GENERAL INTRODUCTION

1. The European Committee of Social Rights, established by Article 25 of the European Social Charter, composed of:

Mr Luis JIMENA QUESADA (Spanish)

President

Professor of Constitutional Law

University of Valencia (Spain)

Substitute Judge at the High Court of Justice of the region of Valencia, Administrative Chamber (Spain)

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Mr Colm O'CINNEIDE (Irish)

Vice-President

Reader in Law

Faculty of Laws

University College, London (United Kingdom)

-

Ms Monika SCHLACHTER (German)

Vice-President

Professor of Civil, Labour and International Law

Director of Legal Studies

Institute for Labour Law and Industrial Relations in the European Community

University of Trier (Germany)

-

Mr Jean-Michel BELORGEY (French)

General Rapporteur

President of Section

Conseil d'Etat, Paris (France)

-

Ms Csilla KOLLONAY LEHOCZKY (Hungarian)

Professor, Legal Studies Department

Central European University, Budapest (Hungary)

Head of the Labour and Social Law Department

Law Faculty, Eötvös Lorand University, Budapest (Hungary)

Mr Andrzej SWIATKOWSKI (Polish)

Professor of Labour Law, Law Faculty

Jagiellonian University, Krakow (Poland)

Mr Lauri LEPPIK (Estonian)

Professor of Social Policy

Tallinn University (Estonia)

Ms Birgitta NYSTRÖM (Swedish)

Professor of Private Law, especially Labour Law

Vice-dean, Faculty of Law

University of Lund (Sweden)

Mr Rüchan I#IK (Turkish)

Professor of Labour Law, Faculty of Law

Bilkent University, Ankara (Turkey)

Mr Petros STANGOS (Greek),

Professor of European law,

Holder of the Jean Monnet Chair "European human rights law"

School of Law, Department of International studies

Aristotle University, Thessaloniki (Greece)

Mr Alexandru ATHANASIU (Romanian)

Professor, Law School, Private Law Department

Center for Comparative Social Law

University of Bucharest (Romania)

Ms Jarna PETMAN (Finnish)

Professor ad interim in International Law

Deputy Director of the Erik Castrén Institute

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University of Helsinki (Finland)

Ms Elena MACHULSKAYA (Russian)

Professor, Department of Labour and Social Law

Lomonosov State University, Moscow (Russian Federation)

Mr Giuseppe PALMISANO (Italian)

Professor of International Law and EU law

Director of the Institute for International Legal Studies

National Research Council of Italy, Rome (Italy)

Ms Karin LUKAS (Austrian)

Senior Legal Researcher and Head of Team

Ludwig Boltzmann Institute of Human Rights, Vienna (Austria)

assisted by Mr Régis BRILLAT, Executive Secretary,

between January 2012 and December 2012 examined the reports on the application of the 1961 European Social Charter by Austria, Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Latvia, Luxembourg, the Netherlands in respect of the Caribbean part, Aruba, Curacao and St. Maarten1, Poland, Spain, "the former Yugoslav Republic of Macedonia" and the United Kingdom. The Netherlands did not submit a report in respect of Aruba and St. Maarten.

2. The function of the European Committee of Social Rights is to rule on the conformity of

the situations in States with the European Social Charter, the 1988 Additional Protocol and the Revised European Social Charter. Its conclusions appear in the following chapters by State. They are also available on the website of the Council of Europe and in the case law database that is also available on this site. A summary table of the Committee's Conclusions 2012 as well as the state of signature and ratification of the 1961 European Social Charter and the Revised European Social Charter appears below.

3. The conclusions adopted by the Committee in December 2012 concern the accepted provisions of the following articles of the 1961 European Social Charter ("the 1961 Charter") belonging to the thematic group "Employment, training and equal opportunities":

- the right to work (Article 1);
- the right to vocational guidance (Article 9);
- the right to vocational training (Article 10);
- the right of persons with disabilities to independence, social integration and participation in the life of the community (Article 15);
- the right to engage in a gainful occupation in the territory of other Parties (Article 18);
- the right to equal opportunities between women and men (Article 1 of the 1988 Additional Protocol).

4. In addition to the state reports, the Committee had at its disposal comments on the reports submitted by different trade unions and non-governmental organisations (see introduction to the individual country chapters). It also received general comments on Article 15 from the Human Rights Committee of the Conference of International Non-Governmental Organisations of the Council of Europe. The Committee wishes to acknowledge the importance of these various comments, which were often crucial in gaining a proper understanding of the national situations concerned.

