos, to meet the costs of their child's education even after it has reached the age of 18. Also the Act on Student Support provides for the income and wealth of the parents of a person who has reached the age of 18 to be taken into account in some cases.

The issue in complaints has primarily related to young persons who have just reached the age of 18 and have announced that they do not receive assistance from their parents although, based on the parents' income and wealth data, the possibility of this assistance being provided would appear to exist.

It has been pointed out in the Ombudsman's decisions that if students or schoolchildren who are not being supported by their parents apply for social assistance, they are entitled to receive it provided they meet the preconditions in other respects. If, however, applicants are in fact receiving funds or other support from their parents, this can be taken into account in determining their need for assistance. It was also stated in earlier decisions that the social welfare authorities have the right to require students who are of age and applying for social assistance to give an explanation of the extent to which their parents are meeting the costs of their education in the manner provided for in the Child Maintenance Act. An applicant can, in turn, report that the parents are unable to provide assistance or in actual fact do not do so (inter alia 2605/95). The duty of the authority to examine and an applicant's obligation to report were interpreted in the same way also in most administrative courts and this interpretation is referred to in some decisions of the Supreme Administrative Court as well.

The Supreme Administrative Court explicated the duty of student applicants for social assistance to provide information on their parents' economic status in a decision that it issued in 2004 (2013/2004). According to the decision, applicants could not be obligated to provide an explanation of their parents' means in association with an application for social assistance. The Ombudsman has likewise subsequently pointed out that applicants can not be obligated to present information on their parents' income and wealth. The Ombudsman has also made it clear that recording detailed data on parents as an appendix to a student's personal information would infringe protection of the privacy of both the social assistance applicant and his or her parents. An applicant who is of age has the right to make an application without informing his or her parents of this. If, by contrast, the parents voluntarily wish to inform the social welfare authorities that they are factually unable to support the applicant, the official in question has the right and indeed even a duty to enter information thus obtained in the client data system (1679/2004).

Municipalities' social assistance guidelines

A municipal body responsible for social welfare has the opportunity to give its officials interpretation and application guidelines for social assistance. In addition to the guidelines that the relevant bodies have approved, the oral or written instructions given by supervisory personnel as well as the ground rules that social workers agree among themselves are applied in municipalities. Joint guidelines have also been confirmed regionally, transcending municipal boundaries within administrative or economic regions. Guidelines speed up processing and bring uniformity to the decisions that officials make, thereby promoting equal treatment of clients. Although the Ministry of Social Affairs and Health's recommendation-type handbook for officials applying social assistance does complement the Act, municipalities' own

more detailed guidelines are necessary in especially processing written applications, which generally do not involve decisions requiring individual consideration of need. Guidelines can also have negative effects. On a national level, they can cause inequality between applicants in different parts of the country. They can also excessively schematise the granting of benefits. Although these general guidelines have not bindingly resolved individual applicants' right to social assistance, they nevertheless steer officials' decision making in practice. In the interpretation of the Supreme Administrative Court, the decisions that a body makes concerning application guidelines are not appealable, so the only way to have the legality of the guidelines tested is to make a complaint.

On the initiative of a Deputy-Ombudsman, municipal social assistance guidelines became the subject of an extensive study in 1994, when the State Provincial Offices, at the Ombudsman's request, evaluated the legality of these guidelines within their respective territories (2028/94). It emerged first of all that different municipalities' guidelines differed greatly from each other. The guidelines were also being observed too schematically and individual need assessment was being overlooked. Special guidelines concerning students, unemployed persons, the self-employed or other named groups excluded them entirely from benefits or limited their right to social assistance, for example chronologically. Guidelines also contained many kinds of unlawful cash ceilings, by means of which the level of social assistance was lowered with respect to, for example, expenses for housing, health care, travelling to work and children' day care as well as those arising from a person's or family's special needs or circumstances.

Also since then, the guidelines have featured in complaints almost every year. Grounds for criticism have continued to be found in them, for example concerning private health care costs (1593/96), determining a self-employed person's disposable income (2117/98), retroactive social assistance (749/99) and processing applications from students (1679/04).

