

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



7 December 2007

Case document No. 3

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

**WRITTEN SUBMISSIONS FROM THE GOVERNMENT
ON THE MERITS**

registered at the Secretariat on 3 December 2007



*Ministério da Justiça
Gabinete do Ministro*

European Committee for
Social Rights
Claim n. 43/2007

Regarding the above identified claim, put forward by Prosecutors' Union, the Portuguese Government notes the following:

1. The Plaintiff invokes that Decree-Law n. 212/2005, of 9 December, in its application to prosecutors, infringes Part I (12), and article 12 (1), (2) and (3) of Part II of European Social Charter.
2. In effect, this act excluded prosecutors from the beneficiaries' scope of Ministry of Justice Social Services.
3. Nevertheless, it did not infringe in any way the invoked precepts of the Revised European Social Charter.
4. The above mentioned Social Services of the Ministry of Justice (SSMJ) were created by Decree-Law n. 47210, of 22 September 1966, in order to establish solidarity relations between the ministry's officials and their relatives and to help satisfying their needs of economic, social and cultural nature.



5. Decree-Law n. 129/2001, of 18 April (former organic law for these services) defined the following mandate:
 - a) *Ensure a health system and medical, pharmaceutical and social care to beneficiaries;*
 - b) *Promote satisfaction of needs derived from professional, personal, family and cultural situations of beneficiaries;*
 - c) *Encourage, in collaboration with other entities or services in, among others, employment, social security, health and education sector, the articulation and harmonisation of mechanisms for complementary social work benefits;*
 - d) *Ensure satisfaction of needs not covered or only partially covered by Public Administration's social security general systems.*

6. Managing the health subsystem in the area of Justice was one, among others, of the SSMJ's competences.

7. Article 3 of Decree-Law n. 129/2001 determined the personal scope of SSMJ's beneficiaries, which were defined in its n. 2:
 - a. Magistrates, servants, agents and other working staff (subparagraph a));
 - b. Jubilees, pensioners or retired employees who render or have rendered service in any Ministry of Justice's department (subparagraph b));
 - c. All other staff determined by law, agreements or conventions (subparagraph c)).



8. Nevertheless, Portugal's economic and social context lead the legislator to try to prevent beneficiaries from having the possibility to accumulate benefits of similar nature between the different health subsystems;
9. SSMJ's health subsystem only covers certain professional categories from the Ministry of Justice, with parallelism only in the Armed Forces and national security forces.
10. Thus, by publishing the referred Decree-Law n. 212/2005 as well as Decree-Law n. 234/2005, of 30 December, republished as annex to Decree-Law n. 118/83, of 25 February, the legislator harmonised the rules of several health subsystems of public officials,
11. Having the mentioned Decree-Law n. 212/2005 provided that all agents and officials of Ministry of Justice, except the ones included in its article 3 and in the rules for exceptional situations (article 26 (2)), would no longer benefit from the health subsystem of Ministry of Justice Social Services,
12. In order to become beneficiaries of the State Officials Sickness Insurance scheme (*ADSE*).
13. Article 1 of Decree-Law n. 118/83, of 25 February, as amended by Decree-Law n. 234/2005, of 30 December, defines *ADSE* as a body of the Ministry of Finances and Public Administration's central



- structure with administrative autonomy and designed to offer protection in the following areas: a) health care; b) maintenance allowance; c) other social security benefits. Under article 1 (2), regarding health care, its action is directed to: a) promoting and monitoring health; b) preventing, treating and recovering from illness.
14. Members of the Plaintiff were beneficiaries of *SSMJ* (to which they did not pay the salaries' compulsory deduction) and at the same time of *ADSE* (where their deductions would go to).
15. Article 63 (3) of the Portuguese Republic's Constitution determines that the social security scheme will protect citizens in sickness, old age, disability, widowhood and orphanhood, as well as in unemployment and all other situations related to lack or few means of subsistence or working capacity.
16. The definition of the basis for social security scheme is recorded in the Basic Law on Social Security (Law n. 4/2007, of 16 January).
17. Social security scheme covers the system for social protection of citizenship, welfare services and complementary scheme (article 23).
18. Article 50 of Law n° 4/2007 determines that:



“The welfare services intend to guarantee, based on the principle of solidarity of professional nature, cash benefits replacing income from lost work due to legally defined situations”.

19. And article 52 of the same law establishes that social protection from welfare services integrates sickness situations; maternity, paternity and adoption; unemployment; accidents at work and professional illnesses; invalidity; old age; and death.

20. The above mentioned Basic Law on Social Security ensured survival of existing special schemes when it became into force (article 103), though underlining the goal of convergence between public social protection schemes and social security schemes (article 74).

