EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

03 February 2015

Case Document No. 2

Finnish Society of Social Rights v. Finland
Complaint No. 108/2014

SUBMISSIONS BY THE GOVERNMENT ON ADMISSIBILITY AND THE MERITS

Registered at the Secretariat on 5 January 2015

Ministry for Foreign Affairs of Finland
Unit for Human Rights Courts and Conventions

Mr Henrik Kristensen
Executive Secretary
European Committee of Social Rights
Council of Europe
F-67075 Strasbourg CEDEX
FRANCE

Helsinki, 5 January 2015

Complaint No. 108/2014
FINNISH SOCIETY OF SOCIAL RIGHTS (FSSR) v. FINLAND

Sir,

With reference to your letters of 26 May and 11 August 2014, I have the honour, on behalf of the Government of Finland, to submit the following observations on the admissibility and merits of the aforementioned complaint.

I. ADMISSIBILITY OF THE APPLICATION

I.1 General

1. The present complaint has been lodged by the Finnish Society of Social Rights (*Suomen Sosiaalioikeudellinen Seura r.y. – Socialrättsliga Sällskapet i Finland r.f.)* ("the applicant association").

2. The Government notes that in accordance with Article 2 § 1 of the Additional Protocol of 1995 providing for a System of Collective Complaints to the Social Charter, any Contracting State may declare that it recognises the right of any other representative national non-governmental organisation within its jurisdiction which has particular competence in the matters government by the Charter, to lodge complaints against it with the European Committee of Social Rights.

3. The Government observes that Finland has ratified the Additional Protocol providing for a System of Collective Complaints (Finnish Treaty Series 75-76/1998) on 17 July 1998 and made a declaration enabling national non-governmental organisations to submit collective complaints on 16 August 1998.

I.2 Admissibility criteria and their application

4. The Government notes that the Committee has in its admissibility decision of 14 May 2013 - concerning the applicant association's complaint no. 88/2012 - assessed its "representativity" as required by Article 2 § 1 of the Protocol. In that decision, having considered the applicant organisation's social purpose, competence, scope of activities, as well as the actual activities performed the Committee found that the applicant association was representative within the meaning of Article 2 of the Protocol.

5. The Government notes, however, that according to Articles 2 § 1 and 3 of the Additional Protocol, national non-government organisations may submit complaints only in respect of those matters in respect of which they have been recognised as having particular competence.

6. With regard to the recognition of particular competence of a non-governmental organisation, your Committee has previously, *e.g.*, examined the statute of an organisation and the detailed list of its various activities relating to the Articles of the Charter covered by the relevant complaint. (Complaint No. 30/2005, *Marangopoulos Foundation for Human Rights (MFHR) v. Greece,* decision on admissibility of 10 October 2005, para. 15).

7. Further, the Government also observes that the Committee in its last admissibility decision in relation to the applicant organisation ."

(*Finnish Society of Social Rights v. Finland,* Complaint No. 88/2012, decision on Admissibility, 14 May 2013) neglects to attach significance to the question of *recognised* and *particular* competence. Instead the Committee considered general competence in relation to social rights, *in toto*, to be sufficient when it stated that "the Association's sphere of activity concerns in a general way the protection of social rights including social security rights. Consequently, the Committee finds that the Finnish Society of Social Rights has particular competence within the meaning of Article 3 of the Protocol as regards the instant complaint." (para. 12). Obviously, this has lead the applicant association to be of the erroneous opinion that the Committee has issued it with not more than a blank-cheque vis-à-vis the admissibility of its complaints, as is evident from the complaint file where the applicant association states that "in our previous complaint (Complaint 88/2012) the Committee noted that our association is admissible to make complaints to the Committee of Social Rights."

8. The Government submits that such an idea is incorrect and rests on a, at best, questionable legal interpretation of Articles 2 § 1 and 3 of the Additional Protocol.

9. This is because both of these provisions lay emphasis on the recognised particularity of expertise required from the representative national non-governmental organisation. According to the Explanatory Report to the Additional Protocol, (*Explanatory Report to the 1995 Protocol)* (para. 21), this recognised particularity of expertise in turn needs to be discerned in a similar manner as that of international non-governmental organisations. Such an assessment then requires that that Committee needs to firstly be of the view that applicant non-governmental organisations are able to support their applications with detailed and accurate documentation, legal opinions, etc. in order to draw up complaint files that meet the basic requirements of reliability. However, as is stated in the explanatory report in relation to international non-

governmental organisations, this fact alone does not relieve the Committee "from the obligation to ascertain that the complaint actually falls within a field in which the INGO concerned has been recognised as being particularly competent."

