



4 May 2007

Case document No. 1

**Sindicato dos Magistrados do Ministério Público (SMMP)
v. Portugal**
Complaint n° 43/2007

COMPLAINT

registered at the Secretariat on 17 April 2007

Executive Secretary of the European Social Charter
Mr Régis Brillat

**Collective complaint submitted
to the European Committee of Social Rights**

The *Trade Union of Members of the Public Prosecutor's Office*, under the terms of Article 1 (c) of the Additional Protocol to the European Social Charter providing for a system of collective complaints, submits the ensuing complaint against the **Portuguese Republic** for violation of the principles set out in paragraph 12 of Part I and paragraphs 1, 2 and particularly 3 of Article 12 of Part II of the Revised European Social Charter, based on the following grounds:

I. ADMISSIBILITY

I.1 RELEVANT INSTRUMENTS RATIFIED BY THE PORTUGUESE REPUBLIC

1. The Portuguese Republic signed the European Social Charter on 1 June 1982 and deposited its instrument of ratification on 30 September 1991 (approved for ratification by Resolution No. 21/91 of the Assembly of the Republic and ratified under Decree No. 38/91 of the President of the Republic).

2. The European Social Charter came into force in Portugal on 30 October 1991.

3. On 9 November 1995 the Portuguese Republic signed the Additional Protocol to the European Social Charter providing for a system of collective complaints and deposited its instrument of ratification on 20 March 1998 (approved for ratification by Resolution No. 69/97 of the Assembly of the Republic and ratified under Decree No. 72/97 of the President of the Republic).

4. The Additional Protocol to the European Social Charter providing for a system of collective complaints came into force in Portugal on 1 July 1998.

5. The Portuguese Republic signed the Revised European Social Charter on 3 May 1996 and deposited its instrument of ratification on 30 May 2002 (approved for ratification by Resolution No. 64-A/2001 of the Assembly of the Republic and ratified under Decree No. 54-A/2001 of the President of the Republic).

6. The Portuguese Republic considers itself to be bound by the principles and provisions of the European Social Charter as invoked for the purposes of the present complaint, given that

Decree No. 54-A/2001 of the President of the Republic only set out a number of selective reservations concerning the application of Article 2 (6) and Article 6 (4).

I.2 THE LEGITIMACY OF THE TRADE UNION OF MEMBERS OF THE PUBLIC PROSECUTOR'S OFFICE

7. The Trade Union of Members of the Public Prosecutor's Office is a representative organisation to which members of the Public Prosecutor's Office can affiliate on a voluntary basis.

8. One of the main aims of the Trade Union of Members of the Public Prosecutor's Office (as in any other trade-union type organisation) is to defend the rights and interests of this category of employee, particularly in terms of their socio-professional status, as well as the individual members' professional rights and interests.

9. Article 5 paras. 1, 2 and 3 of the Statute of the Trade Union of Members of the Public Prosecutor's Office stipulates that the Union must endeavour to defend the professional rights and interests of members, to protect this category's socio-professional status and to promote the status of Public Prosecutor's Office staff [APPENDIX I].

10. Therefore, the present complaint indisputably comes within the ambit of the statutory aims of the Trade Union of Members of the Public Prosecutor's Office.

11. The Trade Union of Members of the Public Prosecutor's Office is a Portuguese organisation responsible for representing the rights and interests of a category of employees (members of the Public Prosecutor's Office) as part, and under the jurisdiction, of the Portuguese legal system. It is empowered to submit complaints for unsatisfactory implementation of the provisions of the Charter under the terms of Article 1 (c) of the Additional Protocol to the European Social Charter providing for a system of collective complaints.

I.3 REPRESENTATION

12. Under the terms of the Rules of Procedure of the European Committee of Social Rights (adopted at the 201st session on 12 May 2005), such complaints must be signed by the person(s) empowered to represent the Trade Union in question.

13. By virtue of Article 19 (1) of the Statute of the Trade Union of Members of the Public Prosecutor's Office, the Chairman of the Governing Board is responsible for representing the Trade Union.

