

DECISION ON ADMISSIBILITY

18 October 2016

Fellesforbundet for Sjøfolk (FFFS) v. Norway

Complaint No. 120/2016

The European Committee of Social Rights, committee of independent experts ("the Committee") established under Article 25 of the European Social Charter, during its 288th session attended by:

Giuseppe PALMISANO, President
Monika SCHLACHTER, Vice-President
Petros STANGOS, Vice-President
Lauri LEPPIK, General Rapporteur
Colm O'CINNEIDE
Birgitta NYSTRÖM
Elena MACHULSKAYA
Karin LUKAS
Eliane CHEMLA
József HAJDU
Marcin WUJCZYK
Krassimira SREDKOVA
Raul CANOSA USERA
Marit FROGNER
François VANDAMME

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having regard to the complaint dated 11 March 2016, and registered on 17 March 2016 as No. 120/2016, lodged by *Fellesforbundet for Sjøfolk* (FFFS) against Norway and signed by its Chairman of the Board, Leif Vervik, requesting the Committee to find that the situation in Norway amounts to a violation of Article 12 of the Revised European Social Charter (“the Charter”).

Having regard to the documents appended to the complaint;

Having regard to the observations on admissibility of the Government of Norway (“the Government”) registered on 6 June 2016; and the response of FFFS registered on 8 July 2016.

Having regard to the Charter and in particular to its Article 12 which reads as follows:

Article 12 – The right to social security

Part I: “All workers and their dependents have the right to social security.”

Part II: “With a view to ensuring the effective exercise of the right to social security, the Parties undertake:

1 to establish or maintain a system of social security;

2 to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;

3 to endeavour to raise progressively the system of social security to a higher level;

4 to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:

a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;

b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

Having regard to the 1995 Additional Protocol to the European Social Charter providing for a system of collective complaints (“the Protocol”);

Having regard to the Rules of the Committee adopted on 29 March 2004 at its 201st session and last revised on 6 July 2016 at its 286rd session (“the Rules”);

Having deliberated on 18 October 2016;

Delivers the following decision adopted on this date:

1. FFFS alleges that the situation in Norway amounts to a violation of Article 12§§1-4 of the Charter on the ground that prior to 1994 Spanish seamen working on ships under Norwegian jurisdiction were excluded from the social security system and in particular from the old age and disability pension schemes.

2. The Government raises the following objections against the admissibility of the complaint:

- FFFS is not a “representative” organisation within the meaning of Article 1§c of the Protocol in that the workers concerned by the complaint are not members of FFFS and therefore it does not represent them and therefore cannot lodge a complaint on their behalf. Further the FFS has provided no evidence that they are entitled to act on their behalf;

- the complaint does not strictly relate to a provision of the Charter accepted by the Contracting Party concerned within the meaning of Article 4 of the Protocol. The complaint concerns a situation arising before 1994, Norway was at that time bound by the 1961 Charter, and had made a reservation to Article 12 of the 1961 Charter, explicitly stating that *“Norway under paragraph 4 of this Article, will be permitted in the bilateral and multilateral agreements therein mentioned to stipulate, as a condition for granting equal treatment that foreign seamen should be domiciled in Norway.”* Therefore, Norway was entitled to require that foreign seamen on ships under Norwegian jurisdiction be resident in Norway in order to be eligible for affiliation with the social security scheme. The present complaint concerns foreign seamen who were not and are not resident in Norway;

- the reservation means that Norway had not accepted the entirety of Article 12 of the 1961 Charter within the meaning of Article 4 of the Protocol.

3. FFFS contests these objections and submits that the complaint should be declared admissible. In view of the reservation made by Norway under Article 12§4, FFFS argues that the complaint could still be examined under Article 12 §§1-3 in light of the non-discrimination clause.

THE LAW

4. The Committee observes that Norway ratified the Protocol on 20 March 1997 and it took effect in respect of Norway on 1 July 1998. In accordance with Article 4 of the Protocol, the complaint has been submitted in writing and concerns Articles 12§1-4, provisions accepted by Norway when it ratified this treaty on 7 May 2001 and to which it is bound since the entry into force of this treaty in its respect on 1st July 2001.

