

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS  
COMITÉ EUROPÉEN DES DROITS SOCIAUX**



12 March 2007  
**Case Document No. 1**

**International Federation for Human Rights Leagues (FIDH)  
v. Ireland  
Complaint No. 42/2007**

## **COMPLAINT**

**registered at the Secretariat on 26 February 2007**

**Complaint to the European Committee of Social Rights  
Pursuant to the Additional Protocol to the  
European Social Charter Providing for a System of Collective Complaints**

**Complainant: International Federation for Human Rights Leagues (Fédération internationale des Ligues des Droits de l'Homme - FIDH)**

**State Party: Ireland**

**Complaint:** That Ireland has failed to satisfactorily apply Article 23 of Part II of the Revised European Social Charter in conjunction with Article E of Part V of the Revised Social Charter and has also failed to satisfactorily apply or implement Article 12.4 of Part II of the Revised Social Charter.

**Summary:** The International Federation of Human rights Leagues (FIDH) complains that Ireland discriminates against persons in receipt of Irish Contributory Old Age Pensions who do not reside permanently in Ireland in that it refuses to allow them access to a Free Travel scheme for pensioners and others of pensionable age when they return to Ireland to visit relatives or friends, take part in social or cultural gatherings, or visit the graves of deceased family members. The FIDH submits that this policy by the Irish authorities is in breach of Article 23 of Part II of the Revised European Social Charter in conjunction with Article E of Part V of the Charter, whereby Ireland has undertaken to take or encourage, without discrimination, measures designed:

“[T]o enable elderly persons to remain full members of society for as long as possible by means of:

- (a) adequate measures enabling them to lead a decent life and play an active part in public, social and cultural life;
- (b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them”

The FIDH also submits that the refusal by the Irish authorities to allow non-resident pensioners access to the Free Travel Scheme is in breach of Ireland’s undertaking under Article 12.4 of the Revised Social Charter, which requires States Parties:

“[T]o take steps, by the conclusion of appropriate bilateral and multilateral agreements *or by any other means* (our emphasis), and subject to the conditions laid down in such agreements, in order to ensure:

(a) equal treatment with their own nationals or 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;”

### **Admissibility:**

Ireland ratified the Revised European Social Charter, including Articles 12 and 23 of Part II and Article E of Part V of the Charter, on 4 November 2000, and the Revised European Social Charter entered into force in respect of Ireland on January 1<sup>st</sup>, 2001. Ireland also ratified the Additional Protocol to the European Social Charter providing for a system of collective complaints on 4 November 2000, and this Protocol entered into force in relation to Ireland on January 1<sup>st</sup>, 2001. The present Complaint concerns the alleged failure by Ireland to satisfactorily apply articles of the Revised Social Charter by which it has undertaken to be bound, namely Article 12.4 and Article 23 in conjunction with Article E of Part V of the Charter.

The International Federation for Human rights (FIDH) is an international non-governmental organisation which has consultative status with the Council of Europe. It is included in the list established by the Governmental Committee of international non-governmental organisations entitled to lodge complaints under the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints.

### **The Complaint:**

#### **The Free Travel Scheme**

The Irish Government introduced a scheme in 1967 providing for free travel on public transport by old age and blind pensioners. It was first announced in the Financial Statement on the Budget made to Dail Eireann (the Lower House of the Irish Parliament) by the Finance Minister on 11 April 1967, when he said: “A scheme is also being worked out in consultation with CIE [the state transport company providing both bus and train services] whereby old age and blind pensioners will be able to travel free of charge on CIE buses and trains during periods when traffic is not heavy”.<sup>1</sup>

The scheme was operational by October 1967 and was administered by the Department of Social Welfare, now the Department of Social and Family Affairs. As far as the old age pensioner beneficiaries were concerned, it applied only to persons in receipt of old age pensions provided by the Department of Social Welfare and their spouses aged 70 and over. Seventy was the qualifying age for the old age pension at the time. Pensioners were allowed to travel without charge on displaying their pension book.<sup>2</sup> Persons in receipt of widows’ pensions and aged 70 or over were also included in the scheme.

<sup>1</sup> Dail Eireann Debates, 11 April 1967, column 1267



A total of 166,000 persons were admitted to the scheme in the first year. The Department made a payment to the state transport company, CIE, and another smaller company, based on an estimate of the number of 'free' passengers carried. A scheme to subsidise electricity costs for old age pensioners was introduced at the same time.