21. The Revised European Social Charter establishes, among others, the “right to health protection” (article 11) and the “right to social and medical care” (article 13).

22. In turn, article 12 of the Revised European Social Charter refers to the “right to social security”.

23. This “social security” is guaranteed, in Portugal, to agents, servants and staff of Public Administration, by the Civil Service Pension Fund (Decree-Law n. 84/2007, of 29 March) and, consequently,



Decree-Law n. 212/2005 cannot infringe the established in article 12 of European Social Charter.

24. The Civil Service Pension Fund (CGA) is, *de facto*, the welfare institution for civil service in pension matters, having as its mission managing social security scheme of civil servants and similar workers in pension, retirement, survival matters, and other matters of special nature, as well as of family allowance and complementary benefits.

25. On the other hand, the Portuguese Government ensures the right to health protection through National Health Service (SNS), which covers all official institutions and services that provide health care dependent of the Ministry of Health (cfr. National Health System's Statute, approved by Decree-Law n. 11/93, of 15 January, as amended by Decree-Laws n. 276-A/2007, of 31 July; 223/2004, of 3 December; 185/2002, of 20 August; 68/2000, of 26 April; 157/99, of 10 May; 401/98, of 17 December; 97/98, of 18 April; 53/98, of 11 March and 77/96, of 18 June).

26. The SNS *"is a ranked and hierarchical set of official institutions and services which provide health care, working under the superintendence or tutelage of Ministry of Health"* (article 1), having as main goal the *"establishment, by the State, of its responsibility in the area of individual and collective health protection"* (article 2).



27. However, regarding civil servants, social protection in situations of lack of medical care is offered through *ADSE*.
28. *ADSE* is the materialisation of the desire to offer the most extensive and best social protection (health care) to civil servants, whom are also covered by the above mentioned *SNS*.
29. For *SSMJ*'s health subsystem, at the date of publication of Decree-Law n. 212/2005, all Ministry of Justice officials were covered, regardless from benefiting from *ADSE* or not.
30. Members of the Plaintiff were beneficiaries of both *ADSE* and *SSMJ*.
31. The mentioned Decree-Law limited the access to *SSMJ*'s health subsystem to the professional categories referred to in its article 3.
32. It must be recalled that the main line of action surrounding the approval of that act, and all other legislation related to public health subsystems, was harmonising the rules of health subsystems of all State officials.
33. It should also be noted that all Ministry of Justice officials, except the ones included in article 3 of Decree-Law n. 212/2005 and in the rules establishing special situations, are no longer *SSMJ*'s beneficiaries.



34. Surely, though, there were exceptions to the exclusion from the quality of beneficiary (article 26 (2)).

35. However, contrary to what the Plaintiff seems to want to demonstrate, it is clear that all its members benefited and will benefit in the future from *ADSE*.

36. That means that members of the Plaintiff were never or will never be without any health protection scheme (assistance in sickness), which has always been ensured to them.

37. They simply no longer benefit from *SSMJ*'s health subsystem.

38. The legislator was very clear in mentioning *ADSE*'s affiliation for all those not covered by article 3 of Decree-Law n. 212/2005.

39. If approved legislation imposes an equality policy for benefits received, straightening out the existing discrepancies between the different existing health subsystems for public administration,

40. Excluding members of the Plaintiff from *SSMJ*'s health subsystem was a measure complying with the established in the European Social Charter, since those members still benefit from health protection through *ADSE*.



41. Thus, no expectations, at least legitimate, were infringed, and least of all in a costly or intolerable way.
42. Nevertheless, under article 26 (2) of Decree-Law n. 212/2005, there were also members of the Plaintiff who are still part of *SSMJ*'s health subsystem, as special very vulnerable cases due to old age, chronic disease or permanent disability.
43. The Plaintiff considers that excluding its members from *SSMJ* health subsystem's beneficiaries group is not based on rational grounds or explanation.
44. With all due respect, also in this case the Plaintiff is not right.
45. The line of action behind the approval of Decree-Law n. 212/2005 was harmonising the rules of civil servants' health subsystems.
46. All Ministry of Justice officials, excepting the ones included in article 3 of the Decree-Law and in the rules establishing special situations, are no longer *SSMJ*'s beneficiaries.
47. However, besides special cases related to age or sickness (article 26 (2)), those exceptions may only derive from activities developed by the beneficiaries covered by the former.



