

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



11 February 2008

Case document No. 4

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

**RESPONSE OF THE SMMP TO THE GOVERNMENT'S
WRITTEN SUBMISSIONS ON THE MERITS**

registered at the Secretariat on 30 January 2008

From: SMMP Trade Union of Members of the Public Prosecutor's Office

To: The President of the European Committee of Social Rights

Complaint nº 43/2007

The *Trade Union of Members of the Public Prosecutor's Office* submits its response, in accordance with §2 of Rule 31 of the Rules of the European Committee of Social Rights, to the memorial submitted by the *Portuguese Government* in connection with the above complaint, on the following grounds:

1. The purpose of the present complaint is to determine whether the exclusion of members of the Public Prosecutor's Office from the scope of beneficiaries of the Social Welfare Services of the Ministry of Justice under Legislative Decree No. 212/2005 of 9 December 2005 is consistent with the obligations arising from the European Social Charter.
2. So far as it is possible to ascertain from the arguments adduced by the Portuguese Government in its memorial, the Portuguese Republic contends that that exclusion is consistent with the obligations assumed under the European Social Charter for the following reasons:
 - a) The purpose of the exclusion of members of the Public Prosecutor's Office from the scope of beneficiaries of the Social Welfare Services of the Ministry of Justice is to preclude the possibility of accumulating similar benefits granted under different health protection schemes (the Ministry of Justice scheme SSMJ and the general scheme ADSE);

- b) The beneficiaries of the Social Welfare Services of the Ministry of Justice include only officials in professional categories that have parallels in the armed forces and security forces;
 - c) The exclusion of members of the Public Prosecutor's Office from the scope of beneficiaries of the Social Welfare Services of the Ministry of Justice is consistent with the obligations arising from the European Social Charter because members of the Public Prosecutor's Office continue to enjoy health protection under the general scheme ADSE;
 - d) The retention of some professional categories in the Ministry of Justice in the scope of beneficiaries of the respective Social Welfare Services and the exclusion of members of the Public Prosecutor's Office is based on a line of reasoning: the parallel with the scheme applicable to the armed forces and security forces is detectable in the former cases but not in the latter;
 - e) Finally, there is no breach of the principles of the European Social Charter because the beneficiaries of the health protection afforded by the Ministry of Justice schemes SSMJ and the general scheme ADSE are identical.
3. With due respect, the arguments submitted by the Portuguese Government not only fail to provide a rational justification for the changes to the health protection scheme of members of the Public Prosecutor's Office, but confirm the uncertain and arbitrary nature of the selection of professional categories still covered by the Ministry of Justice schemes SSMJ and the reduction in the level of health protection granted to members of the Public Prosecutor's Office. We shall see.

4. In the first place, the Portuguese Government states that the purpose of the exclusion of members of the Public Prosecutor's Office from the scope of beneficiaries of the Social Welfare Services of the Ministry of Justice was to preclude the possibility of accumulating similar benefits granted under different health protection schemes. If that was the aim, limiting the personal scope of the Ministry of Justice scheme SSMJ appears to be frankly incomprehensible.
5. The legislator himself explains, in the preamble to Legislative Decree No. 212/2005 of 9 December 2005, that the motive for introducing the measure was the realisation that « *The present economic and social situation in the Country requires that beneficiaries be prevented from accumulating identical benefits under various health subsystems, and the principles of social justice require that a policy of equity be established with respect to the benefits received by officials and staff of the Public Administration, to regularise the present situation of discrepancies between the various health subsystems within the Public Administration* ».
6. The avowed aim was therefore to help to balance the public books. Had the budgetary and financial situation in Portugal been different, it seems certain that the personal scope of the Social Welfare Services of the Ministry of Justice would not have been changed.
7. It is curious to note that the Portuguese Government does not mention any study that might substantiate that assertion. Whether or not the reduction in the personal scope of the Social Welfare Services of the Ministry of Justice had the desired effect on the balance of the public books is not in fact known.
8. What is undeniable is that the members of the Public Prosecutor's Office proposed to the Portuguese Government an increase in their contributions to the public health protection scheme [see ANNEX X] and that that proposal was quite simply ignored. With regard to the financial balance of the Ministry of Justice health protection scheme, what can be