10. However, as the present case concerns a matter that is materially very much akin to the applicant association's complaint that your Committee has already considered (complaint no. 88/2012), and where your Committee found that that applicant association has particular competence, the Government, while preserving its doubts as to the particular competence of the applicant association, finds no reason to contest the substance of the Committee's decision.

I.3 Contents of the present complaint

11. The Government notes that according to Article 4 of the Additional Protocol providing for a System of Collective Complaints, a complaint must relate to a provision of the Revised Charter accepted by the Contracting Party concerned and indicate in what respect the latter has not ensured the satisfactory application of this provision.

12. The Government observes that the applicant association alleges that the situation in Finland in respect to the social protection of the long-term unemployed is not in conformity with Article 12 of the Charter.

13. According to the applicant association there are several recent practices related to the provision of unemployment pensions and the limiting of earnings-related unemployment allowances that contravene Finland's obligation under the European Code of Social Security. Further, the applicant organisation alleges that Finland has not endeavoured to raise progressively the system of social security but is in fact worsening it. As such, the applicant

association alleges that Finland has violated its obligations contained under Article 12 of the Charter.

14. In this respect, the Government notes that the claim of the applicant association fulfils the requirement set out in Article 4 of the Additional Protocol.

II. Merits

15. The Government observes that the heart of the applicant associations complaint rests on a claim that the social security system in Finland in relation to what the association terms the unemployed elderly is being worsened sharply. Moreover, in addition to this explicit allegation, the association insinuates that age based discrimination is an everyday occurrence in Finland.

16. The association has presented a number of claims related to the situation of what they term elderly or aged unemployed persons many of which are apposite. Yet, in addition to those provisions and domestic policies mentioned by the applicant association, there exists a number of important developments, especially in relation to the earnings-related unemployment allowance that are left unmentioned. It is for this reason that the Government is forced to outline in detail the relevant domestic provisions and practices that pertain to the relevant area.

17. Having done so the Government will then also outline the relevant domestic provisions that categorically show that discrimination based on age is prohibited under Finnish labour law.

II.1 On the social security of the 'aged/elderly unemployed'

18. The Government states that according to the Unemployment Security Act (*1290/2002*) the basic unemployment allowance and the earnings-related unemployment allowance are payable for the maximum total of 500 days of unemployment (Chapter 6, Section 7 of the Act). Moreover, the Unemployment Security Act stipulates the right to additional days for jobseekers born between 1950 and 1954 and turning 59 years old before exhausting the maximum period of the allowance; for jobseekers born in 1955 or 1956 and turning 60 years old before exhausting the maximum period, and for jobseekers born in 1957 and turning 61 years old before exhausting the maximum period (Chapter 6, Section 9). Notwithstanding the exhaustion of the maximum period, a jobseeker entitled to additional days receives the basic unemployment allowance or the earnings-related unemployment allowance until the end of the calendar month during which he or she reaches the age of 65 (Chapter 6, Section 9). After the period with the unemployment allowance, the jobseeker is eligible for the labour market subsidy (Chapter 7, Section 1), payable without time limits (Chapter 7, Section 12). If the beneficiary meets again the condition regarding previous employment, required for the unemployment allowance, *i.e.*, if the beneficiary is employed in work eligible under the employment condition in at least 26 calendar weeks (Chapter 5, Section 3), he or she may be entitled to the unemployment allowance again (Chapter 5, Section 8).

19. The age limit at which the right to additional days arises (Chapter 6, Section 9) has been raised many times, the last time being at the beginning of 2014. The limit was raised because studies showed that raising it has improved the employment of aged persons.

20. When raising the age limit for the right of additional days of earnings-related unemployment allowance, the Government has ensured at the same time that the labour market subsidy is not the only benefit available to dismissed aged persons. According to the Act on Public Employment and Business Service (*916/2012*,

Chapter 11, Section 1), the municipality of residence of an unemployed jobseeker at least 57 years of age must ultimately provide the jobseeker with an opportunity to work for six months if his or her right to the daily unemployment allowance would expire because of his or her exhausting the maximum period of the allowance. By engaging in this temporary work the employed person meets again the condition regarding previous employment, and the calculation of the maximum allowance period starts from the beginning (Unemployment Security Act, Chapter 6, Section 8). The Unemployment Security Act also stipulates that the earnings underlying the earnings-related unemployment allowance of the person thus employed are not calculated again, unless the new earnings are higher than the earlier ones (Chapter 6, Section 8, subsection 4).