48. The parallelism between Armed Forces, security forces and elements integrated in the professional careers foreseen in article 3 is obvious.
49. It is indisputable that Armed Forces bear statutory duties which are too expensive, thus justifying special regulation in the area of health protection: *“Military personnel must always be prepared to defend their motherland, even if it means sacrificing their own lives...”* (article 9 of the Armed Forces Members’ Statute, approved and published in annex to Decree-Law n. 236/99, of 25 June).
50. It is also undeniable that comparable risk exists in security forces, like Public Security Police (PSP), whose competences *“derive from internal security legislation and, in exceptional situations, result from legislation on national security, state of siege and state of emergency”* (existing article 3 of Basic Law on PSP, approved by Law n. 53/2007, of 31 August),
51. Those competences and the established in the very Law on Internal Security (Law n. 20/87, of 12 June, as amended by Law n. 8/91, of 1 April) imply special danger to its agents.
52. The same applies, for instance, to National Republican Guard (GNR), whose military personnel is also obliged to pursue security duties sacrificing their own lives if necessary (article 6 of GNR



Military Personnel's Statute, approved by Decree-Law n. 265/93, of 31 July).

53. In view of the danger imposed to the activities of these State servants, the decision should always be to keep strong connection between competences, which justify similar treatment to the one given to Armed Forces and security forces.

54. I.e., Decree-Law n. 212/2005 kept these professions in the *SSMJ* health subsystem's framework based on equality reasons.

55. Judiciary Police, for example, is expressively qualified as security force, along with *GNR* and *PSP* (article 14 (2) (d) of Law on Internal Security).

56. Attention should also be drawn to the special danger incurred to by Prison Guard's personnel and prisons' directors, as well as by some staff of the Social Reintegration Institute, present Directorate-General for Social Reintegration, whose activities are clearly comparable to the one executed by Prison Guard's personnel, as evident when comparing article 2 of Decree-Law n. 126/2007, of 27 April, with article 2 of Decree-Law n. 125/2007, of 27 April.



57. It is so much so that some professional careers may use fire arms in the exercise of their activities, as long as they respect situations defined in article 123 of Decree-Law n. 265/79, of 1 August.
58. It is obvious that the main aspect is not the use of a fire arm in itself, but the reasons that lead the legislator to allow its use, in the exercise of their competences, to elements of certain professional careers belonging to the Ministry of Justice, and not to others.
59. Situations where officials of Ministry of Justice may use a fire arm are very different from the ones where prosecutors or judiciary officials may do it (in terms of action, not the purpose).
60. As it is known, members of the Plaintiff are statutorily authorised to use and carry a weapon for defence.
61. The possibility foreseen by the law is the use of a fire arm for self defence.
62. It is surely not for using in the exercise of their magisterial competences.
63. It is clear that, regarding the level of danger related to a job, there is a difference between the established possibility of using a fire arm when exercising competences and the established possibility of using a weapon for self defence.



64. This distinction is obvious in article 107 of Public Prosecutor's Office Statute, approved by Law n. 47/86, of 15 October, that underlines the special right of its members to "*freely use, carry and own defence weapons...*" and to "*special protection of himself, his family and possessions (...) every time important security reasons demanded it*" [(cfr. subparagraphs b) and g)],
65. It should also be noted that staff from Directorate-General for Social Reintegration included in article 3 of Decree-Law n. 212/2005 is exposed daily to much higher levels of danger than the ones members of the Plaintiff are exposed to.
66. Mainly because Education Law (published in annex to Law n. 166/99, of 14 September), and the various regulations on Educational Centres determine the adoption of "*personal physical restraint*", resorting to physical force (articles 178 and 182 of Education Law).
67. Thus, it is clear that a difference exists between elements covered by SSMJ's health subsystem and others who, as the members of the Plaintiff, were excluded, benefiting exclusively from another health subsystem.
68. It is, hence, justified the persistence of a health subsystem for agents and officials of Ministry of Justice subject to special physical



or health risk, as well as, in certain circumstances, obliged by law to use force to keep the order.

69. The Plaintiff does not admit or, with all due respect, does not want to admit that, while in dangerous situations, its members may resort to the protection of *law enforcement forces*,

70. Elements included in article 3 of Decree-Law n. 212/2005, in similar situations, represent themselves those forces.

71. This said, members of the Plaintiff, till the entry into force of article 3 of Decree-Law n. 212/2005, benefited from accumulation of benefits of similar nature (*ADSE* and *SSMJ*).

72. In this case the question is not to understand how members of the Plaintiff used those benefits *ADSE/SSMJ*, if as complement or replacement.

73. The question is, in fact, to determine the existence or not of a coincidence between such benefits.

74. And the truth is, considering the listed attributions of *SSMJ* and *ADSE*, that benefits from both public health subsystems are undeniably identical.



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75. So the exclusion of members of the Plaintiff from SSMJ's health subsystem does not represent retrogression in the social protection scheme, subsequently not infringing European Social Charter.

The Ministry of Justice of Portugal

A handwritten signature in black ink, appearing to read 'Alberto Costa'.

(Alberto Costa)