EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX

14 April 2016

Case Document No. 1

***Fellesforbundet for Sjøfolk* (FFFS) v. Norway**
Complaint No. 120/2016

COMPLAINT

Registered at the Secretariat on 17 March 2016

Advokatfirmaet Øivind Østberg

The Executive Secretary of The European Committee of Social Rights
Department of the European Social Charter
Directorate General, Human Rights and Rule of Law, Council of Europe
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Oslo, 11. mars 2016
Lawyer in charge: Øivind Østberg

COMPLAINT TO THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS AGAINST THE KINGDOM OF NORWAY - REGARDING THE PENSION RIGHTS OF SPANISH SEAFARERS WHO FORMERLY WORKED ON NORWEGIAN SHIPS

1. The complainant

The complainant is the trade union "Fellesforbundet for sjøfolk" (FFFS). which translates as Joint union for sailors. It was founded 21st October 2000, then named "Seilende Oljearbeideres forening".

It organizes sailors and offshoreworkers in Norway. Presently it has about 1300 members. FFFS is an independent union, not affiliated with any federation of trade unions.

Its address is:
Eidsvågbakken 1, 5105 Eidsvåg, Norway.
Org. no. 982 818 354

The chairman is Mr Leif R. Vervik.

Please find enclosed a letter from the FFFS, signed by its leader and chairman of the board, Mr Leif R. Vervik, whereby the present complaint is endorsed (**Annex 1**). As **Annex 2** is enclosed a print-out of the union´s statutes from its web-site where it appears in § 13 that the chairman of the board represents the union in consultation with the executive leader. On the last page it appears that Leif R. Vervik is the chairman of the board.

FFFS was accepted as an organization with required representativity in complaint 74/2011. In the present complaint, FFFS acts on behalf of Spanish retired colleagues.

2. The substance of the complaint – background resume

Since this matter has been the subject of much communication at various stages before this complaint, it is my view that the basic facts of the matter are not disputed but could be considered common ground between the parties. I therefore find it sufficient to give a resume of the background without documentation. If necessary, documentation can be provided later.

Because of the need for labour power in the Norwegian merchant fleet, a large number of Spanish citizens were recruited for employment on vessels under Norwegian flag from the 1950's onwards. This took place with the active cooperation of the Norwegian authorities, as the shipping industry has for a long time been considered a very important part of the national economy. Altogether it is estimated that around 12 000 Spanish semaen were employed in this way.

Although the individual circumstances of course vary a lot, a significant part of these people have worked during a large part of their professional life on ships registered in Norway and for Norwegian employers (shipowners). However, they had their legal address in Spain, most of them in the region of Galicia, in the northwestern part of the country, where they also had their families and to where they returned between periods on board.

They were mostly employed in subordinate labour categories, often as able bodied seamen.

They were employed subject to contractual conditions that corresponded to those of the Norwegian workers in similar jobs.

During all of the time prior to 1/1/1994 they did not acquire the rights offered by the Norwegian legislation on social security or pension rights. This means they were not earning any right to pension when reaching retirement age or when experiencing disability. What they did have, however, was the right to coverage of burial expenses and to compensation in case of occupational injury. They also had the right to free medical assistance and to receive salary during illness as long as they were in service, that is, on board a ship.

They paid maritime tax in Norway, in line with the Norwegian seamen, but they did not pay contributions to social security scheme or those of the seamen's retirement scheme. This followed from their exclusion by law from these two forms of social security arrangements. Neither did the employers pay contributions to these schemes.

Only as from 1/1/1994, in accordance with the EEA agreement, they were treated on a par with Norwegian seamen as regards the rights and obligations recognised by the social security law and the seamen's social security law. This means that from that date on they were considered as members of these two social security schemes, with corresponding rights and obligations. Many of the seamen had already retired by 1994, so they received no pension. For those who continued to work after 1/1/1994, only the period after this date was taken into account when they reached the conditions (age or disability) for being able to claim pension from Norway, meaning the pension they received was at best very modest.

It must also be pointed out that these seamen acquired only to a very limited degree rights under the Spanish social security legislation, since the time they had been working on board the Norwegian vessels did not count as residence in Spain.

The Spanish seamen have worked, through their organisation Asociación Longhope, for several years to try to induce Norwegian authorities to recognize that their time as workers on board the Norwegian vessels should be fully taken into account as earned time of service for the purpose of pension.

They have tried to get Norway and Spain to enter a bilateral agreement that would address this issue. They have also taken their case to the Norwegian Ombudsman (*Sivilombudsmannen*) and to the Norwegian Government via Member of the European Parliament Ms Lidia Senr Rodríguez. The government responded with a letter from the (then) Minister of Labour and Social Affairs, Robert Eriksson, addressed to Ms Rodríguez, on 30/04/2015, stating that in their view the seamen were treated according to the current provisions and that their claim was unfounded. It is stated that it is considered neither desirable nor feasible to allow that the foreign seamen employed on board Norwegian vessels prior to 1994 could be affiliated to the two pension schemes with retroactive effects, or by means of a bilateral Convention or through any unilateral action. The letter is attached as **Annex 3**.