14. For this reason, and by decision of the Governing Board of the Trade Union of Members of the Public Prosecutor's Office [APPENDIX II], the present complaint has been duly signed by the President of the Governing Board.

II. OBLIGATIONS ARISING OUT OF THE EUROPEAN SOCIAL CHARTER

15. Portugal is bound by paragraph 12 (Parts I and II) of the Revised European Social Charter.

16. This requires the Portuguese Republic to provide the members of the complainant Union with a social security scheme capable of granting benefits commensurate with their social security contributions over their careers.

17. In accordance with the interpretation of the European Committee of Social Rights, Article 12 (1) of Part II of the Revised European Social Charter recognises the right to social security not only for employees but also for their dependents (Conclusions XIV-1, Ireland, p. 466).

18. Article 12 (2) of Part II of the Revised European Social Charter imposes a quality level on this service: States parties, such as Portugal, are required to maintain not merely minimum levels of social security but satisfactory levels capable of coping with all circumstances.

19. Article 12 (3) of Part II of the Revised European Social Charter consequently lays down the principle of non-regression, requiring states to endeavour to raise progressively the system of social security to a higher level.

20. This paragraph imposes on states such as Portugal an obligation to ensure that, where the relevant regulations and the actual facts are concerned, their social security systems develop in such a way as to improve the benefits provided rather than reducing them.

21. The case-law of the European Committee of Social Rights has developed criteria for deciding whether or not a specific national modification which has the effect of restricting rather than expanding the social security system complies with Article 12 (3). The criteria include: (i) the substance of the modification [scope, conditions for entitlement to benefit, level of benefits, duration, etc]; (ii) reasons for the modification and the social and political context; (iii) the extent of the modifications [category and number of persons affected, the volume of benefits before and after the change]; (iv) the need for and the expediency of the reform vis-à-vis the situation which prompted it; and (v) the actual outcome of the change.

22. Although the desire to improve social security finances has been accepted as a valid reason for amending the social security system, the reform obviously should not entail transforming a system that provides a fairly high level of social security into a minimum social welfare system.

23. The Trade Union of Members of the Public Prosecutor's Office is convinced that the amendment to the personal scope of the Social Welfare Service of the Ministry of Justice as effected

under Legislative Decree No. 212/2005 of 9 December 2005, excluding members of the Public Prosecutor's Office from its personal scope, infringes Article 12 (1), (2) and (3) of Part II of the Revised European Social Charter because it excludes dependents, is extremely restrictive and inappropriate in terms of the mandatory contributions payable by the employees, and manifestly fails to comply with various criteria already pinpointed by the European Committee of Social Rights.

III. THE SITUATION OF MEMBERS OF THE PUBLIC PROSECUTOR'S OFFICE VIS-À-VIS THE LEGISLATIVE AMENDMENTS IN PORTUGAL

24. Legislative Decree No. 212/2005 of 9 December 2005 excluded the members of the Public Prosecutor's Office from the scope of the Social Welfare Service of the Ministry of Justice on the grounds of the *current socio-economic situation of the country* [APPENDIX III].

25. The Social Welfare Service of the Ministry of Justice was set up under Legislative Decree No. 47.210 of 22 September 1966. Article 1 (1) mandates this department to *develop ties of solidarity among the employees of the Ministry and their families by helping them to meet their economic, social and cultural needs* [APPENDIX IV].

26. The beneficiaries of the Social Welfare Service of the Ministry of Justice embraced all staff members of the Ministry and their families, thus also including the staff of the Public Prosecutor's Office.

27. The regulations set out in Legislative Decree No. 47.210 of 22 September 1966 were confirmed by Article 22 (2) of Legislative Decree No. 235-B/83 of 1 June 1983, the latter instrument being subsequently approved by the regulations on the Social Welfare Service of the Ministry of Justice [APPENDIX V]

28. The aim in setting up the Social Welfare Service of the Ministry of Justice was reaffirmed in Ministry of Justice Official Communication No. 70/MJ/96 of 1 April 1996, published in the *Diário da República* (official gazette), Series II of 17 April 1996, as follows: *the Social Welfare Service of the Ministry of Justice plays an important and acknowledged role in the field of protecting the health of those working throughout the judicial system, which entails enormous medical expenditure* [APPENDIX VI]

29. This Official Communication not only stipulates that the Social Welfare Service must operate in complementarity with or in place of the general health protection schemes, but also lays down the modalities of the sickness assistance provided by the Social Welfare Service of the Ministry of Justice to its beneficiaries, as well as the areas in which the Social Welfare Service of the Ministry of Justice does not contribute in the case of beneficiaries who are simultaneously beneficiaries of the general scheme (ADSE).