21. Thus, in practice a person who becomes unemployed at the age of 55 continues to receive the earnings-related unemployment allowance until he or she starts to receive an old-age pension. The pension also accrues for the period with the earnings-related allowance. The pension income taken into account is 75% of the earnings underlying the earnings-related allowance (Employees Pensions Act (*395/2006*), Section 74, Subsection 3). The pension accrues at a rate of 1.5% of this sum (section 65).

22. It is also to be noted that the unemployment allowance is payable with an increase for 90 days to jobseekers who have become unemployed because of dismissal without their own fault, e.g. for financial and production-related reasons. In addition, the unemployed person must have been registered as an unemployed jobseeker within 60 days from the termination of the employment relationship and must, by that date, have been engaged in working life for at least 20 years. For the increased earnings-related component to be payable, the unemployed person must also have been a member of an unemployment fund in at least five years (Unemployment Security Act, Chapter 6, Section 3a).

23. Moreover, the increase to the basic unemployment allowance and the increased earnings-related component are payable for the duration of any employment services (and for the time between the services agreed in an employment plan to the extent that the time between the services is seven days at the maximum), for the maximum of 200 days (Unemployment Security Act, Chapter 6, Section 3b). In 2014 the increase to the basic unemployment allowance amounted to EUR 4.78/day.

24. In 2014 the amount of the labour market subsidy is EUR 32.66/day. The subsidy is payable for five days a week, including midweek holidays. For the duration of any employment services, an increase to the labour market subsidy is paid for at most 200 days. In 2014 the amount of the increase is EUR 4.78/day. Without the increase, the subsidy amounts to an average of EUR 702/month (21.5 x EUR 32.66). An unemployed jobseeker is eligible for the labour market subsidy until the age entitling to an old-age pension.

25. Since the beginning of 2013, the earnings of the applicant's spouse have no longer been taken into account in means-tests for applicants for the labour market subsidy. The amount of the subsidy is increased annually according to changes in the National Pensions Index, which tracks changes in costs of living. At the beginning of 2012, the level of the labour market subsidy was increased by EUR 100 per month because the amount of the subsidy was lagging behind the trend of the pay development.

26. At the beginning of 2014, a protected component of EUR 300 was introduced in unemployment benefits. An unemployed person may earn EUR 300 per month without losing any part of the benefit.

27. Regarding the year 2015, the Government has submitted a bill to Parliament to set the rate of the index increase at 0.4% in 2015. Without this adjustment the increase would be approximately 1.1%.

The adjustment applies to all benefits except social assistance. The adjustment is intended to be permanent, *i.e.*, it will not be compensated for in the coming years.

28. Consequently, the index increase to be made in 2016 will not be compared with the original level of the benefits but the level of 2015. In other respects the index increases will be made as usual, unless future governments decide otherwise.

29. As the applicant association states in its complaint, a person receiving the labour market subsidy is usually entitled to the housing allowance, too. The Society regards the housing allowance as insufficient.

30. The Government states that the level of the housing allowance is 80% of those reasonable housing costs in excess of the deductible which the Government defines annually by a Decree as the maximum acceptable costs. In defining the maximum acceptable amount of housing costs, account is taken of the size of the recipient household, the municipality where the household lives, and the age, size and equipment level of the dwelling. The recipient of the allowance must always pay a deductible, at least 20%, of the housing costs. The level of the general housing allowance has not developed on a par with the development of rents. This is the situation especially in cities, e.g. in the Helsinki metropolitan area. Therefore, the real amount of the deductible paid by even the lowest-income recipients may have been higher than the intended 20% of the housing costs.

31. In 2012 an extra rise was made in the income limits for the housing allowance in order to moderate the criteria for granting the allowance. Regarding the 2014 criteria, an extra rise was made in the maximum housing costs. The amount of the rise is largest in Helsinki and smallest in the smallest municipalities. This adjustment eased especially the situation of households living in expensive

dwellings. The housing allowance has been improved systematically. Throughout the existence of the general housing allowance, *i.e.*, in 1975–2014, the average percentage of the allowance of the real housing costs has been 50%. Thus, the allowance has helped to reduce the burden of housing costs efficiently.

