

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



16 May 2008

Case document No. 6

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

**FURTHER WRITTEN RESPONSE FROM THE
GOVERNMENT ON THE MERITS**

Registered at the Secretariat on 2 May 2008

1. Introduction

1.1 Further to the invitation of the President of the European Committee on Social Rights (“the Committee”) made pursuant to Rule 31(3) of the Rules of Procedure of the Committee and communicated to the Agent of the Respondent by letter of 14 April 2008, the Respondent is pleased to submit the following further written response in respect of the Complaint of the International Federation of Human Rights (IFHR) registered at the Secretariat of the European Social Charter on 26 February 2007 (“the Complaint”).

1.2 The Complaint was declared admissible by the Committee on 18 October 2007. Written submissions of the Respondent on the merits of the Complaint were filed on 30 November 2007 (“Core Submissions”), whilst the Applicant, filed its observations thereon on 6 February 2008 (“the Reply”). The present response is confined to addressing certain of the arguments made in the latter. The Respondent refers to its Core Submissions as reflecting the principal reasons why the Complaint should be rejected by the Committee.

1.3 The Respondent, by letter of 10 April 2008, has requested an oral hearing in respect of the present complaint. The Respondent reiterates its willingness to elaborate on its submissions, below, at an oral hearing.

2. Overview

2.1 The Reply underscores the complexity of the legal issues with which the Committee has been asked to grapple. The Complaint purports to concern individuals resident outside of Ireland and mostly in the United Kingdom (some 31 000 of the around 40 000 in total on whose behalf the complaint has been brought are resident in the latter. The individuals concerned are also, for the most part, according to IFHR, in receipt of pension payments from both the United Kingdom and Irish Governments.¹

2.2 The Applicant claims, on behalf of these individuals, that the refusal of the Respondent to extend to them travel concessions available to all residents of Ireland aged over 66 years breaches Article 23 of Part II of the Revised European Social Charter and Article 23 in conjunction with Article E (non-discrimination). It also claims that the Respondent has failed satisfactorily to apply or implement Article 12, paragraph 4, of Part II of the revised Charter. Thus, the Complaint addresses the highly sensitive question of the limits of social security entitlements, as protected by the revised Charter, for those who choose to leave the territory of a State Party where they have acquired pension rights of some kind, and establish themselves in the territory of another State Party where they may have accrued further benefits: is there an obligation by that former State Party to protect their alleged Charter rights because, as suggested in the Reply (at paragraph 2.9) *“the contracting States are committed to securing collectively, through the Charter, the rights in question throughout the area covered by all the contracting States”*?

¹ It is observed in the fourth paragraph on page 5 of the Complaint: *“The pensions in question are paid to the recipient by the Department of Social and Family Affairs and are distinct from whatever the pension the individual may receive from the UK. 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”*.

2.3 The problem is further compounded by the fact that the Complaint is not confined to asserting rights for Irish nationals who have left and secured Charter protection elsewhere. Rather, the Applicant asserts the existence of ongoing duties on the part of the Respondent to all individuals who have at one point been entitled to turn to the Respondent to secure their rights under the Charter, whatever their country of origin (the Reply, paragraph 1.6). This underscores the significant problem of legal certainty which would necessarily follow if the Charter were construed so as to preclude the Respondent from linking travel-concession rules for the elderly to residence.

3. Personal and Material Scope of the Charter

3.1 Turning to the Respondent's first main further observation, it is worth recalling that the free travel scheme, in so far as is relevant to this Complaint, is not "triggered" until the acquisition of the age of 66, even for residents of Ireland. Furthermore, it does not accrue as a legislative entitlement: it has always been a matter of administrative discretion. It is submitted that the arguments presented in the Reply seek to stretch the application of Article 23 to bind States Parties to take "*appropriate measures*" so as "*to enable elderly persons to remain full members of society for as long as possible*" in respect of individuals who have long since left Ireland and who were not entitled to claim the right in question at the time of their residence. While it may be of "*great assistance to non-resident pensioners when they return to Ireland, enabling them to visit their often scattered family members and friends*" (see paragraph 1.7 of the Reply) there is no basis in law for this as of right.