Statements of interpretation

5. The Committee makes the following statements of interpretation:

6. Statement of interpretation on Article 1§2: prison work

Prisoners' working conditions must be properly regulated, particularly if they are working, directly or indirectly, for employers other than the prison service. In accordance with the

principle of non-discrimination enshrined in the Committee's case law, this supervision, which may be carried out by means of laws, regulations or agreements (particularly where companies act as subcontractors in prison workshops), must concern pay, hours and other working conditions and social protection (in the sphere of employment injury, unemployment, health care and old age pensions).

7. Statement of interpretation on Article 1§2: workers' right to privacy

The Committee notes that the emergence of the new technologies which have revolutionised communications have permitted employers to organise a continuous supervision of employees and in practice enable employees to work for their companies at any time and in any place, including their homes with the result that the frontier between professional and private life has been weakened. The result is an increased risk of work encroaching upon all reaches of private life, even outside working hours and outside the place of work. The Committee considers that the right to undertake work freely includes the right to be protected against interferences with the right to privacy. Therefore it is essential that the fundamental right of workers to privacy should be asserted within the employment relationship so as to ensure that this right is properly protected.

8. Statement of interpretation on Article 1§2: requirement to accept the offer of a job or training or otherwise lose unemployment benefit

The requirement for persons claiming unemployment benefit to accept the offer of a job or training or otherwise no longer be entitled to unemployment benefit should be dealt with under Article 12§1. However, the Committee takes due account of the *Guide to the concept of suitable employment in the context of unemployment benefit* drawn up by the Committee of Experts on Social Security of the Council of Europe at its 4th meeting, held in Strasbourg from 24 to 26 March 2009, and holds that the loss of benefit or assistance when an unemployed person rejects a job offer may constitute a restriction on freedom to work where the person concerned is compelled, on pain of losing benefit, to accept any job, notably a job:

- which only requires qualifications or skills far below those of the individual concerned;
- which pays well below the individual's previous salary;
- which requires a particular level of physical or mental health or ability, which the person does not possess at the relevant time;
- which is not compatible with occupational health and safety legislation or, where these exist, with local agreements or collective employment agreements covering the sector or occupation concerned and therefore may affect the physical and mental integrity of the worker concerned;
- for which the pay offered is lower than the national or regional minimum wage or, where one exists, the norm or wage scale agreed on for the sector or occupation concerned, or where it is lower, to an unreasonable extent, than all of the unemployment benefits paid to the person concerned at the relevant time and

therefore fails to ensure a decent standard of living for the worker and his/her family;

- which is proposed as the result of a current labour dispute;
- which is located at a distance from the home of the person concerned which can be deemed unreasonable in view of the necessary travelling time, the transport facilities available, the total time spent away from home, the customary working arrangements in the person's chosen occupation or the person's family obligations (and in the latter case, provided that these obligations did not pose any problem in the person's previous employment);
- which requires persons with family responsibilities to change their place of residence, unless it can be proved that these responsibilities can be properly assumed in the new place of residence, that suitable housing is available and that, if the situation of the person so requires, a contribution to the costs of removal is available, either from the employment services or from the new employer, so respecting the worker's right to family life and housing.

In all cases in which the relevant authorities decide on the permanent withdrawal or temporary suspension of unemployment benefit because the recipient has rejected a job offer, this decision must be open to review by the courts in accordance with the rules and procedures established under the legislation of the State which took the decision.

9. Statement of interpretation on Article 1§2: length of alternative service to replace military service

The length of service to replace military service (alternative service during which persons are deprived of the right to earn their living in an occupation freely entered must be reasonable. The Committee evaluates whether the length of such replacement service is reasonable in view of the period of military service, whether it is proportionate and not excessive.

The Committee recalls in this respect Recommendation R(87)8 of the Committee of Ministers Regarding Conscientious Objection to Compulsory Military Service which provides that 'Alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits.'

The Committee notes that compulsory military service has been abolished by many States Parties in the past decade and that only a minority of States retain such a service.

The Committee has in the past stated that alternative service which is not more than 1.5 times the length of military service is in principle in conformity with the Charter. The Committee wishes now to further develop its case law, the question remains one of proportionality and reasonableness but the approach need to be more flexible and holistic. Where the length of military service is short the Committee will not necessarily insist on alternative service being not more than 1.5 times the length of military service. Nevertheless, the longer the period of military service is the stricter the Committee will be in evaluating the reasonableness of any additional length of the alternative service.