- concluded is that the Portuguese Government did not explore alternative ways of maintaining the same level of protection.
9. But what must be pointed out, to show the incongruities of the entire process, is that it is impossible simply to assert, as the Portuguese Government does, that maintaining the Social Welfare Services of the Ministry of Justice (with the 2005 personal scope) parallel with the general scheme ADSE allowed «[...] *the possibility of accumulating identical benefits under various health subsystems* [...]».
 10. It was the Ministry of Justice of the Portuguese Government itself that openly stated, in Communication No. 70/MJ/96, of 1 April 1996, published in the *Diário da República* (Official Gazette), Series II, of 17 April 1996 [see ANNEX VI] that the Social Welfare Services of the Ministry of Justice were to operate in complementarity with or in place of the general health protection schemes.
 11. Contrary to what the Portuguese Government claims in Article 72 of its memorial, the question of whether they operated in complementarity with or in place of the general health protection scheme is a question not of the use beneficiaries made of them but of the actual operation of the subsystem. It must be noted, again, that this was formally and publicly acknowledged by the Ministry of Justice itself.
 12. Consequently, whether the Social Welfare Services of the Ministry of Justice operated in complementarity with or in place of the benefits provided by the general health protection schemes, the result was that the exclusion of members of the Public Prosecutor's Office from the scope of beneficiaries of those services did not prevent the accumulation of identical benefits but rather reduced the health protection they had previously been granted.

- 13.** In other words, the members of the Public Prosecutor's Office ended up with less health protection than they had before, because there were alternatives that would enable them to maintain the same level of protection.
- 14.** Lastly, on this point, the aim which the Portuguese Government claims underlies the reduction in the personal scope of the Social Welfare Services of the Ministry of Justice does not correspond to the result:
- i.** Because the principal motive for the change was purely financial, as admitted;
 - ii.** Because there were alternative forms of financial compensation which would enable the subsystem to be maintained and which were not explored;
 - iii.** Because the members of the Public Prosecutor's Office proposed an increase in their personal contributions but the proposal was not even considered;
 - iv.** Because the Social Welfare Services of the Ministry of Justice operated in complementarity with the general health protecting schemes or in place of them, so they did not, generally, facilitate the accumulation of identical benefits;
 - v.** Because the only result of the exclusion of members of the Public Prosecutor's Office from the personal scope of the Social Welfare Services of the Ministry of Justice was to reduce the level of protection granted to them, not to prevent duplication of identical benefits.
- 15.** The second line of argument pursued by the Portuguese Government in its memorial has to do with the explanation for maintaining the personal scope of the Social Welfare Services of the Ministry of Justice but restricting it to officials in certain categories. The Portuguese Government states that the Social Welfare Services of the Ministry of Justice

- were maintained only for professional categories that had parallels in the armed forces and security forces.
- 16.** If the complainant understands the argument, what the Portuguese Government means to say is that officials who are subject to greater risks should benefit from more concentrated health protection.
 - 17.** The first point that must be made, in this connection, arises from the fact that the Portuguese Government is contradicting itself: if the Social Welfare Services of the Ministry of Justice provide a higher level of health protection, then it is not true that the aim of the legislative change was to prevent the accumulation of identical benefits ...
 - 18.** As to the criterion employed by the Portuguese Government to determine the status of beneficiaries of the Social Welfare Services of the Ministry of Justice, it is clear that it was not the criterion of parallels with the health protection scheme applicable to the armed forces and security forces.
 - 19.** As already pointed out in the complaint submitted, the careers of officials in the Directorate General for Social Rehabilitation (formerly officers of the Social Rehabilitation Institute) have no parallels with the armed forces and security forces.
 - 20.** They are, moreover, officials who discharge essentially educational duties.
 - 21.** Consequently, the criterion employed to define the personal scope of the Social Welfare Services of the Ministry of Justice cannot have been the criterion of parallels with the armed forces and security forces.

22. If the criterion actually employed was the criterion of the risk associated with the duties of each professional category, then the exclusion of members of the Public Prosecutor's Office appears to be completely absurd.
23. As pointed out in the complaint, members of the Public Prosecutor's Office discharge duties involving coordination and supervision of police work, in the course of which they take the risks inherent in the work of coordination and supervision.
24. They also discharge the duties associated with the direction of investigations and the conduct of criminal proceedings, duties where the degree of risk is extremely high and, in certain cases, even higher than the risks incurred by the police operating under their direction.
25. Their duties also involve monitoring compliance with the law in the enforcement of sentences and safety measures and in the execution of compulsory confinement and treatment orders, where the degree of risk is certainly on a sufficiently high level.
26. Thus, if the criterion adopted was the degree of risk inherent in the duties performed, there is absolutely no reason whatever for the decision to exclude members of the Public Prosecutor's Office from the personal scope of the Social Welfare Services of the Ministry of Justice.
27. In this connection, the Trade Union of Members of the Public Prosecutor's Office cannot refrain from observing that it cannot understand the considerations advanced in the Portuguese Government's memorial on the significance of the right to carry fire arms.
28. These are purely gratuitous statements with no bearing, which are not even applicable to officials in the Directorate General for Social Rehabilitation and which clearly