When announcing the planned scheme in April 1967, the Minister for Finance said the Government was concerned about "the difficult circumstances of old people who live alone" (*See Note 1 above*). Over thirty years later, in 1998, the then Minister for Social and Family Affairs, gave a fuller description of the Government's objective in providing the service, saying: "The purpose of the scheme is to encourage such people to remain active in the community..."<sup>3</sup>

The Free Travel Scheme was very progressive in its time and was in advance of the position in most European countries. It has been very successful over the years in enabling often impoverished elderly people to remain socially active and to keep up contact with their family members and friends.

Not all persons over 70 qualified for an old age pension at the time due to a means test requirement and to avoid hardship and to include a small number of persons living in the Republic of Ireland who were in receipt of United Kingdom pensions, the scheme was extended in 1972 to include all persons of pensionable age. However, the overwhelming majority of those who qualified for the scheme did so by virtue of being in receipt of an Irish Old Age Pension and the Free Travel Scheme was regarded as an additional or adjunct benefit attached to the Old Age Pension.

Over the next few years the pension age was progressively lowered until in 1977 it reached the present age of 66 years, which is also the qualifying age for the Old Age Pension. Persons over 66 were issued with Free Travel Passes instead of having to display their pension books. Passes were issued automatically when persons qualified for the Irish old age pension. Persons not in receipt of Irish pensions had to apply for their Passes. Free Travel was also progressively extended to disabled persons and carers, but applications from persons in these categories were administered separately and the present Complaint deals only with the position of old age pensioners.

The Free Travel Scheme was also expanded over the years to include travel on privately operated bus services and new publicly owned services such as light railways in Dublin. More recently it has been extended to cover air travel to some off-shore islands and, on a reciprocal basis, cross-Border travel to and from Northern Ireland, with which the Republic of Ireland shares a land frontier. Following negotiations between the Irish

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<sup>2</sup> Letter from Department of Social Welfare to Department of Finance, 4<sup>th</sup> July 1967, with attachment; Dail Eireann Debates, Volume 231, 23 November 1967, Questions to Minister for Social Welfare; Question 102.

<sup>3</sup> Dail Eireann Debates, Volume 486, 4 February 1998, Questions to Minister for Social, Community and Family Affairs



Government and the UK Government's Northern Ireland Office, it was announced in February 2007 that a scheme of free travel throughout the island of Ireland for persons over 66 in the Republic and over 65 in Northern Ireland would commence on 2 April 2007.<sup>4</sup>

And in August 2006, the Irish Minister for Social and Family Affairs, Mr Seamus Brennan, announced an end to restrictions on the Free travel Scheme that had prevented holders of Free Travel Passes from travelling on peak time transport in Dublin and two other cities in the Republic.<sup>5</sup> This finally ended a link between the scheme and the utilisation of spare capacity in the transport system which had been a factor in establishing the scheme at the beginning. The ending of this link confirmed that the function of the scheme is to encourage and enable elderly and disabled people to lead a much more active and involved life and maintain family and social ties and activities.

By August 2006, a total of a little over 600,000 persons were in receipt of Free Travel Passes. Of those 430,000 were aged over 66. Some 355,000 were in receipt of Old Age Pensions from the Department of Social and Family Affairs. The others appear to include widows/widowers over 66, dependents of pensioners, and persons in receipt of pensions from other jurisdictions. Another 145,000 people were recipients of invalidity or disability benefits and a further 25,000 were carers for sick or elderly persons who were also given Free Travel Passes (*See Note 5 above and Note 7 below*).

### **Emigration:**

Until the mid 1990s Ireland was a country of net emigration and over the years very large numbers of Irish people had emigrated to the United Kingdom, the United States, and other, mainly English speaking, countries in search of work. Emigration was particularly high between the 1940s and the early 1970s and as a result there is today a substantial community of Irish people of pension age living in the UK in particular, with smaller numbers elsewhere.

This complaint concerns the exclusion from the Free Travel Scheme of all people in receipt of Irish Old Age Pensions who live outside Ireland, but the largest single group of such people is to be found in the UK, so the detailed factual information given below will largely concern holders of Irish pensions resident there. The arguments made, however, apply *mutatis mutandis* to recipients of Irish pensions resident elsewhere as well.

While many Irish people integrated well into UK society, others did not and there are now significant numbers of elderly Irish people who live lonely, impoverished and isolated lives in Britain. Most still have relatives and family connections in Ireland and for some these are their only family connections. However, for many of these less fortunate Irish emigrants, the cost of travelling to Ireland and then embarking on further travel within the

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<sup>4</sup> Press release by Dept. of Social and Family Affairs, 16 February 2007

<sup>5</sup> Press Release by Department of Social and Family Affairs, 9 August 2006

country can be a major obstacle – many of them come from the remoter parts of Ireland in the south and west. As a result, their links with family and friends are weakened, to the detriment of the elderly persons themselves, their families and friends and wider society.

