EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX

16 janvier 2017

Pièce n° 4

***Equal Rights Trust* (ERT) c. Bulgarie**
Réclamation n°121/2016

REPLIQUE DE *EQUAL RIGHTS TRUST* AU MEMOIRE DU GOUVERNEMENT SUR LE BIEN-FONDE

Enregistrée au Secrétariat on 10 janvier 2017

EQUAL RIGHTS TRUST

9 January 2017

Executive Secretary of the ECSR
Department of the European Social Charter
Directorate General Human Rights and Rule of Law Council of Europe
F-67075 Strasbourg Cedex

By email: social.charter@coe.int

Dear Executive Secretary,

Re: Equal Rights Trust (ERT) v. Bulgaria (Complaint No 121/2016)

This is a response by ERT under Rule 31(2) to the undated document entitled '*Information provided by the competent Bulgarian authorities on the merits of Collective Complaint no 121 of 22 of April 2016 by Equal Rights Trust against Bulgaria'* ('the Reply').

(a) Reply does not engage with allegations of indirect discrimination

1. The Reply avers [Reply, p 1]:

> ... the conditions for granting family allowances for children are the same for all individuals and do not depend on their ethnicity, origin, sex, race, age, religion, level of education, marital status, political beliefs, etc.; therefore, the allegations of discrimination on the above grounds are unfounded...

2. That observation (a denial of operating directly discriminatory legislation) is mistaken. Art 2.6(4) FACA provides that monthly child allowance can only be paid in-kind rather than in cash if the qualifying parent is a minor. It therefore does directly discriminate on grounds of age. See §23 of the Complaint.

3. The observation is also of limited relevance. The main thrust of the Complaint's allegations of discrimination is of *indirect* discrimination [Complaint, §24, §25, §47, §53, §54, §55].

4. In our submission, the Reply fails throughout to engage with the detailed reasoning in the Complaint as to why the various measures attacked as indirectly discriminatory are unjustified. One example of this is the failure to explain why it is necessary for Art 2.6(4) FACA to operate as a mandatory rather than discretionary provision.

(b) Reply does not explain why it is necessary for Art 2.6(4) FACA to operate as a mandatory rather than discretionary provision

5. The Reply argues that payment in kind of monthly child allowance to minors may in some cases be appropriate. But the Complaint does not suggest that payment in kind can never be appropriate [Complaint, §33]. Rather, the Complaint argues that payment in kind *may not always be appropriate* [Complaint, §22], and therefore that it is disproportionate to make payment in kind a mandatory rather than a discretionary measure for minor parents. If it were discretionary, it could be left to the expert judgment of the professionals involved with a particular family to decide how best to meet the family's needs.

6. For example, it is claimed '[u]nderage mothers have not developed parenting skills and skills to wisely spend money' [Reply, p 4]. Firstly, that is a generalisation. Some underage mothers would need no help at all. Secondly, a social worker engaging with a minor parent might think it helpful that she get experience of budgeting and spending responsibly by using a cash allowance to make spending choices herself. The legislation as drafted makes that impossible.

7. The Reply contains no explanation of why it was thought necessary to operate in-kind payments as a mandatory rather than a discretionary measure.

(c) Reply does not engage with case law on deterrent-based approaches

Art 7.1(3), Art 7.11(2) and Art 7.11(12) FACA

8. Art 7.1(3), Art 7.11(2) and Art 7.11(12) FACA collectively provide not only that child allowance will be suspended where a child is not attending school, but also that where a child who was not attending school returns, the allowance will remain suspended for a further year. The Reply avers that these policy features are aimed at deterring families from allowing their children to leave school in the first place [p 6].

9. The Complaint accepted that the policy intention was to encourage school attendance, which is a legitimate aim. But we suggest the policy mechanism is disproportionate and inappropriate. For individual children to whom the policy has to be applied, it is likely to *discourage* further school attendance, because it will:

    a. aggravate familial poverty by reducing the household income, which is in itself a major cause of school disengagement [Complaint, §38(b)]; and

    b. discourage a child who has left school from returning [Complaint, §37].

10. The Complaint makes reference to case law on a similar deterrent-based measure in France, which the Committee found disproportionate: *European Committee for Home-Based Priority Action for the Child and the Family v France* – Complaint No. 82/2012 (19 March 2013) [Complaint, §42]. The French measure was actually less strict than Art 7.11 FACA, because it did not seem to have involved anything comparable to the year's suspension of child allowances after children return to school.