- demonstrate the completely unreasonable nature of the Portuguese Government's position.
- 29.** The argument that officials of the Directorate General for Social Rehabilitation are subject to a higher degree of risk than members of the Public Prosecutor's Office is, with all due respect, little short of ludicrous.
- 30.** So the risk results from the exercise of educational duties in Educational Centres and the duty to restrict the use of physical force? But is that not an imperative for any employee of the authorities?
- 31.** It is a joke to consider that the risk associated with the duties of that professional category is higher than the risk associated with the direction of criminal investigations and the conduct of criminal proceedings, with the coordination of police work, or with participation in the enforcement of sentences.
- 32.** In conclusion, as to the criterion for limiting the personal scope of the Social Welfare Services of the Ministry of Justice:
- i.** There is no rational criterion to justify the restriction imposed by Legislative Decree No. 212/2005 of 9 December 2005.
 - ii.** The criterion of parallels with the armed forces and security forces does not explain the continued inclusion of officials of the Directorate General for Social Rehabilitation.
 - iii.** The criterion of risk does not explain the exclusion of members of the Public Prosecutor's Office.

- iv. This is consequently an unreasonable restriction, the aim of which can only be financial.
33. Finally, the third order of arguments employed by the Portuguese Government in its memorial is founded on the idea that the exclusion of members of the Public Prosecutor's Office from the scope of beneficiaries of the Social Welfare Services of the Ministry of Justice is consistent with the obligations arising from the European Social Charter because the members of the Public Prosecutor's Office continue to enjoy health protection under the general scheme ADSE and the benefits granted under that scheme are identical with those granted by the Social Welfare Services of the Ministry of Justice.
34. This is not a serious argument and the Portuguese Government should not employ it.
35. If the benefits granted by the Social Welfare Services of the Ministry of Justice and those granted under the general scheme ADSE were identical, the Portuguese Government would not have reduced the personal scope of the Social Welfare Services of the Ministry of Justice; it would simply have abolished the subsystem.
36. If the Portuguese Government maintained the subsystem for some professional categories, it was because it concluded that it provided a higher degree of health protection than the general health protection scheme provides.
37. The argument is even an attack on the capacity of the complainant's members to take decisions. The Trade Union of Members of the Public Prosecutor's Office does not want to engage in litigation against the Portuguese Republic. It did not submit the present complaint gratuitously or lightly. It submitted it because, without exploring the clearly viable alternatives, the Portuguese Government decided to reduce substantially the level of health protection that was provided.

38. It is not true, however, that the level of health protection provided by the two subsystems is identical.
39. As the complainant pointed out in Article 70 of the complaint, the Portuguese Government was well aware of the ensuing regression in the health protection of members of the Public Prosecutor's Office and, for that reason, subsequently concluded an agreement with a private health insurance company to enable officials who so wish to subscribe, at their own expense.
40. In this context, the statement referred to earlier is not a serious one and should be withdrawn.
41. Lastly, the Portuguese Government did not present any arguments in its memorial to disprove the evidence of failure to fulfil the obligations arising as a result of signing the European Social Charter, as claimed in the present response.
42. The conclusions of the complaint are therefore reiterated:
- A. Legislative Decree No. 212/2005 of 9 December 2005 caused a 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.
 - B. That regression was not justified by studies, reports, statistics or any other objective information.
 - C. The real, available and viable alternatives, which would enable the personal scope of the Social Welfare Services of the Ministry of Justice to be maintained intact, were not explored.

- D. The changes resulting from 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 them from the scope of beneficiaries of the Social Welfare Service of the Ministry of Justice or for reducing the level of protection.
- E. The (budgetary) grounds on which the Portuguese legislator based the changes are inappropriate because the members of the Public Prosecutor's Office were willing to increase their financial contributions in order to ensure the viability and integrity of the Social Welfare 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.
- F. The reform was unnecessary in the case of the members of the Public Prosecutor's Office because the Social Welfare Services of the Ministry of Justice do not constitute a social security scheme providing the same benefits as the general scheme (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.
- G. 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.

In these terms, the Trade Union of Members of the Public Prosecutor's Office requests 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