In addition a number of studies have shown that there is a higher than average incidence of mental illness and depression among the Irish in Britain and also a lot of alcoholism.<sup>6</sup> Closer contact with family and friends and regular visits to Ireland to see them could help to reduce isolation and loneliness and assist these elderly emigrants “to lead a decent life and play an active part in public, social and cultural life” (Article 23.1 (a) of the Revised European Social Charter), or “to remain active in the community” as the then Minister for Social and Community and Family Affairs said in 1998 when outlining the objectives of the Free Travel Scheme (*See Note 3 above*).

A number of Irish emigrants in the UK and elsewhere had worked in Ireland before they emigrated and now qualify for an Irish Contributory Old Age Pension, often on a *pro rata* basis. The Minister for Social and Family Affairs put the number of Irish people in the UK who are in receipt of an Irish Old Age Pension at approximately 31,000 in March 2006. Figures supplied by the Department of Social and Family Affairs in August 2006 gave the number in receipt of Irish Old Age Pensions and the number of retirement pensioners and recipients of widow(er)’s pensions aged 66 or over in the UK, excluding Northern Ireland, as 30,556. The equivalent figure for the rest of Europe was 951 and 8764 for the rest of the world, making a total of 40,271. There were 4632 such persons in Northern Ireland but, as mentioned above, the Irish Government has recently agreed in principle to extend the Free Travel Scheme to include all pensioners from Northern Ireland on a reciprocal basis with the local administration in that area.<sup>7</sup>

The pensions in question are paid to the recipient by the Department of Social and Family Affairs and are distinct from whatever pension the individual may receive from the UK authorities or the authorities in any other country where they may live. Most recipients in the UK would be in receipt of UK pensions as well since they would have spent the bulk of their working lives there. The Irish pensions are all Contributory Pensions because, concentrating again on the UK, people who had not accumulated any Irish contributions before commencing work in the UK would simply qualify for an ordinary UK pension and Irish Non-Contributory Pensions are not payable outside the State.

A number of these ‘Irish pensioners’ in the UK – *this term is used in this Complaint to denote persons who are in receipt of Irish pensions, not persons of Irish nationality who are in receipt of UK pensions only* – have applied to the Irish Department of Social and Family Affairs for Free Travel Passes on the same basis as pensioners resident in Ireland, so that they could avail of the Free Travel Scheme when returning to Ireland to visit

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<sup>6</sup> “Ireland and the Irish Abroad, Report of the Task Force on Policy regarding Emigrants”, Department of Foreign Affairs, August 2002, pages 40-1.

<sup>7</sup> Dail Eireann Debates, 22 March 2006, Vol.616, No. 5, Questions to Minister for Social and Family Affairs; Question 53; Letter from Department of Social and Family Affairs to Free Legal Advice Centres, 8 August 2006.



family and friends. They have been refused on the grounds that they “are not permanently residing in the Republic of Ireland”. See letter to Mrs Kathleen Waddington of Keighley, Yorkshire, in September 2004.<sup>8</sup>

Mrs Waddington is in receipt of a small Irish contributory Old Age Pension in addition to her UK pension. She is aged 69 and comes originally from County Kerry in the South West of Ireland. She worked for some years in Ireland and paid pension contributions before emigrating to England where she worked for many years. She married there and her husband is English.

Mrs Waddington is in receipt of a UK retirement pension and a Disabled Living Allowance – her hearing is impaired. Her husband is in receipt of UK invalidity benefit. She visits Ireland two or three times a year for a week or so at a time. The last of her siblings died in recent years but she still visits an elderly cousin and nieces and nephews. She also visits the graves of her parents and brothers, all in different counties in Ireland.

Neither Mrs Waddington nor her husband are able to drive a car any more and they are dependent on public transport when they visit Ireland. Access to the Free Travel Scheme would enable them to travel around more freely and perhaps come to Ireland more often.

As we have indicated, a number of other Irish pensioners in the UK have been refused Free Travel on the same grounds as Mrs Waddington and over the last ten years or so groups representing Irish emigrants in the UK such as the Federation of Irish Societies, the London Irish Centre, the Camden Elderly Irish Network and the London Irish Elders Forum, have called on the Irish Government to extend the Free Travel Scheme to Irish pensioners from the UK when they visit Ireland.

The Irish Government has shown concern about the position of Irish emigrants in the UK and particularly the elderly and vulnerable among them and in 2001 the then Minister for Foreign Affairs, Mr Brian Cowen TD, set up a ‘Task Force on Policy regarding Emigrants’.

