

Application of the European Social Charter and the European Committee of Social Rights case law by the administrative courts – best practices, challenges and opportunities



European
Social
Charter

Charte
sociale
européenne

COUNCIL OF EUROPE



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Introductory remarks – the Charter and the Committee



- a Council of Europe treaty
 - guarantees fundamental **social and economic rights** - a broad range of everyday human rights related to employment, housing, health, education, social protection and welfare
 - emphasis on the protection of **vulnerable persons**
- the Social Constitution of Europe**
- **monitors compliance** with the Charter
 - two complementary mechanisms: through **collective complaints** lodged by the social partners and other non-governmental organisations (Collective Complaints Procedure), and through **national reports** drawn up by Contracting Parties (Reporting System).



Introductory remarks - Ukraine and Poland and the European Social Charter



- **Ukraine** ratified the **Revised European Social Charter** on 21.12.2006.
- It has not accepted the system of collective complaints.



- **Poland** ratified the **1961 European Social Charter** on 25.06.1997.
- It ratified the Amending Protocol of 1991 (improving the control machinery of the Charter) on 25.06.1997.
- It has not signed the Additional Protocol 1988 to the European Social Charter
- It has signed (on 25.10.2005), but not yet ratified the Revised European Social Charter.
- It has not signed the Additional Protocol providing for a system of collective complaints.

Best practices from Poland - statistics



- In the state official database of administrative courts' judgments there are 1.838.999 judgements of the Regional Administrative Courts and the Supreme Administrative Court of Poland.
- References to the ESC can be found in 167 judgements (last two dated 29.09.2020), including 19 judgments of the Supreme Administrative Court and 148 judgments of Regional Administrative Courts.
- There are no references to the interpretations of the Charter made by the European Committee of Social Rights in decisions and conclusions.



Best practices from Poland

- Resolution of SAC 23.05.2006 (II GPS 2/15)



- Key aspect - interpretation of the term „**social security**” under the Act on social security system
- *„Currently, this notion is used in the legal systems of most European countries (...), besides it has been used in international legal terminology, in acts and declarations of political character and in social and legal literature. (...) Limitative interpretation of the notion is stimulated by the ILO Social Security (Minimum Standards) Convention, 1952 (No. 102). (...) The importance and prominence of the above-mentioned Convention increases especially in Europe (...) in the countries that ratified the **European Social Charter** (...). Ratification of most of articles of the European Social Charter by Poland (...) lists our country among those European countries whose social security system must meet at least the minimum standards of ILO Convention 102. (...) Thus, it must be assumed that such interpretation of the notion <social security> must be recognised in Polish acts, including art. 67 and 68 of Polish Constitution.”*

Best practices from Poland

-Judgment of SAC 1.10.2009 (I OSK 423/09)



- Key aspect - interpretation of the regulation of **granting pensions as a way of exception for especially vulnerable persons** in case of failure to comply with the standard requirements under the legislation on pensions from the Social Security Fund
- *„To explain the meaning of art. 13 of the ESC (...) it must be indicated that the Charter defines obligations of the state relating to social assistance. Poland, by ratification of the Charter, has committed itself to ensuring that each person, who does not possess enough resources and is not capable of providing them from other sources, especially from the statutory social security system, must be granted the aid. The above-mentioned regulations express states' responsibility towards the international community to encourage elimination of unemployment and ensuring work for all citizens and – in case of failing to comply with the obligation – to provide such citizens with social security enabling them life in conditions not violating human dignity. Nevertheless, it must be stressed that Art. 13 ESC does not provide for autonomous legal base for public authority acts, but expresses an idea from which values shaping citizens rights and obligations shall be derived. Thus, it must be understood as basis for interpretation and application of law by public authority.”*

Best practices from ECtHR - Judgment of the Grand Chamber of 12 October 2008, Case of Demir and Baykara v. Turkey, Application No 34503/97