Reducing the basic component of social assistance

Safeguarding indispensable subsistence as a prerequisite

Under Section 10 of the Social Assistance Act, the basic component of the benefit can be reduced by initially up to 20% for reasons that include refusing to accept work or other employment policy measure and then by up to 40% if this refusal is repeated. However, a precondition for reduction is that it will not endanger a living essential in providing security needed for a life of human dignity and cannot otherwise be considered unreasonable.

The Constitution does not define more precisely the income level or the services that the indispensable subsistence and care essential for a life of human dignity presuppose. However, it is stated in the legislative drafting documents created in the process of revising the fundamental rights provisions of the Constitution that assistance of this kind includes provision of the nutrition and housing essential to maintain health and viability. It is further stated that the provision has a close linkage to the constitutional provision concerning the right to life and that its purpose is to safeguard a minimum level of the prerequisites for a life of human dignity, i.e. the so-called existence minimum.

In its statement on the Social Assistance Bill, the Constitutional Law Committee evaluated the preconditions for reducing the basic component from the perspective of the fundamental right to indispensable subsistence and care. The Committee noted first of all that this fundamental right is linked to the fact that a person has not been able to obtain the security required for a life of human dignity. In the view of the Committee, if a person has been offered a genuine opportunity to gain a livelihood by working or participating in an employment policy measure, it can be said that he or she would have been able to obtain security in the meaning of the Constitution. The Committee further concluded that the possibility of reducing the amount paid is compatible with the nature of social assistance as the last-resort social security benefit, because the purpose of the provision permitting a reduction is to promote employment instead of the person in question remaining permanently dependent on social assistance. The Committee also deemed this objective to be acceptable from the perspective of the system of fundamental rights, especially when account is taken of the obligation that is placed on the public authorities in the Form of Government Act (nowadays the Constitution) to promote employment and safeguard for everyone the right to work.

Secondly, the Committee evaluated reduction of the basic component from the perspective of the level of indispensable subsistence. It pointed out that the aim with the social assistance system is to ensure a socially acceptable standard of living, which is in most cases more than the indispensable subsistence that is guaranteed as a fundamental right. Therefore the Committee did not regard a reduction of the basic social assistance component by 40% as a priori endangering this security. However, it pointed out that when the basic component is being reduced, an individual assessment must always be made to ensure that no one's right to indispensable subsistence is jeopardised.

Thus indispensable subsistence and care have been characterised in legislation on a fairly general level. However, when the social welfare authorities who decide on social assistance consider the preconditions for reducing the basic component, they have to evaluate the adequacy of indispensable subsistence quite concretely in the case of the person concerned, and even in terms of euro.

Stances by the Ombudsman on reducing the basic component of social assistance

The Ombudsman has not taken a stance on endangerment of an individual person's indispensable subsistence in any of her decisions. She has, however, underscored that an interpretation of the law that is amenable to fundamental rights is a general principle guiding official actions. The prerequisites for reducing the basic component must be interpreted narrowly, adhering to the wording of the Social Assistance Act. The Ombudsman has also pointed out that the social welfare authorities have a duty to demonstrate that refusal or other negligence has taken place as well as the other prerequisites for reducing the basic component.

Reducing the basic component of social assistance can not be founded on only the decisions of labour authorities, although information received from them and their decisions on unemployment benefits are taken into consideration. Thus the basic component can not be reduced merely on the ground that a person has lost his or her right to unemployment benefits; instead, the prerequisites for reducing it must be considered separately in each case based on the provisions of the Act. Indeed, the Ombudsman pointed out in one decision that after a person had started at the beginning of January in a job that the municipality had arranged for him, the reduction of the basic component could no longer be based on the waiting period that the labour administration specifies, and that in the case of the person concerned, the prerequisites for reduction in the meaning of Section 10 no longer existed in January (149/04).