The Task Force reported in August 2002 and outlined particular concerns about elderly Irish emigrants, especially in the UK. In this connection the Report recommended urgent action “to enable Irish pensioners living overseas to enjoy free travel on public transport when they are visiting Ireland from abroad”.<sup>9</sup>

The Government accepted the broad thrust of the Report with its concern to maintain and foster contacts with, and provide assistance to vulnerable members of the emigrant community, but it did not accept all the recommendations. Among those not accepted was the recommendation on extending the Free Travel Scheme.

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<sup>8</sup> Letter from the Pension Services Office, Department of Social and Family Affairs, to Mrs Kathleen Waddington of Keighley, Yorkshire, England, 27 September 2004.

<sup>9</sup> See Note 6 above; Paragraph 5.15, Page 44 of the Report.



The Task Force Report and most of the Irish emigrant lobby groups had called, at least initially, for extension of the Free Travel Scheme to all Irish emigrants of pension age, whether in receipt of Irish, UK or other pensions. This Complaint, however, deals with the narrower issue of persons in receipt of Irish Contributory Old Age Pensions living outside Ireland, the bulk of whom are in the UK, and the differentiation made between them and recipients of Irish Contributory Old Age Pensions living in Ireland.

Despite the welcome extension of the Free Travel Scheme to all persons over 66 years resident in Ireland, the overwhelming majority of those in receipt of Free Travel Passes on the age ground are people who are in receipt of Irish Old Age Pensions. The link between the Old Age Pension and the Free Travel Scheme is so close that the Pension Services Office of the Department of Social and Family Affairs states that it automatically issues Free Travel Passes to people in receipt of Old Age Pensions. A form is available to apply for a Free Travel Pass but it states at the beginning: “Do not complete this form if you are aged 66 or over and are getting a pension from this Department; we will send you a Free Travel Pass automatically”<sup>10</sup> The Pension Services Office then appears to separate out those pensioners who have addresses outside the State and exclude them from the scheme.

This distinction is based entirely on the place of residence of the pensioners in question, all of whom are contributory pensioners who had paid into the pension fund when working in Ireland, presumably on the assumption that they would eventually receive the same benefits – on a pro rata basis determined by their level of contributions – as other persons paying into the same fund.

### **The Law:**

The Free Travel Scheme was established in 1967 on a non-statutory basis. It was not established under legislation passed by parliament or by Statutory Instrument (secondary legislation made under authority given to a Minister by parliament). It was initially established on foot of an announcement made by the Minister for Finance during his Financial Statement on the Budget, when he simply referred to setting up “a scheme ... whereby old age and blind pensioners will be able to travel free of charge ...” (*See Note 1 above*). Despite a number of enquiries, the Department of Social and Family Affairs has been unable to produce any actual Ministerial Regulation, Order or circular which formed the basis for the scheme and set out the criteria for qualifying for inclusion in it. There was no reference to any residential qualification in the initial announcement. In October 1970, the then Minister for Social Welfare stated that “The scheme of free travel ... was devised primarily for old people aged 70 or over who are receiving social welfare type pensions”.<sup>11</sup>

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<sup>10</sup> Pension Services Office, Form FT1, Application form for a Free Travel Pass

<sup>11</sup> Dail Eireann Debates, Volume 249, 29 October 1970; Question to Minister for Social Welfare

Later expansions and amendments to the scheme appear to have been made in the same informal way as when the scheme commenced. A letter from the Freedom of Information Officer in the Pension Services Office in April 2006 states that no Ministerial Orders were made in connection with the scheme: “All amendments to this scheme were made through Budget changes or by the management of Free Travel and subsequently sanctioned by the Department of Finance”.<sup>12</sup>

The first reference to a residence condition which we have located is in an answer to a parliamentary question in December 1974 when the Minister for Social Welfare stated: “The free travel scheme administered by my Department now covers all persons aged 68 and over who are permanently resident in the State”.<sup>13</sup> This refers to the extension of the scheme, as already mentioned, to include holders of UK pensions living in Ireland and some other elderly persons who did not qualify for any State pension. This had the effect of adding additional beneficiaries to a scheme which was still fundamentally based on receipt of an Irish State pension. The extension was first introduced in July 1972 when the qualifying age was still 70 and there was no mention at that stage of any residence condition.<sup>13A</sup> The residence condition is now set out in a document produced by the Department of Social and Family Affairs and entitled “Guidelines for Area Managers and Inspectors Free Travel Scheme”.<sup>14</sup>

The Guidelines document states at the beginning that “The Free Travel Scheme is non-statutory, having been introduced and extended by Ministerial announcement”. What it says about the residence condition is somewhat confusing. Paragraphs 3.1 and 3.2 refer to the condition with Paragraph 3.2 stating: “To avail of Free Travel, a person must first apply for a Free Travel Pass from this Department. The applicant will qualify if s/he is living *permanently* [emphasis in the original] in the State (i.e. on an all-year-round basis) and is aged 66 or over”.