- Key aspect – the right to organise and the right to bargain collectively (civil servants)
- *„By way of example, in finding that the right to organise had a negative aspect which excluded closed-shop agreements, the Court considered, largely on the basis of the European Social Charter and the case-law of its supervisory organs, together with other European or universal instruments, that there was a growing measure of agreement on the subject at international level (see Sigurður A. Sigurjónsson v. Iceland, 30 June 1993, § 35, Series A no. 264, and Sørensen and Rasmussen v. Denmark [GC], nos. 52562/99 and 52620/99, §§ 72-75, ECHR 2006-I).”*
- *„As to European instruments, the Court finds that the European Social Charter, in its Article 6 § 2 (which Turkey has not ratified), affords to all workers, and to all trade unions, the right to bargain collectively, thus imposing on the public authorities the corresponding obligation to promote actively a culture of dialogue and negotiation in the economy, so as to ensure broad coverage for collective agreements. The Court observes, however, that this obligation does not oblige authorities to enter into collective agreements. According to the meaning attributed by the ECSR to Article 6 § 2 of the Charter, which in fact fully applies to public officials, States which impose restrictions on collective bargaining in the public sector have an obligation, in order to comply with this provision, to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations.”*

Best practices from ECtHR - Judgment of the Grand Chamber of 13 December 2016, Case of Béláné Nagy v. Hungary, Application No 53080/13



- Key aspect – the right to social security and the right of **physically or mentally disabled persons** to vocational training, rehabilitation and social resettlement
- „*The European Committee of Social Rights has “explicitly accepted alterations to social security systems in as far as such changes are necessary in order to ensure the maintenance of the social security system ... and where any restrictions do not deprive individuals of effective protection against social and [economic] risks without a tendency to gradually reduce the social security system to one of minimum assistance” (see Conclusions XIV-1, concerning Finland and Article 12 § 3 of the European Social Charter, p. 232, 30 March 1998).*”

Best practices from ECtHR - Judgment of 2 October 2014, Case of Tymoshenko and Others v. Ukraine, Application No 48408/12



- Key aspect – the right to **bargain collectively**
 - „1. *General principles of interpretation of Article 6 § 4 of the European Social Charter*
- 44. *In its Digest of the case-law of the European Committee of Social Rights of 1 September 2008, the Committee (whose function is to rule on the conformity of the situation in signatory States with the European Social Charter) stated as follows in the Section “Interpretation of the different provisions” (the quotation below is provided without the footnotes, which contain references to specific cases):*
 - “3. *Specific restrictions to the right to strike*
- *The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.*
 - *i. Restrictions related to essential services/sectors*
- *Prohibiting strikes in sectors which are essential to the community is deemed to serve a legitimate purpose since strikes in these sectors could pose a threat to public interest, national security and/or public health. However, simply banning strikes even in essential sectors – particularly when they are extensively defined, i.e. “energy” or “health” – is not deemed proportionate to the specific requirements of each sector. At most, the introduction of a minimum service requirement in these sectors might be considered in conformity with Article 6 § 4. ...”*

Best practices from CJEU - Judgment of 8 September 2020 (GC), In Joined Cases C-119/19 P and C-126/19 P



- Key aspect – the right to paid annual leave
- „More specifically, the explanations relating to Article 31(2) of the Charter state that that provision is based on Article 2 of the European Social Charter and point 8 of the Community Charter of the Fundamental Social Rights of Workers, both of which affirm the right of every worker to paid annual leave, **Article 2 of the European Social Charter** guaranteeing the provision of a minimum of four weeks of paid annual leave”.
- „A provision, such as Article 7(1) of Directive 2003/88, which specifies, in EU law, the minimum duration of the annual period of paid leave to which every worker is entitled, by aligning itself in that respect with the period laid down in **Article 2 of the European Social Charter** which also underpins the fundamental right to paid annual leave affirmed in Article 31(2) of the Charter, cannot, by its very nature, constitute an adverse effect on that fundamental right. Article 7(1) of that directive merely gives concrete expression to that fundamental right”.
- „Setting a period of paid annual leave that exceeds the minimum requirements of Article 7(1) of Directive 2003/88 is also intended to contribute to compliance with the objective laid down in **Article 2 of the European Social Charter**, which the General Court did not, however, take into consideration in the grounds of the judgment under appeal, in particular in paragraph 87 thereof”.
- „It is apparent from that article of **the European Social Charter** that the contracting parties to that charter agreed that a minimum period of paid annual leave of four weeks ‘[ensures] the effective exercise of the right to just conditions of work’.”