Social assistance is nowadays often applied for in writing. In many municipalities the majority of applications are already being made in this way. The Ombudsman has taken the view that an applicant can be required to meet a social worker or social instructor in person if this is essential in order to ascertain the need for social assistance and determine its amount. If an applicant neglects to transact his or her business in person, the amount of the basic component can not be reduced solely on this ground. By contrast, if the information that is necessary in the matter can not be obtained from a written application, failure to transact business in person can lead to an application for social assistance being refused (3884/06).

Not later than the Supreme Administrative Court decisions in 2001 that have been outlined in the foregoing, it has been clear in case law that refusing work or a comparable action can not lead to social assistance being completely refused; the only consequence can be a reduction of the basic component. However, as recently as 2004, one complainant's social assistance had been completely turned down on the ground that he had been offered an

apprenticeship in a municipal multi-purpose facility, where he would have been able to earn his own livelihood by working as an apprentice with the aid of a labour market subsidy or by participating in rehabilitative work and benefiting from the associated support measures. The Ombudsman pointed out that the basic component of social assistance could have been reduced on this ground, but that refusing the benefit altogether was contrary to the Social Assistance Act (682/04).

Disposable income and assets

Sequencing of unemployment benefits or use of the 21.5-day coefficient

Taking unemployment benefits received into consideration when calculating the amount of social assistance has been one recurring theme in complaints for over ten years. The problem stems from the fact that social assistance is determined mainly with respect to a calendar month, whereas the labour market subsidy and basic per diem benefit are paid at four-weekly intervals in instalments for 20 work days. A person who has regularly received unemployment benefits for an entire calendar year receives 13 payment instalments in the course of that year for an average of 21.5 days a month. This problem existed already before the entry into force of the Social Assistance Act. In fact, the Government Order on the general principles for social assistance were amended with effect from the beginning of 1996 so that disposable income was taken into consideration as income, whereas according to the earlier wording actual disposable income was taken into consideration. The reason given in the Ministry of Social Affairs and Health's decree memorandum for deleting the word actual was specifically that it made it possible to sequence unemployment benefits.

The Deputy-Ombudsman noted as long ago as 1996 (773/96) and in several later decisions that the unemployment benefits determined on average in accordance with the 21.5-day coefficient could a priori be taken into consideration as the disposable income of a long-unemployed social assistance recipient. However, it was emphasised in the decisions that also average income sequenced in this way must always be based on actual income. Also, for example, during a brief period of unemployment or when payment of unemployment per diems is otherwise fluctuating more than average, it would be advisable when the applicant's interest so demands to take into consideration the actual income paid in specifically that month. The question of taking unemployment benefits into consideration came up in the Eduskunta in conjunction with passage of the Social Assistance Act, when the Social Affairs and Health Committee drew attention to the matter. The Committee pointed out that the prevailing practice according to which income is taken into consideration in accordance with

the 21.5-day coefficient when social assistance calculations are being made even though unemployment benefits are paid in 20-day sequences leads to a social assistance applicant losing a sum of money equivalent to 1.5 days' unemployment benefits. The Committee made the stipulation that the guidelines concerning social assistance specify that only actual income be taken into consideration in the income calculation.

It is unclear whether the Committee meant the incomes of persons who are only briefly unemployed or have been out of work for a longer period. Another matter that it did not address was how the 13th payment instalment that a long-term unemployed person has received during the year should be taken into consideration. In any event, the Committee's stance led to inconsistent administration of the law. Some administrative courts took the view that sequencing into 21.5-day instalments was possible in the same way as earlier, whereas others referred to the Committee's statement and took the view that sequencing was not possible.

The Supreme Administrative Court set guidelines for sequencing unemployment benefits in three decisions that it issued in 2001 (7.11.2001 file numbers 2754 and 2762 as well as 31.12.2001 file number 3320). The Supreme Administrative Court decided that the unemployment benefits of a social assistance applicant who had been in receipt of these benefits long-term could be divided into instalments to be taken into account as monthly income by using the coefficient of 21.5 days, with the proviso that the same coefficient had been used also in the month during which he or she had been paid two 20-day unemployment benefits.