However, Paragraph 3.3 on “How to obtain a Free Travel Pass” says: “A Free Travel pass will be issued automatically at age 66 if the applicant is getting a pension from this Department.” There is no reference to a residence condition. Paragraph 4.1, headed “Need to Apply?” also says: “Where a person is receiving a pension from this Department, a Free Travel Pass will be automatically issued on his/her 66<sup>th</sup> birthday”.

Paragraphs 3.12 and 5.1 on the other hand say that the entitlement to Free Travel will cease if a Pass holder ceases to reside permanently in the State. This would appear to penalise Pass holders who exercise their right under Article 2.2 of Protocol 4 to the

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<sup>12</sup> Letter from Freedom of Information Officer, Pension Services Office, 6 April 2006.

<sup>13</sup> Dail Eireann Debates, Volume 276, 4 December 1974; Question to Minister for Social Welfare.

<sup>13A</sup> Note from Department of Finance to Department of Social Welfare, 11 July 1972.

<sup>14</sup> Department of Social and Family Affairs, “Freedom of Information, Free Travel, Guidelines for Area Managers and Inspectors Free Travel Scheme”.

European Convention on Human Rights to leave their own country or their right under Article 18 EC, as citizens of the European Union, to reside in another EU state.

The informal basis for the scheme is indicated by Paragraph 6 of the Guidelines, headed “Requests for Case Review”, which states: “As the Free Travel Scheme is a Non-statutory Scheme, there is no legislative right of appeal to the Social Welfare Services Office [*this should probably read ‘Social Welfare Appeals Office’*]. However, a person who is dissatisfied with a decision in relation to his/her application for Free Travel is entitled to a review by another and more senior official of the Department”. There is thus no right to an external, independent appeal. Departmental decisions are, of course, subject to Judicial Review by the courts but such reviews deal primarily with procedure rather than the merits of the decision.

The Old Age Pension itself is established on a statutory basis under a succession of Social Welfare Acts. The Contributory Old Age Pension itself is not subject to any residence condition as can be seen from the fact that it is paid to substantial numbers of people living outside the State. The Non-Contributory Pension is not payable outside the State.

No distinction is made between residents and non-residents of Ireland in relation to qualification for the Contributory Old Age Pension or between citizens or non-citizens, but a distinction is made between residents and non-residents when it comes to the Free Travel Scheme which, it is submitted, is a secondary benefit attaching to qualification for the pension. However, not all secondary benefits attaching to the pension are subject to residence conditions. The Department of Social and Family Affairs pays a bonus to Old Age Pensioners each year at Christmas but no distinction is made between pensioners resident in Ireland or elsewhere.

We submit that the refusal to allow Irish Contributory Old Age Pensioners who are resident outside the State to avail of the Free Travel Scheme when they return to Ireland for short periods is discriminatory on grounds of residence.

### **The Revised European Social Charter:**

We will deal with the Articles which are the subject of this Complaint in reverse order, beginning with Article 23.1.

### **Article 23 – The right of elderly persons to social protection:**

Article 23.1 of the Revised Social Charter requires States parties to the Charter to adopt or encourage measures designed

“to enable elderly persons to remain full members of society for as long as possible, by means of:



- (a) adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
- (b) provision of information about services and facilities available for elderly persons and their opportunities to make use of them;”

The Digest of the Case Law of the European Committee on Social Rights says in relation to Sub-Paragraph 23.1 (a) that

“The primary focus of the right to adequate resources is on pensions. Pensions and other state benefits must be sufficient in order to allow elderly persons to lead a ‘decent life’ and play an active part in public, social and cultural life.... The committee also takes into consideration the cost of transport ...”

In relation to Sub-Paragraph 23.1(b), the Digest says that in its monitoring of how States Parties apply this provision, the Committee “examines not only information relating to the provision of information about these services and facilities [for the elderly] but also these services and facilities themselves. In particular, information is sought on ... cultural, leisure and educational facilities available to elderly persons”.

In this case we submit that the provision of free travel for pensioners clearly comes within the areas covered by Article 23 of the Revised Social Charter. Free travel undoubtedly helps elderly persons to remain full members of society and lead a ‘decent life,’ and to play an active part in public, social and cultural life. As mentioned above, the Digest of Case Law notes that in considering the application of this Article, the Committee takes into account the cost of transport. The provision of free travel also undoubtedly plays a part in making cultural, leisure and educational facilities available and accessible to older people.