32. A recipient of the housing allowance may apply for social assistance from his or her municipality of residence if the recipient's own income and assets do not suffice to ensure the recipient at least the indispensable subsistence after he or she has received the allowance and other benefits and the disposable income and assets. The basic component of social assistance granted to an applicant living alone covers the basic everyday needs, such as food, clothing, telephone and public transports (EUR 480.20/month). In granting social assistance, municipalities have the statutory right to consider and determine the amount of the indispensable housing costs. The amount of the housing costs defined by law to be covered by the social assistance is within the discretion of the authority deciding on the assistance. The purpose of the discretion is to ensure housing for the applicant. When determining the amount of the social assistance, the authorities take account of the size and nature of the dwelling in relation to the size and needs of the household, as well as the local cost level corresponding to a reasonable housing standard. Many municipalities have issued internal instructions to determine the amount of reasonable housing costs for households of different sizes. When social assistance is granted, housing costs are not counted as expenses to be covered by the basic amount of the social assistance, which is of equal size for all recipients. Instead, housing costs are compensated for as "other basic expenses" on the basis of each applicant's real situation.

33. The discretion of reasonableness in granting social assistance must not lead to the applicant's homelessness or being compelled to

move to a dwelling that does not meet the housing standard that is generally acceptable or corresponds to the persons' or family's special needs. Special needs to be taken into account in this context may be, *e.g.*, the school of children, particular need for care, need for room for assistive devices of a person with disabilities, or need for room based on the right of non-custodial parents to meet their children.

34. It is justifiable to take account of the real amount of the housing costs even when they exceed the amount laid down in the municipal instructions, if an applicant for social assistance has no real opportunity of finding a local dwelling at a cost considered reasonable by the municipal authorities. In addition, applicants must be allowed sufficient time for seeking less expensive dwelling before housing costs can be taken into account only in an adjusted amount.

35. An applicant for social assistance may always request the rectification of a discretionary decision of a municipal authority from the municipal social welfare board, and further appeal against a refusal by the board to an administrative court and, in the last resort, to the Supreme Administrative Court.

36. Although the amounts of housing costs acceptable under the housing allowance scheme have been increased in recent years to correspond to the developments in the recipient's rents, the acceptable costs remain, after the savings decisions of the 1990s, lower than the real market rent level. Therefore social assistance, intended as a temporary and last-resort form of support, has often become a continuous form of reimbursement for housing costs. The conclusion made by the applicant association about the low level of the housing allowance ignores that social assistance, in the last resort, ensures a reasonable standard of housing also for those with the lowest income.

37. The applicant association also pays attention to the cuts made in reimbursements for medicine expenses. The Government refers to its observations on complaint no. 88/2012 and adds that the current price list of medicines, applicable since the beginning of 2014, changed the determination of the retail price of medicines and reduced the yearly out-of-pocket limit for the costs for patients.

38. The new Decree on the price list has been expected to reduce the reimbursement costs for medicine expenses by approximately EUR 15.8 million per year, assessed at the cost level of 2011. Correspondingly, patients' medicine expenses have been estimated to rise approximately as much. To compensate patients for the amendment of the decree on the price list, the yearly out-of-pocket limit for clients' medicine expenses was reduced to EUR 610 as from the beginning of 2014 (reduction by EUR 70, without which the yearly limit would have been EUR 680 in 2014).

39. Finally, the Government states that under Section 4a of the National Pensions Index Act (456/2001), the adequacy of basic security must be assessed every fourth year. The next assessment will be completed in early 2015. The assessments are intended to keep the national social security scheme satisfactory. The Committee, too, considered in its Conclusions of 2013 that the Finnish scheme complied with Article 12 paragraph 1 of the Charter in this respect.

II.2 The prohibition of age-based discrimination in Finnish Labour Law

40. Finnish anti-discrimination legislation is based on international human rights instruments, such as the European Convention on Human Rights, the International Covenant on Civil and Political

Rights, the Charter, and the International Labour Organization (ILO) Convention No. 111.

41. EU Council Directives on equal treatment irrespective of ethnic origin and equal treatment in employment constitute the basis of the Non-discrimination Act (21/2004), which entered into force in February 2004.

42. Under the Constitution of Finland, everyone is equal before the law. No-one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

43. According to the Non-Discrimination Act, different treatment based on age is not regarded as discrimination when it has a justified purpose that is objectively and appropriately founded and derives from employment policy, labour market (regarding, e.g., persons under 25 of age and elderly persons) or vocational training or some other comparable justified objective, or when the different treatment arises from age limits adopted in qualification for retirement or invalidity benefits within the social security system. Positive treatment of persons or groups of persons who are considered to be in need of special protection on account of their age is not regarded as prohibited discrimination. The aim of such special treatment is to prevent or reduce the disadvantages caused by discrimination and to achieve genuine equality for a certain group.

44. Further prohibitions against age discrimination are included in such legislation as the acts on employment and civil service relationships, which apply alongside the provisions of the Non-Discrimination Act. Gender equality is protected by the Act on Equality between Women and Men. For instance the Criminal Code, too, prohibits discrimination in business activities, in the exercise of a trade and in public office under penalty of fine or

imprisonment. Discrimination in advertising for job vacancies, in recruitment and during a service relationship is punishable as work discrimination.