Thus, according to the Supreme Administrative Court's decisions, the unemployment benefits received by a long-term unemployed person who is applying for social assistance can be taken into account in two different ways when determining the amount of social assistance. First of all, what can be taken into account as income is the instalment paid in each month, whereby two instalments must be taken into account as income once a year. The other possibility is to take into account as income the average monthly amount received, i.e. unemployment per diem payments calculated for 21.5 days per calendar month. That way, two instalments do not have to be taken into account for any month at all, because the year's 13th instalment has already been divided into monthly portions.

The possibility of using the 21.5-day coefficient with respect to persons who have been in long-term receipt of unemployment benefits has been accepted on an established basis in case law since the Supreme Administrative Court's decisions. By contrast, not all social assistance clients have accepted this. Many a client's own conviction that he or she is receiving unemployment benefits with respect to only 20 days a month rather than for an average of 21.5 remains strong. Complaints about this matter were still arriving at time of writing.

Carrying forward of income surplus

According to Section 15 of the Act, the expenses as well as the income and assets that form the basis for social assistance are taken into account with respect to the period for which the social assistance is determined. However, the income can be divided into instalments to take into account several of the periods for which the social assistance is determined, if this is necessary due to the one-off character of the income or taking the reason for its receipt or its purpose into account. The provision does not contain a more precise specification of the income and assets that can be divided into instalments (i.e. sequenced) nor state for how long the sequencing can extend. The provision is open to interpretation.

This question of so-called rolling up of an income surplus, i.e. of whether a notional income surplus for the previous month or months can be carried forward as income to the following month or possibly months in the social assistance calculation, has prompted several complaints. What is also at issue is whether an applicant who is without means is entitled to social assistance if he or she has had income and assets that should have been sufficient to cover the outgoings that the Act requires to be taken into account, but has spent the money in other ways. The Act does not give a clear answer to these questions and the case law in different administrative courts is to some extent inconsistent.

The Ombudsman has stressed that the question of for how long income and assets can be sequenced (i.e. the income surplus carried forward) must be resolved taking aspects of reasonableness into consideration. Since the Act is open to interpretation in this respect, the Ombudsman has not generally intervened with regard to a social welfare authority's discretionary decision. In one case, however, the Ombudsman did point out that the sequencing of income provided for in Section 15 of the Act did not make it possible for per diem unemployment benefits paid the previous November to be taken into account as income in February (1552/02).

Social assistance and foreigners

The constitutionally enshrined right to indispensable subsistence and care is guaranteed to all persons within the jurisdiction of Finland. The Constitution does not in this respect distinguish between foreigners and Finnish citizens. The Social Assistance Act likewise does not distinguish between applicants on the basis of nationality; instead, eligibility for assistance is linked to the applicant's presence in a municipality and the nature of that sojourn.

The Ombudsman has pointed out in several decisions that a municipality may be obliged to grant social assistance to a foreign national or other person moving to Finland from abroad if that person is a regular resident of the municipality, and even to a temporary resident if the need for social assistance is urgent (inter alia 1398/98 and 2861/02). It has been underscored in the decisions that foreigners may be entitled to social assistance even if they do not have the requisite residence permit for Finland.

In addition, European Union rules require that all Union citizens who have the right of residence as well as their family members must be treated on a footing of equality with the Member State's own citizens within the areas of application of the Founding Treaty, unless otherwise provided for by Community rules. Obligations that may stem from Community law must also be taken into consideration in the granting of individual discretionary benefits that correspond to Finnish social assistance and are intended to ensure a minimum level of subsistence.

The European Court of Justice has examined several requests for precedent decisions concerning equal treatment of EU citizens in the granting of social welfare benefits corresponding to social assistance. However, no cases relating to Finland have come before the Court as yet. Although the right to social assistance is not bound to nationality, but instead to being in a municipality, and our legislation is neutral in this respect, it may be possible that the practices followed in granting social assistance could be referred to the Court for review from the perspective of indirect discrimination. According to the case law of the Court, equal treatment and non-discrimination mean not only a prohibition of overt discrimination against a person on the ground of nationality, but also all forms of latent discrimination, whereby application of other grounds for discrimination leads in practice to the same outcome.