This should not be dependent on the persons concerned residing permanently in the State Party. As we have mentioned above, the provision of free travel during visits to Ireland would enable elderly Irish emigrants, for whom the Irish Government has accepted a measure of responsibility and to whom it is paying pensions, to maintain and strengthen links with their family members and old friends in Ireland, thus enabling them to remain full members of society and lead an active and ‘decent’ life. It would also help to enrich their social and cultural life. This applies not only to emigrants who are Irish citizens; it can equally apply to persons who are not Irish citizens but who have resided in Ireland for long enough to qualify for an Irish Contributory Pension and who may wish to visit friends and acquaintances and/or generally keep up their connection with Ireland.

It must be remembered as well that the interaction of elderly persons with society is a two-way process and that enabling them to play an active part in public, social and cultural life does not solely benefit the elderly persons concerned but also the wider society, so that enabling emigrants to maintain closer links with their family and friends in Ireland benefits Irish society as well as the emigrants themselves.

It must be acknowledged that in providing free transport for pensioners and some other elderly persons, successive Irish Governments have taken a progressive and innovative initiative and that the Irish Free Travel Scheme is still in advance of what is available in most other European countries. However, Article E of Part V of the Revised Social Charter provides that “The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, association with a national minority, birth or other status”.

### **Discrimination:**

The prohibited grounds of discrimination listed in Article E are not exhaustive and it is submitted that in this case Irish pensioners in the UK, or elsewhere in the EU or beyond, are being discriminated against on the basis of their residence outside the State and that this is in breach of Article E. These pensioners, by residing abroad, are exercising rights accorded to them by EU law, in the case of those residing in other EU states (see, inter alia, in the case-law of the Court of Justice of the European Communities, Case C-520/04, *Pikko Marjatta Turpeinen*, judgment of 9 November 2006, not yet reported (confirming that Article 18 of the EC Treaty prohibits discrimination based on the fact that a pensioner has chosen to reside in another EU Member State, thus exercising a fundamental right attached to the citizenship of the Union). . They should not be disadvantaged on account of having exercised a right recognized under EU Law. Neither should they be disadvantaged for exercising a right recognized to them under Article 2.2 of Protocol n°4 to the European Convention on Human Rights.

The Appendix to the Revised Social Charter states in relation to Article E that “differential treatment based on an objective and reasonable justification shall not be deemed discriminatory”. And Article G of the Revised Social Charter also allows restrictions to be imposed on the exercise of the rights protected by the Charter if the restrictions are “prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of the public interest, national security, public health, or morals”.

Is the differential treatment of Irish pensioners, i.e. recipients of Irish Contributory Old Age Pensions, living in the UK or elsewhere outside Ireland, based on objective and reasonable justification, or can the restriction imposed in their case on the right to free travel within Ireland be justified on the grounds set out in Article G?

These possible justifications for differential treatment are related and we will deal with them together.

Firstly, however, there is a preliminary issue. The Irish Government might argue that entitlement to participate in the Free Travel Scheme is not amenable to review under the



Revised Social Charter and the Collective Complaints procedure on the same grounds on which it has been excluded from the external appeals procedure that applies to disputes about other social welfare benefits, namely that because it is a non-statutory scheme, its application is entirely within the discretion of the Minister.

We submit that the Free Travel Scheme clearly comes within the scope of the measures contemplated by Article 23 of the Charter and is therefore subject to the prohibition against discrimination under Article E. Furthermore, any scheme which has been in existence for almost 40 years, applies to up to 430,000 people and deals with matters that have a significant effect on the lives of its recipients, cannot, in a democratic society, be entirely discretionary and must be subject to certain fundamental safeguards such as a prohibition on arbitrary or unwarranted discrimination.

### **Prescribed by Law?**

Secondly, in relation to whether the restriction on access to the Free Travel Scheme can be justified under Article G, there must be some question as to whether the residence condition meets the requirement that it should be “prescribed by law”. As indicated earlier, neither the original scheme nor the subsequent changes to it were made by way of legislation, Statutory Instrument or Ministerial Order and the Department of Social and Family Affairs has indicated that amendments were made either by changes in the Budget or by administrative decisions which were subsequently sanctioned by the Department of Finance. The Department of Social and Family Affairs has not so far been able to produce copies of the actual decisions in question.

It is not clear in the circumstances that the details of the restriction on access to the scheme by non-resident pension holders, its basis in law, and the limits on the discretion of the decision-maker are sufficiently accessible and set out clearly enough to satisfy the requirement in Article G that it should be prescribed by law. This is reinforced by the fact that there is no provision for a proper appeals procedure in relation to decisions on eligibility for the scheme.

### **Objectively Justified/Necessary in a Democratic Society?**

Without prejudice to the legality of the restriction in question, is it objectively justified and/or is it necessary in a democratic society for the protection of the rights of others or the public interest? National security, public health or morals are not at issue in this connection.