A more elaborated legal argumentation for the claim was presented to the government in a letter from the undersigned of 2/11/2015. This too was rejected by a letter from the Ministry of Labour and Social Affairs 28/1/2016. Following this, a supino of the government on behalf of Asociacion Longhope and 210 individual former sailors (in some cases their widows) was filed to Oslo tingrett (district court) 25/2/2016.

3. The specifics of domestic substantive law

3.1. The Social Security Law (*folketrygden*)

The Social Security Law of 17/6/1966, which took effect on 1/1/1967 (*SSL 1966*), provides for old-age pension from the age of 67 and disability pension according to specified critieria. It also provides for pension to descendants. Those are the areas of coverage that interest us in this context.

SSL 1966 excluded social security affiliation for non-Norwegian citizens employed on board Norwegian vessels unless they resided in Norway or were citizens of another Nordic country. See its section § 1-2.

It appears from the preparatory works that this choice was made under considerable doubt by the *Storting* and on the premise that it would govern only provisionally, until the matter could be reviewed again in the near future. The *Storting* made it clear that a re-appreciation of the issue should take into account an analysis of the relevant international conventions (*Innst. O VIII* 1965-66, p. 11).

From the same source it appears that the major argument in favour of the adopted solution was the economic interests of the maritime sector, as incorporation of the foreign sailors into the SSL would entail compulsory contribution to the social security (i.e. the state) from the employers in the form of an excise calculated as a certain percentage of the gross wage (ca 14%). It was alleged by the shipowners' association that it would seriously affect the competitiveness of Norwegian shipping if this excise were to be imposed.

On the occasion of the next amendment to the SSL, related to the inclusion of the sickness-pay scheme in the SSL, the Ministry of Social Affairs expressed its adherence to the principle of equal treatment between Norwegian and foreign citizens with respect to social security. Nonetheless, it proposed to maintain the legislation as described above (*Ot prp no. 62, of 1968-69)*. The expectation formulated by the *Storting* in 1966, that a re-evaluation would be made in view of Norway's international commitments, seems to have been forgotten.

Non-Norwegian citizens employed on board Norwegian vessels, licensed in the ordinary Norwegian registers, in international navigation were thus only affiliated with the Social Security with regards to burial aid (chapter 9) and provisions for occupational injuries (chapter 11).

SSL 1966 was substituted by a new Social Security Law of 28/2/1997 (*SSL 1997*). The principle of residence in Norway as the fundamental condition for social security affiliation is now found in § 2-1 (the principle of domicile). It should be pointed out that this condition is not only a necessary, but also a sufficient condition, in that it is not required that the person is employed or has any other kind of income, although the level of (supplementary) pension is dependent upon the income one has had and the number of years worked. In § 2-2 the condition of domicile is modified for those employed in Norway (meaning the mainland) or the Norwegian continental shelf. Those categories are affiliated to the social security regardless of whether or not they reside in Norway or whether or not they have Norwegian nationality. Exempted from this rule are those that work on board supply ships or other vessels that operate in the platform.

As regards seamen, § 2-5 g) of SSL 1997 maintains that those who work on board a Norwegian vessel are affiliated to the social security system only if they fulfill the requirement of residence in Norway or have Norwegian nationality.

SSL 1997 § 2-6, first paragraph, letter a) states provides that seamen have a limited insurance coverage that includes burial and occupational injury (like they had in SSL 1966).

The § 1-3 provides that the Government can enter into mutual agreements with other countries with regard to rights and obligations according to the Act and that such agreements may include derogation from the law's provisions. This basis for a possible convention with Spain, which could protect the Spanish seamen, has not been used.

After the EEA 1.1.1994 (*cf.* EEA law of 27/11/1992) took effect, the practical application of the social security law was adjusted accordingly. In the area of social security, the main instruments of the EEA are constituted by the EU Regulation no. 883/2004 on coordination of the social security schemes, which replaces the previous Regulation no. 1408/71, and the Regulation no. 987/2009. These regulations are transposed into Norwegian law. This means that the SSL, despite the wording of § 1-2, first paragraph, letter b), is now fully applicable to the seamen who are citizens of countries of the European Union or of the EEA.

Consequently, the provisions of § 2-6 now are relevant only for the seamen that are not citizens of countries affiliated to the EEA.