30. Under the Implementing Law of the Ministry of Justice, approved by Legislative Decree No. 146/2000 of 18 July 2000, and particularly Article 5 (e) and Article 21 (2) thereof, the Social Welfare Service is subject to the supervision and superintendence of the Ministry of Justice, through the intermediary of a Governing Board made up of a Chairperson and two other members with equal rights, viz the Director General and the Department Director [APPENDIX VII].

31. In accordance with the provisions of Article 21 para. 1 (a) and (b) of the aforementioned Legislative Decree No. 146/2000 of 18 July 2000 the Social Welfare Service of the Ministry of Justice - which already had a nursery-kindergarten set up in pursuance of Legislative Decree No. 460/99 of 5 November 1999 - took on a dual mandate, namely to manage the Ministry's *health system* and to direct and implement the Ministry's *complementary social action* programmes.

32. Legislative Decree No. 129/2001 of 18 April 2001 then established the new Implementing Law for the Social Welfare Service of the Ministry of Justice, defining its status, attributions and personal scope [APPENDIX VIII].

33. Where *personal scope* is concerned, in line with the legislation setting up the Service, Article 3 of Legislative Decree No. 129/2001 of 18 April 2001 stipulated that the *beneficiaries* include serving members of the judiciary, civil servants and other staff [Article 3 para. 2 (a)], and also that entitlement could also be extended on request to members of the employee's family, including descendants [Article 3 paras. 3 and 4].

34. The members of the Public Prosecutor's Office previously enjoyed the status of beneficiary of the Social Welfare Services of the Ministry of Justice, together with the rights inherent in such status.

35. It should be noted that the Social Welfare Service of the Ministry of Justice was one of the first sector health protection systems set up in Portugal.

36. To many members of the complainant Union, the scale of the supplementary medical protection guaranteed by the Social Welfare Services of the Ministry of Justice was a decisive factor in their desire to become a member of the Public Prosecutor's Office.

37. The existence of a more advanced specific health protection system was perceived by most persons wishing to take up duties in the Public Prosecutor's Office as offsetting the lower salaries inherent in the profession.

38. Since employment in the Public Prosecutor's Office has never been very attractive in terms of remuneration, the advanced system of medical protection was geared to compensating for this

drawback, thus constituting the decisive factor that induced many individuals to become members of the national legal service.

39. Furthermore, the regular mobility of members of the Public Prosecutor's Office, which is one of the defining aspects of the judicial career from the recruitment stage onwards, offsets the inadequate health protection arrangements provided under the general system (ADSE - public service medical support system), which fully justifies the implementation of a complementary system intended to cater for these specific features.

40. Unfortunately, the Portuguese Government, instead of resorting to criteria based on proportionality and suitability in terms of delimiting the personal scope and the quantity and quality of benefits and the specific objectives of reforming the public social security systems, decided to make swingeing cuts based on the idea that rehabilitating public finances necessitates a rock-bottom social security system.

41. So, in addition to the fact that the list of beneficiaries of the Social Services of the Ministry of Justice set out in Article 3 of Legislative Decree No. 212/2005 of 9 December 2005 omits certain members of the national legal service, Article 26 (1) also provides that *the current beneficiaries who are family members or persons treated as such who do not fulfil the conditions set out in Article 4 for registration as beneficiaries shall forfeit beneficiary status.*

42. In other words, descendants of members of the Public Prosecutor's Office are also no longer beneficiaries of the Social Services of the Ministry of Justice.