5. Moreover, the grounds for the complaint are indicated.

6. The Committee observes that the complaint submitted on behalf of FFFS is signed by Leif Vervik, chairman of the board of directors of FFFS, who by virtue of Article 13 of FFFS’ statutes is entitled to represent the union in this matter. The Committee therefore considers that the complaint complies with Rule 23.

7. The Committee observes that the Government contests FFFS's status as a representative organisation within the meaning of Article 1§c of the Protocol in the current complaint in that the Spanish seamen whose situation the FFFS complains about, are not members of the FFFS, in fact they are represented by another organisation, *Asociación Longhope*.

8. The Committee recalls that it has previously found that the FFFS is a representative trade union within the meaning of Article 1§c of the Protocol, see *Fellesforbundet for Sjøfolk (FFFS) v. Norway*, Complaint No. 74/2011, decision on admissibility of 23 May 2012, §22. Further it recalls that "a trade union deemed to be representative for the purposes of the collective complaints procedure in accordance with Article 1§c of the Protocol, thereby has the right to lodge a complaint against the Party concerned on any point, within the bounds of Article 4 of the Protocol, on which it alleges unsatisfactory application of the Charter. This right of complaint is independent of which categories of employees the union according to its statutes is unionising, or which categories of employees it is authorised to represent or unionise in the framework of domestic law." (*SUD Travail Affaires sociales, SUD ANPE and SUD Collectivités territoriales v. France*, Complaint No. 24/2004, decision on admissibility of 7 December 2004, §11). The Committee reiterates that the meaning of representative within the collective complaints procedure has a meaning different to that under domestic law.

9. The Committee considers that FFFS is a representative trade union organisation for the purposes of the collective complaints procedure and this particular complaint.

10. The Committee considers that the issue complained of relates to the coordination of social security schemes thus falling within the scope of Article 12§4 and not the other paragraphs of Article 12. Article 12§4 requires states to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, in order to ensure equal treatment with their own nationals of the nationals of other Parties in respect of social security rights,

11. The Committee notes that the situation complained of arose whilst Norway was bound by the 1961 Charter (ratified on 26 October 1962) not the Revised Charter (ratified on 7 May 1997). In accordance with the principle of non-retroactivity of treaties as codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties, and taking also into account the principle that "an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs" (2001 UN Draft articles on Responsibility of States for Internationally Wrongful Acts, Art. 13), the Committee therefore must examine the situation under the 1961 Charter and the validity of the reservation made by Norway to Article 12§4 of that treaty.

12. The Committee recalls that despite the 1961 Charter containing no reservation clause, the Committee has in the past accepted that reservations may be made under the Charter, subject to certain conditions; in particular that the minimum number of provisions foreseen under Article 20 of the 1961 Charter, are accepted (see Conclusions XIV-1 (1998), Netherlands, Article 6§4, see also Conclusions VII (1981), Germany, Article 6§4). It also considers that in accordance with a general

principle of international law, as codified in the 1969 Vienna Convention of the Law on Treaties Article 19(c), reservations must not infringe the object and purpose of the Charter, and should not be too general in nature. It finds that Norway's reservation met these conditions, it is precise and limited in scope. Further Norway's acceptance of provisions remained above the minimum. Therefore, as a consequence of its reservation, whilst Norway was bound by the 1961 Charter it was not obliged to grant under the 1961 Charter, social security rights to foreign seamen not domiciled in Norway.

13. The Committee finds that the Government's objection in this respect is sustained.

14. On this ground, the Committee, on the basis of the report presented by Karin LUKAS,

DECLARES THE COMPLAINT INADMISSIBLE

Pursuant to Article 7§1 of the Protocol, requests the Deputy Executive Secretary to notify the complainant organisation and the Respondent State of the present decision, and to publish it on the Council of Europe's Internet site.

Karin LUKAS
Rapporteur

Giuseppe PALMISANO
President

Henrik KRISTENSEN
Deputy Executive Secretary