The only substantial arguments given by successive Ministers over the years for retaining the exclusion of non-resident pensioners from the Free Travel Scheme were excessive cost



and the possibility that inclusion of the non-resident pensioners, or Irish citizens living abroad in general, while other EU nationals were excluded, might be in breach of EU law.

The EU argument was to the effect that if the scheme was extended to Irish emigrants generally, EU law might require that it should be broadened further to include all EU nationals over 66 who visited Ireland. That in turn would lead to very substantial administrative and logistical difficulties and costs. An example of this response was given in a letter from the then Minister for Social, Community and Family Affairs to an Irish MEP in November 1998.<sup>15</sup> The implication was that such a development would place an unacceptable burden on the Irish social welfare system and would accordingly be injurious to the public interest.

Thus the Government's position has been, in effect, that to extend the scheme to all Irish nationals of pension age in the UK, or elsewhere, would endanger the public interest because it would require extension of the scheme to all EU nationals of pension age visiting Ireland, requiring substantially increased payments to the transport operators to compensate for lost revenue, and increased administrative costs within the Department of Social and Family Affairs for issuing new, probably temporary, Free Travel Passes and trying to guard against fraud etc. By implication such an extension would absorb scarce public resources required to provide other services to vulnerable groups in Irish society. In the circumstances, the Government might seek to argue that the residence condition for the Free Travel Scheme is objectively and reasonably justified.

In response to a very general question in August 2005, the European Commissioner for Employment, Social Affairs and Equal Opportunities, Mr. Vladimir Spidla, stressed that a member state providing a free transport scheme must do so "in a non-discriminatory way to all EU nationals complying with the same conditions as its own nationals".<sup>16</sup> However, when asked specifically about the extension of Free Travel passes to recipients of Irish pensions living abroad, Mr. Spidla said in February 2006: "EU law would not prevent the Irish Government from granting a free travel pass to pensioners who receive a pension from Ireland but reside outside Ireland. However, EU law does require that if the free travel scheme was to be extended in such a way it would have to be non-discriminatory and would have to be available to all beneficiaries of an Irish pension regardless of their nationality".<sup>17</sup> Thus the bulk of the problems envisaged by the Irish Government seemed unlikely to arise if any extension of the scheme was limited to non-resident Irish pension holders.

We should make clear at this stage that the FIDH is not at all opposed to the development of an EU-wide or European-wide scheme of free travel for older persons. On the contrary, we would very much welcome such a scheme created under the auspices of the

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<sup>15</sup> Dermot Ahern TD, Minister for Social, Community and Family Affairs, to Brian Crowley MEP, 24 November 1998.

<sup>16</sup> Reply to Written Question E-2721/05 by Proinsias De Rossa MEP to the Commission, 29 August 2005.

<sup>17</sup> Reply to Written Question E-4723/05 by Mary McDonald MEP to the Commission, 1<sup>st</sup> February 2006.

EU or the Council of Europe where all governments would share the cost and older persons would have access to the same level of service in every member state.

Some months after his February 2006 Parliamentary answer and following an indication that the Irish Government was considering the possibility of extending the Free Travel Scheme to Irish pensioners living abroad, Commissioner Spidla was more cautious in his response to another question in September 2006. He suggested that such a move might discriminate against non-resident Irish citizens who had exercised their right to free movement but were not in receipt of Irish pensions, and/or against citizens of other EU states who had established connections with Ireland which they wished to maintain but who did not draw pensions from there.<sup>18</sup> He said that the Commission and the Irish authorities were exploring possible solutions to these issues which would be in line with EU law.

The information provided in August last by the Department of Social and Family Affairs about non-resident Irish pension holders put the figure at 30,556 for the UK, excluding Northern Ireland, and another 10,000 or so for the rest of the world. The additional expense involved in including them in the Free Travel Scheme would not be very large. Precisely because they are non-resident, their take-up of the scheme would be much less than that of equivalent Irish-based pensioners. They would make use of it only during periodic visits to Ireland, usually of short duration, and a significant number would not make use of it at all because they would be too old or frail to undertake the air or sea journey to Ireland or because they would not have retained connections with Ireland.

The administrative costs would be small as all the people concerned would already be in receipt of Irish pensions and would be on the books of the Department of Social and Family Affairs, so that supplying them with Travel Passes should pose no significant problems. If anything, it might simplify matters as the Pension Services Office would no longer have to separate out the non-residents from the other pensioners in order to exclude them from the scheme. The Minister for Social and Family Affairs, Seamus Brennan TD, confirmed in March 2006 that financial concerns were no longer a significant obstacle to ending the restriction on non-resident pensioners accessing the Free Travel Scheme and that the Government favoured ending it, were it not for the possible EU law implications.<sup>19</sup>

Even if the concerns raised by Commissioner Spidla in September 2006 were to materialise, which is arguable, the additional numbers involved would not be unmanageable, given the factors mentioned above and we suggest that they would not constitute a significant threat to the Irish social welfare system or the public interest.