10. Statement of interpretation on Article 18 (§1 and §3)

Article 18 requires each State Party to ensure to the nationals of any other Party the effective exercise of the right to engage in a gainful occupation in its territory, by applying existing regulations in a spirit of liberality (§1), and by liberalising regulations governing the employment of foreign workers (§3). As the Committee has already observed, economic or social reasons might justify limiting access of foreign workers to the national labour market. This may occur, for example, with a view to addressing the problem of national unemployment by means of favouring employment of national workers.

The Committee considers to be also in conformity with Article 18§§1 and 3, the fact that a State Party, in view of ensuring free movement of workers within a given economic area of European States, such as the EU or the EEA, gives priority in access to the national labour market not only to national workers, but also to foreign workers from other European States members of the same area. An example of such a situation can be found in the application of the so called "priority workers" rule, provided for by the EU Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment. This Resolution states *inter alia* that EU Member States will consider requests for admission to their territories for the purpose of employment only where vacancies cannot be filled by national and Community manpower, or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market.

In this regard the Committee notes, however, that in order not to be in contradiction with Article 18 of the Charter, the implementation of such policies limiting access of third-country nationals to the national labour market, should neither lead to a complete exclusion of nationals of non-EU (or non-EEA) States parties to the Charter from the national labour market, nor substantially limit the possibility for them of acceding the national labour market. Such a situation, deriving from the implementation of "priority rules" of the kind just mentioned, would not be in conformity with Article 18§1, of the Charter, since it would prove an insufficient degree of liberality in applying existing regulations with respect to the access to the national labour market of foreign workers of a number of States Parties to the Charter. It would also be contrary to Article 18§3, since the State in question would not comply with its obligation to progressively liberalise regulations governing the access to the national labour market with respect to foreign workers of a number of States Parties to the Charter.

The Committee refers to its general questions below on Article 18§1 and 18§3 (EU/EEA States).

11. Statement of interpretation on Article 18§2: dues and charges

According to Article 18§2 of the Charter, with a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, States Parties are under an obligation to reduce or abolish chancery dues and other charges paid either by foreign workers or by their employers. The Committee observes that in order to comply with such an obligation, States must, first of all, not set an excessively high level for the dues and charges in question, that is a level likely to prevent or discourage foreign workers from seeking to engage in a gainful occupation, and employers from seeking to employ foreign workers.

In addition, States have to make concrete efforts to progressively reduce the level of fees and other charges payable by foreign workers or their employers. States are required to demonstrate that they have taken measures towards achieving such a reduction.

Otherwise, they will have failed to demonstrate that they serve the goal of facilitating the effective exercise of the right of foreign workers to engage in a gainful occupation in their territory.

12. Statement of interpretation on Article 18§3: recognition of certificates, qualifications and diplomas

Article 18§3 requires each State Party to liberalise regulations governing the employment of foreign workers, in order to ensure to workers from other States Parties the effective exercise of the right to engage in a gainful occupation. The Committee considers that, in view of ensuring the effective exercise of this right, States Parties' engagement in liberalisation shall include regulations governing the recognition of foreign certifications, professional qualifications and diplomas, to the extent that such qualifications and certifications are necessary to engage in a gainful occupation as employees or self-employed workers.

A requirement that foreign worker be in possession of certificates, professional qualifications or diplomas issued only by national authorities, schools, universities, or other training institutions, without opening the possibility of recognising as valid and appropriate substantially equivalent certificates, qualifications or diplomas issued by authorities, schools, universities or other training institutions of other States parties, which have been obtained as a result of training courses or professional careers carried out within other States Parties, would represent a serious obstacle for foreign workers to access the national labour market, and an actual discrimination against non-nationals. For this reason the Committee, taking inspiration also from the example of the legislative and jurisdictional practice of EU institutions aimed at guaranteeing the right to establishment by the harmonization and mutual recognition of qualifications, considers it necessary that States Parties make efforts to liberalise regulations governing the recognition of foreign certificates, professional qualifications and diplomas, progressively reducing the disadvantages for foreign workers to engage in a gainful occupation due to lack of recognition of foreign diplomas or professional qualifications substantially equivalent to those issued by national authorities, schools, universities or other training institutions.

The Committee refers to its general question below on Article 18§3 (recognition of certificates, qualifications and diplomas).

