



Explanatory Report to the European Convention on Social and Medical Assistance and Protocol thereto*

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I. Introduction

1. The European Convention on Social and Medical Assistance (ETS 14) was drawn up and signed at the same time as the European Interim Agreements on social security schemes.⁽¹⁾ Like these agreements, the Convention is accompanied by a protocol which extends its scope to cover refugees, as defined in the Geneva Convention of 28 July 1951 on the Status of Refugees.

2. The European Convention on Social and Medical Assistance and its Protocol were opened for signature on 11 December 1953 and entered into force on 1 July 1954. As of 1 January 2000, the Convention has been ratified by the following 17 member States: Belgium, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey and the United Kingdom. With the exception of Malta, all of these States have also ratified the Protocol.

3. Reference to the European Convention on Social and Medical Assistance is made in Article 13, paragraph 4, of the European Social Charter and of the Revised European Social Charter. Article 13 of the Charter concerns the right to social and medical assistance, and paragraph 4 states that this right must also be granted to nationals of other Contracting Parties lawfully within their territories and must, moreover, be exercised in accordance with the Contracting Parties' obligations under the European Convention on Social and Medical Assistance. 4. The European Convention on Social and Medical Assistance is an instrument of co-ordination, and its provisions are directly applicable. If difficulties arise concerning the interpretation or application of the Convention, it is for the competent authority of the Contracting Party faced with the difficulties to endeavour to settle the dispute with the competent authorities of the other Contracting Parties or, failing that, to bring the matter before an arbitration body, whose decision is final and binding (Article 20 of the Convention). Thus far this procedure has not been used.

(*) See document [CM/Inf\(2001\)42](#) of 21 November 2001.

(1) On 17 March 1948 in Brussels, Belgium, France, Luxembourg, the Netherlands and the United Kingdom signed a Treaty on "economic, social and cultural collaboration and collective self-defence". In the spirit of this Treaty the five states resolved to extend their co-operation in the social field and, accordingly, signed a "Convention on social and medical assistance" in Paris on 7 November 1949. In 1950 the Council of Europe's Committee of Experts on social security questions proposed drawing up a European Convention on Social and Medical assistance that would extend the provisions of the convention concluded between the above five States to all the members of the Council of Europe.

II. Comments

Section I (Articles 1 to 5) comprises the general provisions of the Convention.

Article 1

5. Article 1 establishes the basic principle on which the Convention is based, namely the principle of equal treatment. Each of the Contracting Parties undertakes to ensure that nationals of other Contracting Parties who are lawfully present in their territory shall be entitled, according to the principle of equality of treatment, to the same social and medical assistance as that available to its own nationals. Another important concept in Article 1 is that of lawful presence. For persons to be entitled to social and medical assistance, they must be "lawfully present" in the territory of a Contracting Party. The Convention therefore applies to nationals of Contracting States who are lawfully present in the territory of another Contracting State, irrespective of their length of stay. The only conditions governing entitlement to social and medical assistance are that a person's presence in the Contracting Party be lawful and that he or she be in need. Whether or not a person's presence is lawful is determined by the Contracting Parties' laws governing the conditions of entry and the presence of foreign nationals in their respective territories, as well as any international agreements that may alter these conditions.

Article 2

Article 2 (a) contains a number of definitions.

6. "Assistance" covers the means of subsistence and the care necessitated by their condition by persons without sufficient resources. According to the European Committee of Social Rights of the European Social Charter, "whatever the nature of this assistance, with benefits provided in cash and/or in kind, the assistance must be provided as long as the need persists in order to help the person concerned to continue to lead a decent life".⁽¹⁾

7. Assistance does not cover non-contributory pensions, nor benefits paid in respect of war injuries or injuries due to foreign occupation. The limitation is due to the fact that non-contributory pensions are social security benefits covered by the European Interim Agreement on social security schemes relating to old-age, invalidity and survivors. Benefits paid to victims of war injuries or injuries due to foreign occupation are generally governed by different laws to those governing social security and social assistance benefits.