11. The Reply does not mention the *France* case, still less set out how it can be distinguished. We repeat our suggestion that the principle which underlay that decision applies even more strongly in the instant case. In the French case (and under the previous Bulgarian law), the measures involved a mixture of deterrence and motivation – benefit would be suspended where a child stopped attending, but could quickly be restarted if the child were to be sent back to school. In the instant case, the

method is deterrent only. Sending a child back to school does not restart benefit payment until a whole further year has elapsed.

12. The Reply refers to the Pre-school and School Education Act passed in August 2016 ('PSSEA'). Section 38 of the Supplementary Provisions to PSSEA does provide for funds withheld from monthly allowances to be passed to educational institutions. But while that may be of general benefit to the institution, it does not ensure that those funds will be spent on the child in question: indeed, if the child is not at the time engaged in school, the funds cannot be spent on that child by the school. The 2016 legislation appears to be a further example of the interests of individual children being sacrificed to a perceived greater good.

Art 7.11(3) FACA

13. Art 7.11(3) FACA provides that support terminates when a child becomes a parent. Again it is common ground that this is a deterrent measure. Again the *France* case is relevant authority, and has not been addressed by the Reply.

(d) Reply wrong to suggest it matters whether allowances are categorised as social security

14. The Reply argues that the FACA allowances 'do not represent insurance benefits' but benefits of universal application, and therefore are not social security benefits [Reply, p 1]. It is also suggested that the benefits are supplementary benefits and therefore should not be described as subsistence benefits [Reply, p 1].

15. It is not conceded that those matters necessarily prevent FACA allowances being categorised as social security benefits, or subsistence benefits – but it is an immaterial issue because, since the Reply describes the benefits as social assistance, it must be common ground that even if Art 12 is not engaged, Art 13 is (as well as Arts 16 and 17). Therefore discriminatory treatment in relation to the allowances will be unlawful.

(e) Reply wrong to argue that in-kind payments are not detrimental

16. The Reply suggests that the ILO's approval of in-kind payments as a legitimate means of providing social security means that the in-kind payments cannot be seen as detrimental [Reply, p 5].

17. That argument is flawed. Just because two methods of providing social assistance are in principle lawfully available to a state does not mean that they are of equal quality.

18. We have already set out why the restriction of in-kind payments to minor parents is potentially detrimental in comparison to the possibility enjoyed by others of receiving cash benefits [Complaint, §22].

19. Having chosen to provide a cash benefit to some citizens, Bulgaria must demonstrate justification for treating others differently: *Clift v United Kingdom – App no 7205/07* [2010] ECHR 1106 (13 July 2010), §60.

(f) Absence of equality data

20. The Reply states that in the first six months of 2016:

    a. 2454 families received assistance in kind, in respect of 2564 children;

    b. 3851 families had assistance suspended due to non-attendance at school, in respect of 4270 children;

    c. 99 families' support was discontinued because the relevant children had become parents.

21. The Complaint set out the basis of our suspicion that analysis of those figures would show that the policy measures have had a disproportionate impact on women and Roma people [Complaint, §§24-25, §§28-31, §47, §§54-55]. For example, we suspect

that the majority of children whose support has been discontinued due to them becoming parents will be female.

22. However, no information is provided in the Reply about the race or gender of the relevant individuals in those families (the child, and the parental recipient of the benefit). Given that the Complaint raises allegations of discriminatory treatment on race and gender grounds, we suggest that the Committee would be assisted by statistical evidence regarding the relevant individuals' race and gender. We invite the Committee to ask the Bulgarian Government to provide such statistics.

(g) Further directions

23. We invite the Committee to:

    a. invite the Bulgarian Government, by a date to be determined by the Committee, to provide statistical evidence of the race and gender of the affected persons, as set out in paragraph 22 above;

    b. direct that ERT may, by a date to be determined by the Committee, respond in writing to the further submissions of the Bulgarian Government; and

    c. direct that the parties may have two weeks from date of the final written submissions made under Rule 31 to state whether they seek an oral hearing under Rule 33, giving reasons for their position.

Joanna Whiteman
Co-Director
Equal Rights Trust