45. Chapter 2 Section 2 of the Employment Contracts Act (55/2001), contains a provision on a prohibition of discrimination and on equal treatment: "The employer shall not exercise any unjustified discrimination against employees on the basis of age, health, national or ethnic origin, nationality, sexual orientation, language, religion, opinion, belief, family ties, trade union activity, political activity or any other comparable circumstance." It is a general obligation of employers to ensure that the employees perform their work also when the operations, the work to be carried out or the working methods of the employer change or develop. In order to maintain and improve the employees' qualifications, employers are expected to ensure that elderly employees, too, are provided with all the guidance that they need for performing their duties.

46. Regarding elderly employees there are some special features of employment protection: The periods of notice are linked to the uninterrupted duration of their employment relationship. Elderly employees usually have longer periods of notice.

47. An employer who has a legal ground for terminating an employment contract on production-related or financial grounds is not entitled to terminate an elderly employee's contract on grounds of his or her age.

48. In considering the appropriate amount of compensation, the following should be taken into account: the employee's estimated time without employment and his or her loss of earnings, the duration of the employment relationship, the employee's age and prospects for finding work corresponding to his or her profession or education and training, the termination procedure applied by the employer, and the employee's and the employer's circumstances in general and other comparable factors.

49. Since 2005 the retirement age has been flexible. The accrued old-age pension is granted between the ages of 63 and 68. The employment contract and the service relationship terminate without a term of notice, when the employee or the official reaches the age of 68. The employer and the employee may, however, agree that the employment relationship does not terminate when the employee reaches the retirement age.

50. According to the Act on Co-operation within Undertakings ((334/2007), Section 16) the undertaking must annually prepare a personnel and training plan in co-operation negotiations in order to maintain and improve the occupational skills of its employees. The personnel and training plans must include the general principles aiming to maintain the working ability of employees who are at risk of unemployment or aged and to improve the access to labour market of employees at risk of unemployment. The personnel and training plan must pay attention to the special needs of ageing workers.

51. Legislation does not specifically prescribe the order in which employees are to be given notice or laid off for production-related and financial reasons. The employer's right to choose the employees who are to be given notice is, however, restricted by the provisions of the Employment Contracts Act which prohibit discrimination and require equal treatment, as stated above.

52. Since the 1960s, the order of reducing the labour force has been agreed upon by collective agreements. The provisions on the order of reduction are very similar in various agreements. According to these provisions, the last employees to be given notice or laid off are those qualified employees who are important for the operation of the company and those employees who have lost part of their working capacity in the service of the same employer. In addition, account is also taken of the duration of the employee's employment

relationship and the degree of his or her liability for maintenance of dependants.

53. In practice, this provision has been interpreted so that the qualified employees important to the company and the employees who have lost part of their working capacity is determined on the basis of the duration of their employment relationship and their liability for maintenance. The relative order of employees other than those referred to above is also determined on the basis of the duration of the employment relationship and the liability for maintenance.

54. The duration of the employment relationship – and thus indirectly also the age of the employee – is of significance, when employees are chosen for dismissal.

55. The provisions of collective agreements on the order of reducing labour force are also applied to unorganised employers in the sector in question if the agreements are universally valid, *i.e.*, binding beyond the parties to the agreements.

56. If an employer bound by the agreement violates the provision on the order of notice, the employer may be ordered to pay a compensatory fine prescribed in the Collective Agreements Act. No compensatory fine can be imposed for a violation of a universally valid collective agreement.

III. CONCLUSION

57. Referring to observations touching on the admissibility of the complaint, the Government notes that in relation to the formal requirements listed under Article 4 of the Additional Protocol it has no objections.

58. Moreover, the Government notes that the Committee has previously considered the applicant association's representativity and recognised particular competence in relation to questions related to Article 12 of the Charter, albeit in a manner that the Government holds doubtful.

59. Further, with regards to the social security of the "aged/elderly unemployed" the Government reiterates that as becomes clear from its observations above, as opposed to the allegation of the applicant association, the trend has and continues to be to improve the social security system in Finland.

60. Moreover, the domestic discrimination law categorically forbids discrimination on the base of age in the workplace.

61. Therefore, the Government submits that there is no violation of Article 12 of the Charter in the present case.

Accept, Sir, the assurance of my highest consideration.

Arto Kosonen
Director,
Agent of the Government of Finland
before the European Court of Human Rights