8. Each Contracting Party is left free to adopt its own definition of the terms "national" and "territory" but, through the Secretary General of the Council of Europe, must notify the other Contracting Parties of the scope given to these terms. Persons who have lost their nationality otherwise than by deprivation and have thus become stateless continue to be treated as nationals until they have acquired another nationality.

9. For the purpose of the Convention, "country of origin" means the country of which the person seeking to benefit from the Convention is a national.

10. Lastly, Article 2 (b) requires that the Contracting Parties list, in Annex I of the Convention, the laws and regulations to which the Convention applies and, in Annex II, the reservations they intend to formulate.

(1) General introduction to Conclusions XIII-4, p.56.

11. The scope of the Convention is determined by references to the domestic laws of the Contracting Parties, with details of such laws set forth in the annexes. When depositing the instrument of ratification, each Party is therefore required to supply precise information for incorporation in the said annexes. Accordingly, the annexes play a key role in identifying the undertakings of each Contracting Party.

Article 3

12. Under the terms of Article 3, it is the regulations in force in the country of which the person is a national (the country of origin) which shall apply for the purpose of providing proof of his or her nationality.

Article 4

13. Article 4 establishes another important principle, namely that there is no requirement for the country of origin to refund the cost of assistance. The cost of assistance incurred by one Contracting Party on behalf of a national of another Contracting Party shall be borne by the Contracting Party which granted the assistance.

Article 5

14. If the laws of one Contracting Party provide for recovery of the sums paid to an assisted person from third parties under financial obligation to that person or liable to contribute to the cost of his or her maintenance, Article 5 requires that, so far as their laws and regulations permit, the other Contracting Parties help this Contracting Party with the administrative formalities involved in order to facilitate recovery of the costs incurred. However, it seems that this provision is seldom applied. The involvement of third parties, who are often insurance companies dealing directly with the assisted person, reduces the cost of assistance.

Section II (Articles 6 to 10) is concerned particularly with repatriation.

Article 6

15. In relation to lawfully resident nationals of another Contracting Party, Article 6 (a) is important insofar as it states that the need for assistance is not a ground for repatriation. A Contracting Party may not therefore deport a national of another Contracting Party on the ground that he/she is no longer able to meet his/her needs or requires care necessitated by his/her condition. However, Article 6 (b) provides that the right to deport shall not be prejudiced by the Convention, as long as the need for assistance is not used as the ground for deportation.

Article 7

16. Article 7 lays down three conditions which, if all met at the same time, allow Contracting Parties to depart from the provisions of Article 6 (a). The first condition concerns the age and length of stay of the person concerned. Repatriation is only possible if the person entered the territory before attaining the age of 55 and has been continuously resident there for less than 5 years or if he or she entered the territory after attaining the age of 55 and has been resident there less than 10 years. The other two conditions are that the person's health must allow repatriation and that he or she has no close ties with the country of residence. It should be noted that the term "close ties" leaves the Contracting Parties a margin for their own interpretation. An exact definition is therefore difficult. However, this question raised no major problems when the Convention was being prepared. For the representatives of the different countries, it was clear that what was meant was all the different kinds of ties people may have with their place of residence (eg family, social and cultural). In this context it is important to note that according to Article 7 (b) of the Convention, Contracting Parties must have recourse to repatriation only in the greatest moderation and only where there is no objection on

humanitarian grounds. Lastly, Article 7 (c) states that if assisted persons are repatriated, facilities to accompany them should be offered to the spouse and children. It should also be noted that certain periods of residence may be deducted by Contracting Parties when calculating length of residence in their territories (Article 14 of the Convention).

Article 8

17. Article 8 stipulates that the cost of repatriation is borne by the Contracting Party responsible for the repatriation. Contracting Parties undertake to receive nationals of theirs who are repatriated, and other Contracting Parties must not hinder transit of repatriated persons across their territory.

Article 9

18. In the event of disagreement over the nationality of the assisted person, the country of which he or she claims to be a national must provide proof to the contrary within 30 days or as soon as possible thereafter.