3.2 Ireland reiterates its view that the term “*full members of society*” appearing in Article 23 of the Charter means the society over which the State Party in question exercises jurisdiction. A broader interpretation, requiring integration of individuals who no longer live within jurisdiction but who maintain family links and/or a connection based on nationality, would require express words. Any interpretation of the word “*society*” in Article 23 must take into account the broader jurisdictional limits of the Charter itself. It is submitted that this is not a “*narrow and regressive*” interpretation but rather, one which is logical and consistent with the fact that the Charter is a legal text. Interpretation of a legal text is separate matter from policy decisions regarding funding Irish emigrant organisations in the United Kingdom as referred to at paragraph 3.4 of the Reply.

3.3 A State Party cannot be bound, under either Articles 23 or 12, to extend discretionary measures to those who have for the most part long since ceased to be resident in Ireland.

3.4 The Applicant is mistaken in asserting the “*closeness of the link between the pension and the Free Travel scheme*” (the Reply, paragraph 4.6). There is no statutory basis for this link and the complainant’s reliance on administrative documents, such as application forms, is insufficient to establish an on-going responsibility to Article 12 rights to social security, or Article 23 rights of the elderly to social protection.

3.5 The Applicant’s arguments based on Article 18.4, Article 12(4) (a), Protocol 4.2.2 of the Charter, and Articles 18 and 19 of the EC Treaty (the Reply, paragraphs 1.5, 2.2, 2.6, 3.2 and 5.1) are also fundamentally misconceived. In a nutshell, the Applicant asserts that these provisions preserve social security rights in the former State of residence, due to the obligation on States Parties not to deter their workers from leaving to take up employment opportunities elsewhere. Article 12, paragraph 4(a), of the Charter binds the states parties to “*take steps*” to ensure, *inter alia*,

retention of social security benefits whatever movements the person protected may undertake. However, this obligation cannot be interpreted in a vacuum. It must be borne in mind that the broader rights arising from Article 12 transfer to another State Party on change of residence. What Article 12, paragraph 4(a), cannot have been intended to permit is “double dibbing” in social security law, with entitlement to claim benefits extending across more than one State Party in perpetuity. The same applies to Article 18, paragraph 4. It merely binds the States Parties to “*recognise*” the rights of their nationals to leave the country to engage in a gainful occupation in the territories of other parties. It does no more than that.

4. Residence as the Primary Basis for Jurisdiction

4.1 The Respondent reiterates its view that the Appendix of the Charter suggests *residence* (rather than mere presence) in a State Party’s territory as a primary basis for jurisdiction. The Appendix states that Articles 20 to 23 of the Charter “*include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned*”. The tying of the right of foreigners to rely on the Charter to being “*lawfully resident*” is a clear indication that residence is the generally required nexus. The fact that the majority whose interests the Applicant seeks to represent are Irish nationals (the Reply, paragraph 2.2) is immaterial to the interpretation of the Appendix. The Respondent disputes that recourse to residence as the touchstone for claiming rights constitutes such “*a fundamental limitation on social rights*” as would have required to be “*expressly stated in the Charter*” (the Reply, paragraph 2.4). On the contrary, it is the continuation of social security obligations with respect to Irish nationals and others who have left and acquired rights *vis-à-vis* another state party to the Charter that would plainly amount to a fundamental departure to the rules on jurisdiction, such as to require express language.

4.2 The Respondent further submits that the Applicant's observation that the proviso in the Appendix does not apply to Article 12.4 of the Charter is also immaterial. As stated in the Core Submissions (paragraph 4.3), Article 12.4 does not include an obligation to extend such benefits that are available independently of insurance contributions, to residents of other States Parties.