43. Under the terms of Article 25 of Legislative Decree No. 212/2005 of 9 December 2005, members of the Public Prosecutor's Office who had until then been beneficiaries of the Social Service of the Ministry of Justice were transferred to the register of the general scheme for civil servants, the "ADSE".

44. Therefore, the application of Articles 3, 8, 25, 26 and 31 of Legislative Decree No. 212/2005 of 9 December 2005 excluding members of the complainant Union from entitlement to the Social Services of the Ministry of Justice constitutes retroactive application of these provisions, given that under the terms of the Law in force when they were granted entitlement to these benefits none of the grounds of exclusion had been present.

45. This retroactive application of the Law has an excessive and intolerable effect on the legitimate rights and expectations of the members of the complainant Union as beneficiaries of the Social Services of the Ministry of Justice, in blatant breach of the principle of prohibiting excessive measures inherent in the criteria underlying Article 12 para. 3 of Part II of the Revised European Social Charter.

46. In addition to the fact that the Social Services of the Ministry of Justice have not been wound up (in fact the *supplementary social benefit* system is still available for all beneficiaries under the terms of Legislative Decree No. 110/2006 of 9 June 2006 [APPENDIX IX]), the social benefit of sickness aid is a vital rather than an atypical benefit provided by these Services, especially since the latter were set up specifically in order to provide such medical benefits.

47. Furthermore, it is a benefit which is inherent in and indissociable from a person's status as civil servant of the Ministry of Justice and which therefore lacks any form of insecurity liable to justify its discontinuation at any time and for any reason, which means that it could only be reasonably expected to end with the loss of the aforementioned status.

48. Consequently, the excessive, intolerable effect on beneficiaries' rights of the retroactive application of Legislative Decree No. 212/2005 of 9 December 2005 also results from the aforementioned fact that the Social Services of the Ministry of Justice operate in *complementarity* with or in substitution of the general health protection schemes.

49. The exclusion of members of the Public Prosecutor's Office from entitlement to the Social Services of the Ministry of Justice is also irrational and unreasonable.

50. Article 3 of Legislative Decree No. 212/2005 of 9 December 2005 entitles the following civil servants of the State/Ministry of Justice to the Social Services of the Ministry of Justice: working and retired prison security staff; working and retired prison directors; working, non-active and retired members of the CID, forensic scientists dealing with ridge pattern analysis and the Judicial Police department; working and retired technical-professional staff dealing with social rehabilitation and teaching auxiliaries assigned to Social Rehabilitation Institute (IRS) educational centres; working and retired technical staff assigned to the IRS electronic surveillance units; and staff undergoing (re)training for specific careers.

51. The fact of attributing beneficiary status with the Social Services of the Ministry of Justice to the personnel mentioned in the previous paragraph and failing to attribute it to or even withdrawing it from specific employees linked to the Ministry of Justice, viz members of the national legal service working for the sovereign courts responsible for the administration of justice (to which category the civil servants in question belong) is something which lacks the least rational explanation, flies in the face of any criteria of alleged social justice and cannot be seen as offsetting any specific risk to which the members of the Public Prosecutor's Office are not exposed.

52. The truth of the matter is that members of the Public Prosecutor's Office discharge, for instance, duties involving co-ordination and supervision of police work.

53. They also direct investigations and conduct criminal proceedings.

54. Furthermore, their duties involve monitoring compliance with the law in the enforcement of sentences and safety measures, as well as measures involving compulsory confinement and treatment orders.

55. These examples of the duties associated with the work of a member of the Public Prosecutor's Office perfectly illustrate the similarity between the risks they face and those linked to some categories of civil servants who are still covered by the Social Services of the Ministry of Justice.

56. This is sufficient reason to conclude that the argument for retaining these categories of civil servants within the scope of the Social Services of the Ministry of Justice also applies to the members of the Public Prosecutor's Office, which means that Legislative Decree No. 212/2005 of 9 December 2005 is manifestly irrational on this point.