Article 10

19. Article 10 describes the administrative procedure for repatriation: notification of the diplomatic or consular authorities of the country of origin, notification of the authorities of the country or countries of transit, agreement between the country of residence and the country of origin concerning the place where the repatriated person will be handed over.

Section III (Articles 11 to 14) of the Convention contains various provisions relating to the term residence.

20. These provisions are particularly important with respect to Section II on repatriation. They are designed to enable the Parties to determine whether or not a person claiming assistance is "resident" in the country and has been "continuously resident" there for five years (or, in special cases, ten), in which case he/she cannot be repatriated on the ground that he/she is in need of assistance.

Article 11

21. Article 11 clarifies the term "lawful" within the meaning of the Convention. As explained with respect to Article 1, the term lawful is determined by the Contracting Parties' laws and regulations. The documents listed in Annex III may be used as evidence of the residence.

Article 12

22. Article 7 of the Convention authorises repatriation if certain conditions are met. One of these concerns the period during which the person concerned has been resident on the territory of the Contracting Party granting assistance. Article 12 specifies that it is for the Party granting assistance to set the commencing date of this period of residence and that it must rely for the purpose either on evidence supplied by official investigation, or on the documents listed in Annex III or on any documents recognised by the country's laws and regulations as affording proof of residence. The person concerned may dispute these documents if he/she is in a position to produce other evidence.

Article 13

23. Sub-paragraph a indicates that the continuity of the person's residence may be shown by the production of any evidence acceptable in the country granting assistance. Sub-paragraph b specifies that continuity of residence is not held to be interrupted by periods of absence of less than 3 months, provided that the absence is not caused by repatriation or deportation. Periods of absence of 6 months or more are held to interrupt continuity of residence. With respect to periods of absence of between 3 and 6 months, it is to be decided if the person concerned has preserved his/her links with the country during his/her absence and has expressed the intention of returning to that country, in which case the period of residence should be regarded as continuous.

Article 14

24. Periods during which the person concerned has received assistance from public funds, paid according to laws and regulations mentioned in Annex I, are excluded from the calculation of the period of residence. However, if the person has received, during those periods, medical treatment for acute illness or short-term medical treatment, this period is included in the calculation of the period of residence.

Section IV (Articles 15 to 24) contains various miscellaneous provisions, which are mainly of a technical nature.

Article 15

25. Article 15 provides for mutual assistance of the authorities (administrative, diplomatic, consular) of the Contracting Parties in implementing the Convention.

Article 16

26. Article 16 (a) and (b) contain respectively provisions as regards notification by the Contracting Parties of any subsequent amendments to their national laws and regulations which may affect Annexes I and III, and of new laws or regulations not already in Annex I.

27. According to Article 16 (b), the Contracting Parties can make reservations not only at the time of ratification, but also at a later date. However, any subsequent reservation shall relate to, and be formulated at the same time as a notification concerning new laws or regulations.

28. Any information notified by a Contracting Party under Article 16 (a) and (b) is communicated to the other Contracting Parties by the Secretary General (c).

Article 17

29. Article 17 indicates that two Contracting Parties, if they wish so, may conclude an agreement to deal with the cases in which assistance was granted prior to the entry into force of the Convention.

Article 18

30. Article 18 guarantees that in ratifying the Convention there shall be no limitation of any more favourable rights already acquired under national laws or regulations, international conventions or agreements.

Article 19

31. Article 19 provides that the three Annexes form an integral part of the Convention. In order to allow the proper application of the Convention, the Contracting Parties are bound, as and when necessary, to update Annexes I and III.

Article 20

32. Article 20 contains provisions about settlement of disputes.

33. According to Article 20 (a), any disagreement regarding the interpretation or application of the Convention, shall in the first place be attempted to resolve by negotiations between the competent authorities of the Contracting Parties. This entails that it is up to the Contracting Parties to make an authoritative interpretation of the provisions of the Convention.