3.2. The pension insurance for seamen

The pension insurance for seamen *(pensjonstrygden for sjomenn)* is regulated by the law of 03/12/1948. This scheme also includes employees on board drilling vessels and floating rigs offshore. In all cases the same basic condition applies here as in SSL: Only Norwegian citizens or persons who have residence in Norway are included.

An important general limitation of the scheme consists in the fact that the condition for acquiring the right to an old-age pension is a mimimum navigation time of 150 months, that is 12.5 years (*cf.* § 4). The scheme grants an old-age pension to seamen between 60 and 67 years of age, from which time the old-age pension of the SSL is payable. This, then, is a scheme that recognises - under certain conditions - a retirement age of 60 years for the seamen. Membership entails a special contribution from the employee and the employer (shipowner). The level of the workers' contribution is - for seamen of lower rank - currently 0.91% of the base amount of the social security per month ("*Grunnbeløpet*"). Grunnbeløpet has been adjusted upward every year, today it is about 90 000 NOK.

In *NOU 1999:6.* «*Seamen's pensions*», the following is declared, which deserves to be recalled as background for the creation of a pension scheme for the seamen (chapter 4.1):

"Even if there were differences of opinion with regard to the configuration of the pension scheme - especially on the financing - there existed a broad consensus as to the justification of a pension scheme for the seamen, and that the scheme would include a retirement age lower than the current one in other contexts ...Among other things, the seamen's profession is exercised according to special labour conditions, in changing working conditions. What is more, many sailors cannot benefit from the social offers of the community in the same measure as others. It was also stressed that navigation had a decisive importance for the national economy of the country. Good social conditions would contribute to ensure stable and sufficient recruitment to the trade."

From 1/1/1994, the EEA agreement has been applied; that is, despite the wording of the law, seamen who are citizens of countries of the European Union or of the EEA have been treated the same way as Norwegian citizens.

3.3. The tax regulations

3.3.1. The Norwegian tax law

By virtue of the seamen's tax law of 1947 (law on taxation of seamen, *sjomannsskatteloven*), the obligation to pay taxes was in force for each sailor employed on the vessels with Norwegian licence of a minimum of 100 gross tonnage, among them those licenced in the Norwegian International Vessel Registry (*NIS*), as well as on board foreign vessels under the management of Norwegian shipowners.

The tax rates were set by the *Storting* on an annual basis. The tax of seamen was always lower than the tax on an equivalent income earned on land.

The seamen's taxation law was repealed in 1989, in which the seamen's tax was incorporated into the general tax law. This legislation continues the principle of a more favourable tax treatment for seamen, by way of granting a special deduction on the sailors' income corrsponding to 30% of the taxable income on board, but with an upper limit.

The § 2-3, first paragraph, letter h), of the tax law provides that the employees at sea, including foreign citizens, are obliged to be taxed in Norway, with the exception for what may be provided in conventions on double taxation. However, it is not applicable to the employees on board NIS vessels that reside outside Norway. One must suppose that they, as a general rule, will pay taxes in their country of origin.

To sum it up: The Spanish sailors paid taxes to Norway on conditions equal to the Norwegian sailors.

3.3.2. Tax Conventions

By virtue of the Tax Convention entered into between Norway and Spain in 1963, ratified in 1964, the income earned from work on board a vessel will be taxed in the State in which the shipowner has its principal headquarters, meaning that the Spanish sailors who work on board the Norwegian vessels will be taxed for their work in Norway and only in Norway. This is continued in the new Tax Convention between the two countries, from 1999, Article 15, no. 3.

The Norwegian taxation of Spanish seamen who work on board Norwegian vessels has legal foundation therefore, both in the internal Norwegian Law and, since 1964, in a bilateral convention with Spain. As regards the situation prior to 1964, it is supposed that the same principle was applied.

The question of social rights of Spanish seamen does not seem to have been on the agenda when the Tax Convention of 1964 or its successor in 1999 was negotiated.

4. The European Social Charter (ESC)

4.1 General provisions of the ESC. Norwegian adherence

It seems appropriate to quote from the web-site of the Council of Europe:

"The European Social Charter is a Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights, which refers to civil and political rights. It guarantees a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare.

The Charter lays specific emphasis on the protection of vulnerable persons such as elderly people, children, people with disabilities and migrants. It requires that enjoyment of the abovementioned rights be guaranteed without discrimination.

No other legal instrument at pan-European level can provide such an extensive and complete protection of social rights as that provided by the Charter, which also serves as a point of reference in European Union law; most of the social rights in the EU Charter of Fundamental Rights are based on the relevant articles of the Charter.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

The Charter is therefore seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture."

The European Social Charter entered into effect for Norway in 26/2/1965. A revised version, which incorporated the latest additional protocols, is dated 3/5/1996 and ratified by Norway 7/5/2001. The revisions don't concern elements of importance to this complaint.