In the granting of social assistance to EU citizens, account must be taken of especially Directive 2004/38/EC on the right to move and reside freely, according to which Union citizens with a residence certificate or a permanent residence certificate as well as their family members must be treated on an equal footing with citizens of the Member State. However, according to the Directive, the host State need not grant, before a permanent right of residence is obtained, benefits that belong to the sphere of social welfare to persons other than those in paid employment or self-employed persons and their family members, and social assistance payments granted to cover living costs are not available to residence certificate-holders who have come to the country to study. Thus in access to benefits corresponding to social assistance the Directive permits unequal treatment of, on the one hand, people who have come to the country seeking work and, on the other, persons with the status of employees or self-employed persons and their families.

Our Social Assistance Act is compatible with the Directive since the right to social assistance is linked to being in a municipality.

When a citizen of a Nordic country applies for social assistance, the special status of citizens of the Nordic countries that flows from the Nordic Social Services Agreement and other regulations must also be taken into consideration.

In one decision on a complaint, the Ombudsman evaluated the right of a Nordic citizen who had come to Finland seeking work to receive social assistance. The person in question had been granted social assistance for temporary housing and other livelihood for a period of seven months, after which the view had been taken that he had no possibility of being employed. He had been given a ticket to his home country and other social assistance had been refused. The Ombudsman pointed out that, as a Nordic citizen, the complainant had the right to be in Finland and move here either temporarily or permanently. As a Nordic citizen, his sojourn in the country could not be limited for reasons relating to job-seeking or obtaining employment. When moving to the country, however, he should have registered in accordance with Finnish legislation; i.e. notified a registry office of his change of address. In fact, he had done that just before his application for social assistance was rejected. The Ombudsman took the view that the social welfare authorities had acted contrary to Section 14.1 of the Act in granting him only a ticket to his home country as social assistance. In the opinion of the Ombudsman, a different interpretation would jeopardise the right to move that is guaranteed Nordic citizens in the Aliens Act (3711/07).

Processing times for social assistance applications

The speed with which social assistance is obtained is essential from the perspective of safeguarding indispensable livelihood. In terms of numbers of complaints, the most common theme of complaints, especially in the 21st century, has been the long times taken to process social assistance applications.

After the recession has begun in the 1990s, the numbers applying for social assistance grew rapidly. Municipalities tried to cope with the increased workload by entrusting more processing of written applications for benefits to persons other than those who had been trained in social work, having employees work overtime, increasing personnel strength and developing work processes. Once a recovery from the recession had begun after 1997, the numbers of clients began declining again, but long processing times for social assistance continued to be a problem.

A provision requiring that social assistance matters be processed without delay was added to the Act in 2000. A precise time limit was not written into the Act then, but when it was going through the Eduskunta, the Social Affairs and Health Committee concluded that a processing time of about a week should be the goal since what is involved is safeguarding last-resort subsistence.

This recommendation of a one-week limit was the starting point that the Ombudsman adopted in decisions when evaluating whether processing of applications had been effected without delay. A processing time of over a week earned a rebuke from the Ombudsman for it having taken too long, and a reprimand for having acted unlawfully if processing had taken longer than three weeks. The Ombudsman pointed out that a municipality must perform its statutory tasks and ensure implementation of fundamental and human rights, and that computer-related technical problems, personnel being on their annual holidays or sick leave or comparable matters were not a lawful reason for long processing times.

At the beginning of 2008, precise deadlines for processing social assistance applications were added to the Act; according to these, urgent applications must be dealt with on either the same or the following day and the others within seven weekdays. It also appeared in 2008 that municipalities were beginning to get a handle on their processing of applications. However, with a new recession having set in, 2009 saw the arrival of complaints about long processing times from even localities where these times had been brought into line with the requirement of legality.