34. In cases where it has not been possible to settle the dispute by the use of negotiations, the arbitration is called upon, whose decision is final and binding.

Article 21

35. Article 21 contains standard provisions about signature and ratification as adopted by the Committee of Ministers of the Council of Europe.

Article 22

36. Article 22 envisages the possibility of non-member States of the Council of Europe acceding to the Convention on the invitation of the Committee of Ministers and lays down the procedure to be followed in such a case.

Article 23

37. Article 23 contains standard provisions for notification by the Secretary General of important information received by him under the provisions of the Convention (see also Article 16 (c)).

Article 24

38. Although the Convention was concluded for an initial period of two years, no positive act is required in order to keep it in force indefinitely, from year to year. On the other hand, a Contracting Party which wishes not to be bound by the Convention any longer, must positively denounce it. The denunciation procedure is, for practical reasons, so arranged that the denunciation always take effect from the expiry, either of the initial two-year period or of a subsequent yearly period.

III. Comments on the Protocol on Refugees

39. The Protocol concerns all persons, irrespective of nationality, who have obtained refugee status in a Contracting Party.

Article 1

40. Article 1 defines the term "refugee" by making use of the definition of Article 1 the United Nations' Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951. This definition was changed by a Protocol to the UN Convention signed on 31 January 1967.

41. The Declaration mentioned in Article 1, paragraph B, has no relevance after the change in 1967 of the definition in the UN Convention.

Article 2

42. Article 2 provides that Section I of the Assistance Convention, which concerns the right to assistance, shall apply to refugees under the same conditions as to nationals of the Contracting Parties.

Article 3

43. Paragraph 1 provides that the provisions of Section II of the Convention, which concern repatriation, shall not apply to refugees.

44. Naturally, persons who have obtained refugee status in a Contracting Party where they are lawfully resident cannot be returned to the country they have fled because this would be in breach of the United Nations Convention.

45. Likewise, the provisions of Section II do not concern refugees who have obtained refugee status in a Contracting Party and who travel to another Contracting Party. However, in cases where the European Agreement on Transfer of Responsibility for Refugees, opened for signature in Strasbourg on 16 of October 1980, is applicable, a refugee has to be readmitted by the first Contracting Party as long as transfer of responsibility has not occurred.

Articles 4 and 5

46. Articles 4 and 5 are standard final provisions.

IV. Comments on the Annexes to the Convention

47. Annexes I to III constitute an integral part of the Convention. The States are bound to provide the information to be included in Annexes I and III at the time of ratification of the Convention. Only a Contracting Party can dispute the content of the annexes relating to another Contracting Party. The Contracting Parties are bound to update the annexes as and when necessary in order to ensure the correct application of the Convention.

Annex I

48. Article 2(b) of the Convention, provides that the laws and regulations in force in the territories of the Contracting Parties and to which the Convention applies are set forth in Annex I.

49. Under the terms of Article 1 of the Convention, each of the Contracting Parties undertakes to ensure that nationals of other Contracting Parties who are lawfully present in their territory and who are without sufficient resources shall be entitled, equally with its own nationals and on the same conditions, to the social and medical assistance provided by the legislation currently in force in its territory. It follows that the Contracting Parties should, in principle, list under Annex I all the laws and regulations relating to social and medical assistance in force in their territory at the time of ratification of the Convention. If the Parties did not extend the application of the Convention to all relevant legislation, the treatment of nationals of other Parties would in fact no longer be equal to that of the nationals of the host State.

Annex II

50. Article 2(b) of the Convention, provides that the States can set forth reservations in Annex II. These reservations must be made at the time of ratification of the Convention. If the laws and regulations mentioned under Annex I are repealed, modified, supplemented or replaced after ratification of the Convention, the new legislation or regulation must be listed under Annex I, together with any possible reservations under Annex II (article 16 of the Convention).

Annex III

51. Annex III serves to facilitate the application of the Convention, by establishing the list of documents recognised as affording proof of residence referred to in Article 12 of the Convention.