

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



9 October 2006

Case document n° 2

**World Organisation against Torture (OMCT)
v. Portugal**
Complaint n° 34/2006

**OBSERVATIONS OF EUROPEAN TRADE UNION
CONFEDERATION (ETUC)
ON THE MERITS**

registered at Secretariat on 29 September 2006

Introduction

Before submitting its observations, the ETUC would like to repeat its congratulations to the government of Portugal for having ratified the Revised European Social Charter (the Charter) and the Additional Protocol providing for a system of collective complaints. In this way, the government contributes in reinforcing the European Social Charter and the fundamental social rights as well as their effectiveness.

In respect of the specific role of ETUC in the collective complaints procedure ETUC would like to refer to the general observations in previous cases¹.

On the merits

The complaint alleges that Portugal does not comply with the Article 17 of the Charter, since, in the light of the Supreme Court judgement of 5 April 2006, domestic law does not explicitly nor effectively prohibit all corporal punishment of children.

First of all, the ETUC, as in its observations on the Collective Complaint 20/2003 OMCT vs. Portugal, would like to stress again that the OMCT rightly referred to the human rights character of the right involved and to the other international instruments, in particular the United Nations Convention on the Right of the Child, instruments to which ETUC also pays particular attention.

As to this collective complaint n°34/2006, the ETUC would like to highlight the following:

- In the decision on the merits of collective complaint n° 20/2003, the ECSR concluded that there was no violation of article 17 since in Portugal the prohibition of all forms of violence has a legislative basis and which was even confirmed/enforced by a Supreme Court judgement of 9 February 1994. However, a recent decision of that Supreme Court (05/04/2006 and of which an unofficial translation was annexed to the collective complaint) seems to indicate a change of reasoning in the case law in the direction that in certain situations corporal punishment would be allowed. Therefore the ETUC considers indeed that a new consideration of the alleged violation of article 17 by the ECSR is necessary if only because despite legislative prohibitions there seems to be no constant interpretation of higher courts confirming these prohibitions. As to the latter, the ETUC also draws the attention of the ECSR to the three dissenting opinions to collective complaint n° 20/2003, and in particular those of Mr. Belorgey and Mr. Mikkola, which deal amongst others also on this relationship between law and the related case law in order to define whether there is a violation of the Charter or not.

¹ Starting from complaint No. 1/1998

- Although it is indicated that the document is not binding on the ECSR, the ETUC would nevertheless like to highlight certain parts of the Information document prepared by the Secretariat of the ESC on “Children’s rights under the European Social Charter” (dated 18 November 2005 and available at: http://www.coe.int/t/e/human_rights/esc/7_resources/factsheet_children.pdf). Next to the statement that the “Charter is the major European Treaty which secures children’s rights” (p.1), it also states in section F “Special protection of children” on page 6 that “Article 17 requires a prohibition in legislation against any form of violence (including corporal punishment) against children, whether at school, in institutions, in their home or elsewhere. This prohibition must be combined with adequate sanctions in penal or civil law. Even if violence against the person is punished under the criminal law and provides for increased penalties where the victim is a child, this will not constitute a sufficient prohibition in law to comply with Article 17§1 of the Charter unless a state can demonstrate that such legislation is interpreted as prohibiting corporal punishment and effectively applied as such.” (section i) Ill treatment and abuse, second paragraph – underlining added by ETUC)
- In its Conclusions XVII-2, the ECSR asks the Portuguese government to explain in the next report how the Supreme Court decision (i.e. the one of 1994) effectively prohibits the corporal punishment of children in the home as well as to provide any information on whether and when this ruling has been confirmed in legislation. (Conclusions XVII-2 Vol 2, page 695) To the ETUC, the recent judgment of the Supreme Court of 2006, could be considered as an argument that such prohibition is not effectively guaranteed.
- Next to the fact that on the specific section of the Council of Europe website relating to children’s rights (http://www.coe.int/T/TransversalProjects/Children/default_EN.asp) multiple references can be found that the Council of Europe and its instruments do in case accept violence against children, including corporal punishment and regardless of traditions, the ETUC would like to draw particular attention to the final communiqué and political declaration “Changes in parenting: children today, parents tomorrow” elaborated in the framework of the Conference of European Ministers responsible for Family Affairs (28th session 16-17 May 2006, Lisbon – -Portugal – Committee of Liaison Officers -3rd preparatory meeting – 15 May 2006). In this document², the following is –amongst others- highlighted:

“Positive Parenting

29. The Council of Europe considers a non-violent upbringing as a human rights issue and, to a considerable extent, the 1989 United Nations Convention on the Rights of the Child (UNCRC), changed the context within which parenting is carried out. In granting children rights as individuals, it redefined not only children’s place in society but the relationship between parents and their children. These rights, together with the latest knowledge from research and practice, are the constituent elements of positive parenting.

² Available at

<http://www.coe.int/t/dg3/youthfamily/Final%20Communique%20and%20Political%20Declaration.pdf>

30. Ministers discussed the need to abolish corporal punishment, as a human rights issue within the family as well as the protection against all forms of violence, including abuse within the home environment. They recognised the State responsibility on this subject as well as the responsibility of the family and all the members of the society and decided to take some further concrete steps in this direction to provide adequate measures with a view to preventing any violence within the families against children and other dependant family members

31. Ministers agreed that national legislation or programmes which include provisions against violent parental upbringing of children provide a platform for all to build on, making it easier for professionals to stress an anti-violent view and giving parents and even young children an opportunity to assert their rights and preferences in this regard. They make explicit the state's view on corporal punishment, sending a clear message to people who consider it an acceptable behaviour, be it inside the family or outside the family by having recourse to physical or psychic restraints." (page 6 – underlining added by ETUC)

Furthermore, in the Political Declaration, the European Ministers responsible for family affairs expressed their "availability to take adequate measures with a view to preventing any violence within the families against children and other dependant family members." (page 10 of document)

Conclusion

In conclusion and given the abovementioned, the ETUC considers that Portugal has not ensured the satisfactory application of Article 17 of the Charter.