5. Extra-territorial Effects

5.1 The Applicant observes (the Reply, at paragraph 1.10) that no extra-territorial effects arise because the travel in question takes place *in* Ireland, and not in any other state. The Respondent suggests that this analysis is misconceived. The Respondent stands by the position taken in the Core Submissions (paragraph 3.8): that the text of the revised Charter, like the European Convention on Human Rights ("ECHR"), is primarily territorial in its jurisdictional ambit but with the **added requirement of residence or regular work in that territory**. The Respondent has never maintained that presence in the territory is sufficient to engage obligations under the Charter rather it is *residency* in the territory that is the key. The Respondent wishes to make it clear that the reference to *Bankovic v. Belgium and Others* ECHR 2001 – X II, paragraph 61 was to demonstrate that extra-territorial jurisdiction is exceptional. The Respondent rejects that its argument here is "*fundamentally misconceived*."

6. Objective Justification for Difference in Treatment between Residents and Non-Residents.

6.1 The Applicant effectively challenges (the Reply, paragraph 2.5) the alleged failure of the Respondent to provide objective justification for a difference of treatment based on residence. In the first place, and as the Respondent has already submitted, differentiated treatment on grounds of residence is not incompatible *per se* with the Charter and the ECHR, and so in principle requires no objective justification. Without prejudice to the above, the Respondent maintains that residence as an eligibility criterion for the free travel scheme is wholly justifiable. In the event that the Committee is of the view that it is necessary for the Respondent to elaborate on the reasons underlying the difference of treatment the Respondent would point in particular to the requirement of legal certainty as the principle justification for the difference of treatment. Contributory pensions payments earned during periods of work in Ireland are easily calculable, and Ireland does not dispute its obligation to pay these regardless of residence. Payment of additional non-contributory benefits, such as free travel, on the basis of some kind of “*connection*” with Ireland would be administratively unworkable. For these reasons, and so as to eschew discriminating on the basis of nationality (*i.e.* in favour of a group of non-residents of very predominantly Irish nationality), the Respondent submits that residence is the most appropriate basis on which an entitlement to non-contributory benefits such as free travel concessions may be calculated in a foreseeable and workable manner (that complies with Ireland’s obligations under EC law).

7. Nature of the Free Travel Scheme

7.1 The Respondent considers that, in order to prove eligibility for benefits after leaving Ireland, the person concerned must be able to point to a legal *nexus* that allows the right to continue to be claimed, in circumstances in which another State Party to the Charter has assumed Article 12 and 23 responsibilities for the claimant due to the change of residence. As mentioned above, this legal nexus exists with respect to pensions. The travel concession has no legislative basis and has always been paid by virtue of administrative discretion. The *Guidelines of the Department of Social and Family Affairs* for processing applications for free travel concession (discussed at paragraphs 4.2 to 4.6 of the Reply), are of insufficient legal weight to create this nexus. Furthermore, as the Applicant acknowledges (the Reply, paragraph 4.3), point 3.1 of the said Guidelines states that the “*Free Travel Scheme...allows people who are aged 66 and over and who are permanently resident in the State, to travel free of charge*”. The Respondent rejects the argument (the Reply, paragraph 4.4) that the change of wording in the most up-to-date version of the Guidelines (*i.e.* those dated 28 November 2007 a copy of which was attached to the Core Submissions), whereby reference is made to the requirement to be “*living permanently in the State*”, has made any material difference to the basis on which the concession are granted. The absence of a need for those in receipt of a pension to apply for a pass was purely for administrative convenience. Without any amendment by statute, it cannot, with all due respect, plausibly be argued (as the Applicant seeks to do in paragraph 4.5 of the Reply in order to eschew the critical factor that those it seeks to represent are not resident in Ireland) that: “*a discretionary scheme that has been in existence for over 40 years has been so intimately linked with the receipt of the pension that the Department administering it says that it will be paid automatically on qualification for the pension, has effectively ceased to be genuinely discretionary and has become an entitlement for pension-holders.*”

7.2 The Applicant also argues (the Reply, paragraph 4.8) that the “*measures*” of “*social protection*” to which reference is made under Article 23 of the Charter include a non-statutory scheme. This takes Article 23 plainly out of context. On no reasonable analysis can that provision be interpreted as *obliging* States Parties to promulgate non-statutory measures. Nor can it be argued that, simply because a measure is of a non-statutory nature, it reflects obligations contained in Article 23.