Best practices from CJEU - Judgment of 27 June 2006 (GC), In Case C-540/03



- Key aspect – the right to family reunification of **minor children of third country nationals**
 - „Article 3(4) of the Directive states:
‘This Directive is without prejudice to more favourable provisions of:
 - (a) *bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other;*
 - (b) *the **European Social Charter** of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the legal status of migrant workers of 24 November 1977.’*”
 - „Subject to **the European Social Charter** which will be mentioned in paragraph 107 of this judgment, the remaining international instruments invoked by the Parliament do not in any event appear to contain provisions affording greater protection of rights of the child than those contained in the instruments already referred to.”
 - So far as concerns the Member States bound by these instruments, it is also to be remembered that the Directive provides, in Article 3(4), that it is without prejudice to more favourable provisions of **the European Social Charter** of 18 October 1961, the amended European Social Charter of 3 May 1987, the European Convention on the legal status of migrant workers of 24 November 1977 and bilateral and multilateral agreements between the Community or the Community and the Member States, on the one hand, and third countries, on the other.

Best practices from CJEU – clause used in lots of judgments e.g. Judgment of 6 November 2018 in Case C-684/16



- Different key aspects
 - *„That principle is itself mainly derived both from instruments drawn up by the Member States at EU level, such as the Community Charter of the Fundamental Social Rights of Workers, which is moreover mentioned in Article 151 TFEU, and from international instruments on which the Member States have cooperated or to which they are party. Among them is **the European Social Charter**, to which all Member States are parties in so far as they are party to it in its original version, its revised version or in both versions, also referred to in Article 151 TFEU. Mention should also be made of Convention No 132 of the International Labour Organisation of 24 June 1970 concerning Annual Holidays with Pay (revised) which, as the Court noted in paragraphs 37 and 38 of the judgment of 20 January 2009, Schultz-Hoff and Others (C-350/06 and C-520/06, EU:C:2009:18), sets out principles of that organisation which recital 6 of Directive 2003/88 states must be taken account of.”*

ESC as instrument for protection of social rights: CHALLENGES and OPPORTUNITIES



- **The ESC can and should be used in Ukrainian administrative justice** as an instrument for protection of social rights and especially for protection of the rights of vulnerable groups.
- All legal professionals involved in the administrative court proceedings can and should use the ESC and its interpretations given by the ECSR to provide proper interpretation of Ukrainian regulations and strengthen their way of reasoning.
- Best practises from both – national and international level show that the ESC is especially useful while **interpreting legal terms; determining the scope of particular rights and their understanding.**

ESC as instrument for protection of social rights: CHALLENGES and OPPORTUNITIES



- The monitoring body that examines the compliance of state regulations with the ESC - the European Committee of Social Rights – issues conclusions in which it:
 - gives broad interpretation on the understanding of particular provisions of the Charter
 - concludes if regulations of a particular state comply with obligations under the ESC
- The latest ECSR's conclusions with regard to Ukraine have been translated into Ukrainian language and are available online:

<https://rm.coe.int/european-committee-of-social-rights-conclusions-2019-ukraine-ukr-/16809e21f3>

ESC as instrument for protection of social rights: CHALLENGES and OPPORTUNITIES



- The easiest and most comfortable tool that can be used to get familiar with the ESC and its interpretations by the ECSR is „DIGEST OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS”, December 2018.

<https://rm.coe.int/digest-2018-parts-i-ii-iii-iv-en/1680939f80>

- There are also e-learning courses on ESC provided by the CoE in the frames of HELP learning courses e.g.: „Labour Rights as Human Rights” – available in Ukrainian language.

<http://help.elearning.ext.coe.int>

- The most comprehensive database of conclusions and decisions of the ECSR can be found in HUDOC database

Thank you for your attention



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