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<sup>18</sup> Reply to Written Question E-2765/06 by Proinsias De Rossa MEP to the Commission, 11 September 2006.

<sup>19</sup> Seanad Eireann Debates, 22 March 2006



In his Parliamentary answer in September last, Commissioner Spidla quoted from the judgment of the European Court of Justice in Case No. C-224/02, delivered on 29 April 2004, where the Court said at Paragraph 20:

“National legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move (D’Hoop, paragraphs 34 and 35). Such legislation could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions (D’Hoop, paragraph 36).”<sup>20</sup>

We suggest that, in fact, the principle enunciated in this judgment applies precisely to the complaint made herein as the administrative practice/decision (not legislation) which excludes non-resident Irish pension-holders from the Free Travel Scheme disadvantages them for having exercised their right to freedom of movement and residence. And we suggest that the additional expense and administrative problems which are perceived as a possible outcome of expanding the Free Travel Scheme would not be so grave as to be necessary in a democratic society for the protection of the public interest, or objectively and reasonably justified. Nor is the restriction proportionate to the aim sought to be achieved.

### **Article 12 – The right to social security:**

Article 12.4 (a) of the Revised Social Charter is concerned with “the retention of benefits arising out of social security legislation”, where the person entitled to the benefits moves between the territories of the Parties in question. We have already submitted that the entitlement to Free Travel in Ireland is a secondary or ancillary benefit connected with the Old Age Pension, as demonstrated by the practice of the Pensions Service Office of the Department of Social and Family Affairs, which automatically issues Free Travel Passes to all persons when they qualify for the Old Age Pension except when they are non-resident.

While Article 12.4 generally deals with reciprocal agreements with other State Parties, it also provides that action can be taken “by other means” to ensure the retention of benefits and this is obviously more appropriate where the threat to retention of the benefit or actual withholding of the benefit is due to the action of the Party providing the benefit.

We submit that Article 12.4(a) gives rise to a positive obligation by Ireland to take action to protect benefits to which Irish nationals or others who have worked in Ireland or would otherwise have qualified for the Free Travel Scheme would be entitled if they had

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<sup>20</sup> Heikki Antero Pusa v. Osuuspankkien Keskinäinen Vakuutusyhtio, Case C-224/02, 29 April 2004



remained in Ireland and had not exercised their right to freedom of movement under Article 18 EC or Article 2.2 of Protocol 4 of the European Convention on Human Rights. Ireland is clearly not fulfilling that obligation by retaining the restriction that prevents non-resident Irish pension-holders from availing of the Free Travel Scheme on their return visits to Ireland. We would also submit that by failing to protect the rights of non-resident pensioners to the benefit in question, Ireland is discriminating against them because of their exercise of their right to freedom of movement, contrary to Article E of Part V of the Revised Social Charter.

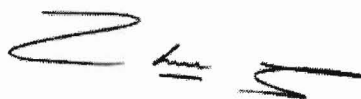
**Conclusion:**

In the circumstances, it is submitted that the restriction which prevents non-resident Irish Contributory Old Age Pensioners from accessing the Free Travel Scheme during temporary stays in Ireland is not necessary to protect the public interest or the rights of others in Irish society, is not based on any objective and reasonable justification, and its effects are not proportionate to the end sought to be achieved. Accordingly, it is submitted that this restriction amounts to discrimination against persons who have exercised the right to freedom of movement and residence provided for under the EU Treaties and the European Convention on Human Rights, both of which are binding upon Ireland. We submit that this amounts to discrimination prohibited by Article E of Part V of the Revised Social Charter, taken in conjunction with Article 23 of the Charter, and that, as a result, Ireland is in breach of its obligation to satisfactorily apply Article 23 of the Charter in conjunction with Article E thereof.

We further submit that the retention of the restriction on access to the Free Travel Scheme for non-resident pensioners during visits to Ireland is in breach of Ireland's obligations under Article 12.4 of Part II of the Revised Social Charter and also amounts to discrimination prohibited by Article E of the Charter, which discrimination, for the reasons already given, is neither necessary to protect the public interest or the rights of others, nor proportionate in the circumstances. As a result, we submit that Ireland has failed to fulfil its obligations under Article 12.4 of the Revised Social Charter in respect of this group of persons.

Done in Paris, on 22 February 2007

For the International Federation for Human Rights,  
The President,



Sidiki Kaba