EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

3 May 2013

Case No. 2

Association for the Protection of All Children (APPROACH) Ltd v. France
Complaint No. 92/2013

OBSERVATIONS OF THE GOVERNMENT ON ADMISSIBILITY

Registered at the Secretariat on 3 May 2013

MINISTRY OF FOREIGN AFFAIRS

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LEGAL AFFAIRS DIRECTORATE

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FRENCH REPUBLIC

Paris, 3 May 2013

The Minister of Foreign Affairs

to

Secretariat of the Council of Europe
Directorate General of Human Rights
Secretariat of the European Social Charter
For the attention of the Executive Secretary

Subject: Collective Complaint No. 92/2013, Association for the Protection of All Children (APPROACH) Ltd v. France

In a letter of 26 March 2013, the Secretariat of the European Social Charter invited the French Government to submit observations on the admissibility of this complaint by 3 May 2013. The French Government would like to submit the following observations to the European Committee of Social Rights (hereinafter the "ECSR").

The Government disputes the admissibility of Complaint No. 92/2013 lodged by APPROACH on the ground that there has been a violation of Article 17 of the European Social Charter (hereinafter the "Social Charter") because not all corporal punishment of children is prohibited.

To begin with, several comments need to be made on the subject of the complaint. Firstly, the ECSR has already found violations of Article 17 of the Social Charter by France following the reports on the application of the Social Charter submitted in 2003, 2005 and 2011 because not all corporal punishment of children is prohibited. It is therefore well established that the ECSR has already ruled on the subject of this complaint and found a violation by France of Article 17 of the Social Charter. Furthermore, APPROACH does not provide any new evidence or refer to any specific circumstances of a nature to give rise to any fresh doubts as to the compatibility of the current legislation with Article 17 of the Social Charter. In fact, the only argument put forward by the association in support of the complaint is the finding of a violation which the ECSR has already arrived at in the course of the national reporting procedure.

The Government notes therefore that this complaint attempts to use the collective complaints system as a means of reiterating findings of violations issued in the context of the national reporting procedure. This aim is, moreover, clearly stated in the conclusions to APPROACH's submissions, when it says that it hopes that the ESCR will declare that "France's failure to fulfil its obligations, despite repeated conclusions of the ECSR and recommendations from UN Treaty Bodies, conflicts with effective respect for the provisions of the Charter".

In the Government's opinion, the subject of this complaint is not in keeping with the spirit of the Additional Protocol establishing a system of collective complaints and is especially incompatible with paragraph 2 of the preamble and Articles 5 and 8 of the Additional Protocol.

The explanatory report on this protocol states that the point of the system of collective complaints is to "give a new impetus to the Charter" (§1). It goes on to explain that "the introduction of a system of this type is designed to increase the efficiency of supervisory machinery based solely on the submission of governmental reports" and that it "is to be seen as a complement to the examination of governmental reports, which naturally constitutes the basic mechanism for the supervision of the application of the Charter" (§2). Lastly, paragraph 2 of the preamble states that member states are "resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter" (our underlining).

Clearly therefore the purpose of the collective complaints procedure is to complement the national reporting procedure and in no respect to duplicate it. It is also designed to bolster the participation of social partners and non-governmental organisations.

Article 8 of the Additional Protocol also provides that "the Committee of Independent Experts shall draw up a report in which it shall describe the steps taken by it to examine the complaint and present its conclusions as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision of the Charter referred to in the complaint". Article 8 therefore includes an implicit requirement to present a relevant legal question raising a problem of compatibility with one of the provisions of the Charter in support of any complaint.

However, it is quite clear to the Government that no such requirement has been fulfilled in support of this complaint as the ECSR has already responded in all respects to the question raised and already found a violation in the context of the national reporting procedure. The question that must be addressed therefore is whether there is anything to be gained from the ECSR examining a complaint which does not raise any new legal problems at a time of growing numbers of complaints and budget cuts.

It should be borne in mind that, by contrast with the national reporting procedure, which involves verifying compliance by each state party with each Article of the Social Charter every four years[1], the main advantage of the collective complaints procedure is its speed. The explanatory report on the additional protocol states this explicitly in relation to Article 5: "The adverb 'immediately' underlines that one of the advantages of the new procedure is its rapidity".

It should be recalled that, whereas, over the period from 2003 to 2010, the ECSR had to deal with six complaints per year on average, this figure rose to 13 complaints in 2012 and there have been no less than 11 complaints for the first three months of 2013 alone. Yet, declaring a complaint admissible when its aim is to make the ECSR reiterate a finding of a violation which it has already arrived at following the national reporting procedure **paves the way for disputes which may jeopardise the very system of collective complaints while bringing no potential improvement in the effectiveness of rights guaranteed by**

[1] On 3 May 2006, at its 963rd meeting, the Committee of Ministers adopted a new system for the presentation of reports (CM(2006)53).

the Social Charter in the States Parties. APPROACH's complaint proves that there is a genuine risk of the collective complaints procedure becoming saturated as it has lodged complaints against no fewer than seven States Parties on the same issue.

Admittedly, in paragraph 31, the explanatory report on the additional protocol notes that when the additional protocol on the collective complaints system was being negotiated, the Charte-Rel Committee chose not to include a provision in the protocol which would be a direct impediment to the possibility of violations found in the course of the national reporting procedure being the subject of a complaint and to leave the ECSR a margin of appreciation in this area[2]. Clearly therefore this matter was identified as a problem at the time of the negotiations and it was decided that the ECSR was best placed to deal with it depending on the content of the complaint submitted to it.

However, in the Government's opinion, a distinction should be made between, on the one hand, a fresh complaint linked to a previous finding of a violation by the ECSR and, on the other, a complaint stemming solely from the finding of a violation by the ECSR in the course of the national reporting procedure. While in the first case, the ECSR does indeed have scope to examine the admissibility of the complaint, the Government is not convinced that this is true in the second case.

Articles 21 and 29 of the 1961 Charter set out the follow-up procedure for findings of violations by the ECSR in response to a report submitted by a State Party. Neither the additional protocol nor any subsequent amendment to the 1961 Charter has made any provision for organisations such as APPROACH to "appeal on grounds of inaction" following a finding of a violation during the national reporting procedure. Follow-up to violations found by the ECSR is the responsibility of the Governmental Committee then, as a last resort, the Committee of Ministers. Consequently, since this complaint can be regarded as an appeal on grounds for inaction, it has no basis in any relevant treaty.

If the ECSR were to consider that it has the necessary scope to examine the admissibility of such a complaint, the Government would point out that the ECSR's own case-law prevents it from declaring the complaint admissible.

If, in a recent decision of 5 November 2012 on CESP v. France, the Committee declared a complaint which had already been dealt with in the context of a previous decision admissible, it was on the following ground: "The Committee considers that, in this case, the examination of the circumstances relating to the admissibility of the complaint has highlighted new evidence pertaining to the merits of questions raised in the context of previous complaints linked to the same subject-matter. This evidence concerns the command bonus awarded to senior police officers, its increase and the actual circumstances of the payment of this bonus to the officers in question".

Yet, as stated above, APPROACH's complaint does not present any new evidence and, accordingly, it can be dismissed as inadmissible.

In the light of the foregoing, the Government must invite the ECSR to declare the complaint inadmissible.

[2] "The fact that the substance of a complaint has been examined as part of the 'normal' government reports procedure does not in itself constitute an impediment to the complaint's admissibility. It has been agreed to give the Committee of Independent Experts a sufficient margin of appreciation in this area".

Géraud de Bergues

Deputy Director of Legal Affairs