57. Nor is the exclusion of members of the Public Prosecutor's Office from the scope of the Social Services of the Ministry of Justice justifiable on economic/financial grounds, particularly since prior to the adoption of the aforementioned Decree the Trade Union of Members of the Public Prosecutor's Office proposed that the Portuguese Government increase individual contributions in order to preserve the viability of the system [APPENDIX X].

58. Given the Portuguese Government's failure to respond to this proposal, it may be assumed that the employees in question were not excluded for financial reasons.

59. If so, however, there is no legislative rationale for excluding members of the Public Prosecutor's Office from the Social Services of the Ministry of Justice, especially as they were prepared to increase their contributions in order to ensure that the system remained economically and financially sustainable.

60. Additionally, the Portuguese Government has at no point attempted to demonstrate that the solution adopted is an appropriate means of pursuing the aim of improving public finances. The fact is that no study has ever been conducted or published to demonstrate that if the Social Services of the Public Prosecutor's Office had been duly adapted and modernised, their operations would have been more costly to the public exchequer than under the current system.

61. The truth of the matter is that, according to a general consensus (the Portuguese Government has never published any comparative data), the ADSE is much more expensive, proportionally and in absolute terms, for the State budget than were the Social Services of the Public Prosecutor's Office in its pre-2005 configuration.

62. Consequently, the Portuguese Government's decision is also incomprehensible from the purely economic angle.

63. The Government's option embodied in Legislative Decree No. 212/2005 of 9 December 2005 constituted a major retrograde step in the health protection system for members of the Public Prosecutor's Office.

64. The regressive nature of this development emerges clearly from Article 26 (2) of Legislative Decree No. 212/2005 of 9 December 2005, which retained entitlement to the Social Services of the Ministry of Justice for members of the Public Prosecutor's Office who have reached the age of 65 or who suffer from chronic illness (the latter are entitled by law to exemption from payment) or who are in a situation of permanent disability.

65. Another clear indication of the regression in the protection of the members of the complainant Union is that the Portuguese Ministry of Justice subsequently concluded an agreement with a private health insurance to enable civil servants who so wish to become affiliated, at their own expense, obviously..

66. Legislative Decree No. 212/2005 of 9 December 2005 thus represents a very real situation of unjustified and unreasonable regression in the social security system, entailing, in particular, a major reduction in the previous guarantees vis-à-vis medical consultations and hospitalisation.

67. It follows from the foregoing arguments that the content of the changes under Legislative Decree No. 212/2005 of 9 December 2005 affecting the members of the Public Prosecutor's Office are incompatible with Article 12 para. 3 of Part II of the Revised European Social Charter, because there is no justification either for excluding such staff from entitlement to the Social Services of the Ministry of Justice or for reducing their level of protection.

68. It further follows that the (budgetary) grounds on which the Portuguese legislator based the changes are inappropriate because the members of the Public Prosecutor's Office stated their willingness to increase their financial contributions in order to ensure the viability and integrity of the Social Services of the Ministry of Justice. This is a manifest infringement of Article 12 para. 3 of Part II of the Revised European Social Charter.

69. It is also evident that the reform was unnecessary in the case of the members of the Public Prosecutor's Office because the Social Services of the Ministry of Justice do not constitute a social security scheme providing the same benefits as the general system (the ADSE) but rather represent a complementary, or sometimes an alternative scheme; this is manifestly incompatible with Article 12 para. 3 of Part II of the Revised European Social Charter.

70. Lastly, it also follows that the actual results of the legislative change fail to justify the latter or to vindicate the general reduction in the level of social protection, in breach of Article 12 para. 3 of Part II of the Revised European Social Charter.

IV. REQUEST

In these terms and under the present complaint, the Trade Union of Members of the Public Prosecutor's Office request that the European Committee of Social Rights declare that by publishing Legislative Decree No. 212/2005 of 9 December 2005 the Portuguese Government violated the Revised European Social Charter as it failed to apply appropriately paragraph 12 of Part I and Article 12 paragraphs 1, 2 and 3 of Part II, given that it effected an unnecessary and unreasonable reduction of the standard of the social security and health protection system applicable to members of the Public Prosecutor's Office.

The President of the
Trade Union of Members of the Public Prosecutor's Office

António Cluny