8. Article E and residence as “other status”

8.1 The Respondent reiterates its submission that the case-law of the European Court of Human Rights (“the Court”) has been slow to recognise alleged discrimination on grounds of residence as a basis on which Article 14 of the ECHR can be invoked. There is nothing in the text of Article E of the Charter to suggest that it should be interpreted more broadly than Article 14 ECHR. None of the authorities relied on by IFHR in this respect in paragraph 5 of the Reply, save *Darby v. Sweden* judgment of 23 October 1990, Series A no. 187, concern residence at all.

8.2 Further, even the reliance of IFHR on *Darby v. Sweden* is misconceived. The applicant in that case, a Finnish national, worked in Sweden as a doctor during the week, and spent the week-ends in a Finnish territory. Due to a change in Swedish law, he lost deductions for maintaining two homes, and deductions for travel expenses. The change in the law also meant he had to pay a higher rate of tax, and a special tax to the Swedish Lutheran church. He was told by the Swedish authorities that he could not claim exemption from the church tax unless he formally registered as resident in Sweden.

8.3 Dr Darby's petition to the Court concerned the following discrete point. He claimed that the refusal to grant him an exemption from the impugned part of the church tax on the ground merely that he was not formally registered as a resident in Sweden amounted to a discrimination in comparison with other non-members of the Swedish Lutheran Church who were so registered. Ireland would refer the Committee to paragraphs 30 to 33 of the Court's judgment from which it is clear that the basis of the judgment is narrower than that suggested in the Reply.² First, it primarily concerned discrimination on the basis of tax registration, with the court placing little emphasis, and failing to develop any legal doctrine, concerning residence. Secondly, the Court focussed on the fact that Sweden had failed to develop any arguments on whether the difference in treatment had a "legitimate aim", thereby illustrating that there will commonly be legitimate justification for difference in treatment based on residence.

² These paragraphs are worded as follows:

"30. Article 1 of Protocol No. 1, second paragraph (P1-1-2), establishes that the duty to pay tax falls within its field of application. Accordingly, Article 14 (art. 14) is also applicable (see, *mutatis mutandis*, the Inze judgment of 28 October 1987, Series A no. 126, pp. 17-18, paras. 36-40).

31. Article 14 (art. 14) protects individuals placed in similar situations from discrimination in their enjoyment of their rights under the Convention and its Protocols. However, a difference in the treatment of one of these individuals will only be discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" and if there is no "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, amongst other authorities, the above-mentioned Inze judgment, *ibidem*, p. 18, para. 41).

32. It appears first that Dr Darby can claim to have been, as regards his right to an exemption under the Dissenters Tax Act, in a situation similar to that of other non-members of the Church who were formally registered as residents in Sweden.

33. As regards the aim of this difference in the treatment of residents and non-residents, it is worth noting the following. According to the Government Bill (1951:175) which gave rise to the Dissenters Tax Act, the reason why the right to exemption was reserved for persons formally registered as residents was that the case for reduction could not be argued with the same force in regard to persons who were not so registered as it could in regard to those who were, and that the procedure would be more complicated if the reduction was to apply to non-residents (see paragraph 22 above). The Government Bill (1978/79:58) containing the tax-law amendments that brought about this complaint did not mention the special situation which the amendments would create for non-residents under the Dissenters Tax Act (see paragraph 20 above). In fact, the Government stated at the hearing before the Court that they did not argue that the distinction in treatment had a legitimate aim" (emphasis added).