Norway ratified in 20/3/1997 the protocol regarding the right to file complaint for representative national organizations.

Since the majority of the provisions of the Charter are only applicable to citizens legally residing in another State that has adhered to the Charter, it is pointed out that Spain has adhered to the Charter from the beginning.

The preamble of the Charter of 1961 states that:

"the enjoyment of the social rights shall be secured without discrimination on any ground such as race, colour, sex, religion, political opinion, national or social origin."

Part 1 says:

"The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised:

1[...]

12. All workers and their dependants have the right to social security.

13. Anyone without adequate resources has the right to social and medical assistance.

14. Everyone has the right to benefit from social welfare services."

The parties have, consequently, obliged themselves to pursue as an aim for their policy that all workers and those that are maintained by them have the right to social security. This right shall not be the subject of discriminatory treatment because of the national origin of the workers.

It is held by the complainant that Norway, with respect to the Spanish sailors concerned, has not fulfilled these obligations. Although it is understood that these provisions cannot in themselves be the subject of complaint, they serve to emphasize that there has been a breach of the specific provisions treated below.

4.2 Specific provisions of the charter which are alleged to be violated
The provisions of Part II, Article 12, reads:

"Article 12 – The right to social security

With a view to ensuring the effectice exercise of the right to social security, the Contracting Parties undertake:

1. to establish or maintain a system of social security:
2. to maintain the social security system at satisfactory level at least equal to that required for ratification of International Labour Convention (No 102) Concerning Minimum Standards for Social Security.

3. to endeavour to raise progressively the system of soscial security to a higher level:
4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements, or by other means, and subjected to the condition laid down in such agreements, in order to ensure:
    a. equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties,
    b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance and employment periods completed under the legislation of each of the Contracting Parties."

It is held by the complainant that Norway has failed to comply with article 12 no 1-4 in their treatment of the Spanish seamen working on ships under Norwegian flag.

Firstly, as the level of social protection afforded to them falls short of the standards laid down in this article, espcially since there was in no way provided for them earning any rights to pensions related to old age or disability.

Secondly, as there has been a breach of the principle of non-discrimination laid down in 12 no 4 litra a), by virtue of the wording and practising of the provisions in the Social Security Law and the Law of Pension for seamen as described in detail above, until the entry into force of the EEA agrement 1/1/1994. The foreign workers, including the Spanish seamen, were excluded by law from the social security arrangements that benefited their fellow workers of Norwegian or Nordic nationality, or who were residing in Norway. This was on the basis of the criterion of nationality, thus constituting a discrimination contrary to what is allowed by article 12 no 4, especially intrepreted in light of the more general provisions mentioned in 4.1. above. The argument that they would have been included in the schemes if they had been residing in Norway cannot be considered a sufficient defense, since for Norwegian nationals working on the same ships, there was no such requirement.

Norway has done nothing to amend this situation as far as the Spanish seamen are concerned, by way of bilateral or multilateral agreement, for the period before the EEA agreement took effect.

It is held that there were no weighty reasons on part of the Kingdom of Norway that could justify this exclusion.

The argument that the seamen were exempted from the duty to pay contributions to the respective social security schemes cannot be considered a weighty defense. Firstly because there is nothing in the text nor the spirit of the charter which permits this as an excuse for not including workers in social security schemes. Secondly because the economic importance of this contribution, for the average employee, is small compared with the long-term benefits of being included. These pension systems are not closed systems financially speaking, but financed by the government according to the legal entitlements of the individual members. In practice they are only partly financed by the input in the form of excise put on employees and employers.

The exclusion has had very significant negative consequences for the social protection of these workers, as many of them spent a great part of theier working life on Norwegian ships and acquired entitlement to very little in terms of pension from Spain or other jurisdictions.

For the sake of completeness, it is pointed out that there can be no basis for claiming that the Social Charter is not fully applicable with respect to workers employed on board a vessel that is subject to the jurisdiction of Norway as the flag-state. As for which state is responsible for the pension rights in question, it is held by the complainant, in line with the rules set out in Article 13 of Council Regulation (EU) 1408/71 and its successor 883/2044, that the state responsibe is Norway. This must be the case also for the purpose of the European Social Charter.

5. Conclusion

The Kingdom of Norway is alleged to have violated Part II article 12 no 1-4 of the European Social Charter in excluding, until 1/1/1994, Spanish seamen working on ships under Norwegian jurisdiction from the social security schemes of *Folketrygdloven* and *Pensjonstrygden for sjomenn* on the ground that they were not nationals of Norway or a Nordic country.

The decision of the European committee of social rights is respectfully asked in the matter.

A copy of this letter is sent to the Ministry of Labour and Social Affairs of Norway.

Sincerely

Øivind Østberg
attorney

3 annexes