One of the factors that have made it difficult to oversee legality of processing times for social assistance applications is that uniform data on these times are not available from municipalities. In fact, not all municipalities systematically monitor this matter. Processing of all applications is kept track of in some municipalities, whereas in others tracking relates only to applications for the basic component of assistance. The deadline provision of the Act does not distinguish between applications for basic, supplementary or preventive assistance, although from the perspective of ensuring indispensable subsistence whether the application is for basic assistance or some other kind can make a major difference.

Complainants have been dissatisfied also with the measures taken by the Ombudsman and have demanded that tougher steps than reprimands or the expression of an opinion be taken against municipal officials or holders of elective office. In cases of misconduct in office the Ombudsman can lay a charge or order a prosecution and also has the power to order a police investigation under the Police Act or a criminal investigation under the Criminal Investigations Act. To date, the Ombudsman has not taken measures of this kind in social assis-

tance matters, although she has pointed out that processing of applications has taken unlawfully long and that a municipality has failed to safeguard implementation of fundamental and human rights. The reason for this is that a prosecution for misconduct in office, such as negligence in the performance of official duties, presupposes an itemisation of the official actions that the person in question has neglected to perform. However, attributing responsibility under criminal law to an individual official or office holder and demonstrating his or her neglect is difficult when many factors and decisions throughout the municipal organisation have contributed to the unlawful situation being brought about.

Adequacy of social assistance

People have often turned to the Ombudsman to seek help in a difficult economic situation when an application for social assistance has been turned down or they feel that the amount granted is insufficient. Often, however, the complainants have had to be disappointed with the Ombudsman. Given that the provisions of the Social Assistance Act are so loosely formulated, it has not generally been possible to intervene in the official's or office-holder's discretionary power; instead, the Ombudsman has had to note that the social welfare authority has acted within the discretionary power that the Act confers. Social assistance is also always based on individual assessment of need and in addition to that often on a professional social worker's evaluation, in which the Ombudsman, as an overseer of legality, can not intervene. The Ombudsman is not an alternative to an appeal and complainants have been advised to avail themselves of the means of appeal for which the Act provides.

Measures to raise the level of social assistance have also been demanded of the Ombudsman. Especially people who have had to rely on this assistance long-term have felt that it is not enough to cover even essential outgoings.

The level and content of minimum security of livelihood have been deliberated by several working groups and committees since as far back as the 1970s. The conclusion reached already then was that last-resort security should make a socially acceptable standard of living possible, one that does not differ excessively from the average standard of living of the population as a whole, but that on the other hand it should preserve its character as something that encourages people to gain their livelihood independently. The present basic component of social assistance is founded on data, obtained on the basis of the Statistical Centre of Finland's consumption survey, indicating the sums of money that low-income households (belonging to the two lowest income bracket quintiles) spend to cover certain categories of costs. In this light, the basic component of social assistance is notionally calculated to be

49% for food costs, 9% for clothing and footwear, 20% for information costs, 3% for minor health care expenses and 19% for other expenses that are included in everyday subsistence. The adequacy of social assistance to cover certain expenses can be evaluated empirically as well. By contrast, what is a more difficult question is what expenses social assistance should cover. In reality, families that receive social assistance, in common with other families as well, spend money on things other than those that belong to the sphere of this benefit, which means that they may have to compromise on essential spending, such as that for food and clothing.

Since the entry into force of the Act on 1.3.1998, the level of social assistance has remained unchanged in its main features except for index-linked increases and the abolition of the seven per cent excess for housing costs that came into effect on 1.9.2006. The basic component of social assistance is linked to the National Pension Index (since the end of 2000 to the amount of the full national pension) and is increased in the same way as other benefits linked to this index, such as the national pension and unemployment benefits. The National Pension Index, in turn, is based on the Cost-of-Living Index, which is calculated according to data on the prices of key commodities. Because social assistance is not linked to, for example, changes in wage incomes, when these incomes grow in good economic times, the gap between the income levels of wage-earners and those who depend on social assistance widens.

As I stated in the beginning, last-resort security of income is a fundamental and human right and the level of security is also a question of legality. However, in the final analysis, the level of social assistance is a legislative matter that belongs to the sphere of societal decision making and in which the Ombudsman, as an overseer of legality, does not see herself as having power to intervene.