8.4 Finally, the Applicant asserts that none of the Court authorities on which Ireland relies “concerned the refusal by a Contracting State to allow access to services provided in its territory to persons, who otherwise qualified for those services and were in receipt of closely related services, simply based on their residence in another state” (the Reply, paragraph 5.4). This point is misconceived. The Respondent is not providing a service to those in receipt of a free travel concession, but a discretionary non-contributory benefit for elderly persons over whom the Respondent has responsibility under the Charter, *i.e.* for those resident in Ireland.

9. Membership of the European Community

9.1 The Applicant’s assertion (the Reply, paragraph 6.1) that “*the Committee should not give any undue deference to EC law*” is misconceived. The Respondent has acknowledged (Core Submissions, paragraph 7.5) that States Parties to the Charter are not absolved with respect to their obligations thereunder by virtue of their membership of an international organisation; rather it submits that where the organisation in question protects fundamental rights in a manner which can be considered equivalent to that for which the Charter provides, the Committee should exercise a presumption that the State Party has not departed from its Charter obligations. Any interpretation of the Charter should therefore take due account of Ireland’s obligations under other international treaties.

9.2 Furthermore, the Applicant's assertion (the Reply, paragraph 6.3) that the issues under dispute are "*not the subject of any EC law specifically*" is misconceived. There is a large body of Court of Justice case-law and EC legislation on social security rights which govern the position on the social security rules applicable when EU citizens move between Member States. Even more significantly, under Article 12 of the EC Treaty, discrimination on grounds of nationality is absolutely prohibited. The Applicant proposes effectively that the Respondent's EC law obligations should be ignored so the Complaint can be considered on the basis of the Respondent's Charter obligations alone. The Respondent submits however that the Charter should be interpreted so as to enable it to comply with its EC law obligations (given the equivalent protection of human rights provided by the EC). What EC law requires is an objective rule, applicable to all such citizens, to prevent discrimination on grounds of nationality. The Respondent maintains that the grant of Irish free travel concessions on the basis of the objective criterion of residence in Ireland is entirely appropriate, having regard to the need for legal certainty and for compliance with EC law.

9.3 Neither of the two judgments of the Court of Justice of the European Communities cited by the Applicant, *Pusa*³ and *Turpeinin*⁴, assist the Applicant. Both cases concerned Finnish citizens with a statutory right to a Finnish pension that was reduced by the Finnish authorities following their respective moves to another Member State. They can, thus, readily be distinguished from the case at hand in that (i) Finland and no other EC Member State remained responsible for the payment of the full pension and (ii) the pension entitlement was prescribed by Finnish law. In the present case, the Applicant does not claim that the Respondent has reduced the pension entitlements of those it seeks to represent because they no longer live in Ireland but seeks access for them to an ancillary benefit provided as a matter of administrative discretion based on residence in Ireland.

³ Case C-224/02 [2004] ECR I-5763.

⁴ Case C-520/04 [2006] ECR I-10685.

10. Conclusion

10.1 There is no basis under the Charter whereby the Respondent is responsible for the payment of non-statutory and discretionary benefits with respect to individuals (largely of Irish nationality) who are entitled to contributory Irish pensions but who have ceased to reside in Ireland (in many cases a long time ago). Although the Respondent acknowledges its obligation to make payments accruing by reference to its own statutory laws, such as the payment of pensions, to non-residents who now fall under the responsibility, pursuant to the Charter, of another State Party, legal certainty prevents extension of this responsibility beyond payments prescribed by law to other non-contributory benefits provided to Irish residents on the basis (with certain limited exceptions not relevant to the Complaint at issue) of their satisfying an age condition, i.e. being aged at least 66 years.

10.2 Ireland submits that the Reply does not undermine in any way its Core Submissions and would refer the Committee back again to this document together with these additional comments on the Reply.