European Social Charter | Charte sociale européenne

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

20 July 2021

Case Document No. 2

European Organisation of Military Associations and Trade Unions (EUROMIL)
v. Portugal
Complaint No. 199/2021

THE GOVERNMENT'S OBSERVATIONS ON ADMISSIBILITY

Registered at the Secretariat on 5 July 2021

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

EUROPEAN ORGANISATION OF MILITARY ASSOCIATIONS AND TRADE UNIONS (EUROMIL)

(COMPLAINANT)

V.

PORTUGAL

(RESPONDENT)

COMPLAINT N.º 199/2021

OBSERVATIONS ON ADMISSIBILITY

28 JUNE 2021

I. INTRODUCTION

1. On the 25th of May, 2021, the European Organisation of Military Associations and Trade Unions («Complainant») lodged a complaint against the Government of Portugal («Respondent») with respect to the application of Articles 5 and 6 of the Revised European Social Charter («RESC») to the Portuguese military associations.

In summary, the Complainant claims that:

(i) Respondent has contravened Article 5 of the RESC because it prohibits its military associations from undertaking trade union rights and hence of collective bargain of their members for the protection of their economic and social interests;

(ii) Respondent has contravened Article 6(1) of the RESC because it fails to promote joint consultation between military associations and the Ministry of National Defence, as an employer;

(iii) Respondent has contravened Article 6(2) of the RESC because it fails to promote mechanisms of voluntary negotiations between military associations and the Ministry of National Defence, as an employer, to the purpose of regulating the terms and conditions of employement by means of collective agreements;

(iv) Respondent has contravened Article 6(4) of the RESC because it barrs military associations as workers' organizations from exercising the right to strike.

2. The Respondent shall address the admissibility of the aforementioned claims, as follows:

II. PRELIMINARY OBJECTIONS TO THE ADMISSIBILITY OF THE COMPLAINT

1. The Respondent notes that, while the Additional Protocol to the RESC does not require the exhaustion of local remedies for the purpose of establishing an alleged violation of the provisions of the RESC and for the European Committee of Social Rights to be seized of the matter, the Complainant must, nonetheless, demonstrate that the State did not provide for a "satisfactory application" of the allegedly breached provisions of the RESC, pursuant to Article 4 of its Additional Protocol.

2. It also worth noting that no legal action has been brought before the Portuguese judicial system against the Portuguese Government which could eventually entail the review of the constitutionality of the legal norms set out in the internal legal order, specifically in Organic Law n.º 3/2001, Decree-Law n.º 90/2015, of May 29th, Organic Law n.º 1-B/2009, of July 7th, in their current wording.

3. Pursuant to Article 8 of the Constitution of the Portuguese Republic («CRP»), the legal norms and principles of intertnational law are a part of the Portuguese internal legal order, which means that the Portuguese legal system is the primary "caretaker" in charge of ensuring compliance with the rule of law, including the legal framework of the RESC.

4. In fact, as generally noted by the International Court of Justice in the *Interhandel* case, the exhaustion of local remedies ensures that "*the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic system*" (*Interhandel*, International Court of Justice, Switzerland v. United States of America, Judgement on Premilinary Objections, 1959, p. 27).

5. The legal rule of exhaustion of local remedies is widely recognized in transversal branches of international law: It reflects customary international law in the field of diplomatic protection (*Interhandel*, ibidem; *Elettronica Sicula S.p.A. (ELSI)*, International Court of Justice, United States of America v. Italy, Judgement, 1989, par. 50), enshrined in the 2006 Draft Articles on Diplomatic Protection, adopted by the International Law Commission, and constitutes a cardinal principle of international law established both in Article 35(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms and in Article 41(1)(c) of the International Covenant on Civil and Political Rights – the latter instrument being invoked by the Claimant to establish its claim (p. 5 of the complaint).

6. For the purpose of establishing a systematically accurate interpretation of the meaning of "satisfactory application" of the provision contained in Article 4 of the Additional Protocol to the RESC, the Respondent contends, in line with international State pratice and *opinio juris*, that said expression withholds a minimal threshold of burden of proof, which requires the Claimant to demonstrate, to the very least, an attempt to review the object of the complaint before the judicial system of the concerned State, or otherwise be burdened with the proof of an effective denial of justice.

7. As noted *supra* in II.1., the fact that no legal action has been brought before the Portuguese judicial system against the Portuguese government for the contravention of Articles 5 and 6

of the RESC should, therefore, preclude the ascertainment of a “satisfactory application” of said provisions, rendering the present complaint inadmissible.

III. CONCLUSION

For the reasons set out above, the Respondent respectfully asks the Committeee to declare the complaint inadmissible.