13. Statement of interpretation on Article 18§3: consequences of job loss

The Committee observes that both the granting and the cancellation of work and temporary residence permits may well be interlinked, in as much as they refer to the same case in question- whether or not to enable a foreigner to engage in a gainful occupation. However, in case a work permit is revoked before the date of expiry, either because the employment contract is prematurely terminated, or because the worker no longer meets the conditions under which the work permit was granted, it would be contrary to the Charter to automatically deprive such worker of the possibility to continue to reside in the State concerned and to seek another job and a new work permit, unless there are exceptional circumstances which would authorise expulsion of the foreign worker concerned, in the meaning of Article 19§8.

14. Statement of interpretation on Article 1 of the 1988 Additional Protocol: equal pay comparisons

Under Article 20, equal treatment between women and men includes the issue of equal

pay for work of equal value. Usually, pay comparisons are made between persons within the same undertaking/company. However, there may be situations where, in order to be meaningful this comparison can only be made across companies/undertakings. Therefore, the Committee requires that it be possible to make pay comparisons across companies. It notes that at the very least, legislation should require pay comparisons across companies in one or more of the following situations:

- cases in which statutory rules apply to the working and pay conditions in more than one company;
- cases in which several companies are covered by a collective works agreement or regulations governing the terms and conditions of employment;
- cases in which the terms and conditions of employment are laid down centrally for more than one company within a holding [company] or conglomerate.

General Questions from the Committee

15. The Committee addresses the following general question to all the States Parties and invites them to provide replies in the next report on the provisions concerned:

16. Article 1§2: workers' right to privacy

The Committee asks for information in the next report on measures taken by States Parties to ensure that employers give due consideration to workers' private lives in the organisation of work and that all interferences are prohibited and where necessary sanctioned.

17. Article 1§2: existence of forced labour in the domestic environment

The Committee would like to draw the States' attention to the problem raised by domestic work and work in family enterprises, both different phenomena but both which may give rise to forced labour and exploitation, problems at the heart of ILO Domestic Workers Convention No. 189 (2011).

Work in family enterprises may give rise to excessive working hours, failure to remunerate properly, etc. The Committee asks States Parties for information on the legal provisions adopted to combat these practices and the measures taken to supervise their implementation.

As regards domestic work the Committee considers that such work often involves abusive, degrading and inhuman living and working conditions for the domestic workers concerned (see ECtHR judgments in *Siliadin v. France,* 26 July 2005, final on 26 October 2005, and in *Rantsev v. Cyprus and Russia,* 7 January 2010, final on 10 May 2010). Consequently, the Committee asks whether the homes of private persons who employ domestic workers are subject to inspection visits. It further asks whether penal law effectively protects

domestic workers in case of exploitation by the employer and whether regulations offer protection against abuse, by requiring, for example, that migrant workers recruited in one State for the performance of domestic work in another State receive an offer of employment in writing or an enforceable employment contract in this last State. It finally asks whether foreign domestic workers have the right to change employer in case of abuse or whether they forfeit their right of residence if they leave their employer.

18. Article 18§1 (EU/EEA States)

The Committee asks all States Parties being EU/EEA member states to provide information in the next report on the number of work permits granted to applicants from non-EEA States, as well as on work permit refusal rate with respect to applicants from such States, as this information is relevant in order to assess the degree of liberality in applying existing regulations governing access to national labour market. In this regard, the Committee observes that an absence or an extremely low number of work permits granted to nationals of non-EEA States Parties to the Charter, together with a very high work permit refusal rate with respect to applicants from such States, due to the application of rules like the so called “priority workers” rule (according to which a State will consider requests for admission to its territories for the purpose of employment only where vacancies cannot be filled by national and Community manpower), would not be in conformity with Article 18§1, since it would indicate an insufficient degree of liberality in applying existing regulations with respect to the access to the national labour market of nationals of non-EEA States Parties to the Charter.

19. Article 18§3 (EU/EEA States)

The Committee asks all States Parties being EU/EEA member states to provide information in the next report on the number of applications for work permits submitted by nationals of non-EEA States, as well as on the grounds for which work permits are refused to nationals of non-EEA States parties to the Charter. In this respect the Committee observes that should refusals always or in most cases derive from the application of rules – like the so called “priority workers” rule –, according to which a State will consider requests for admission to its territories for the purpose of employment only where vacancies cannot be filled by national and Community manpower, determining as a consequence to discourage nationals of non-EEA States from applying for work permits, this would not be in conformity with Article 18§3, since the State would not comply with its obligation to liberalise regulations governing the access to national labour market with respect to nationals of non-EEA States Parties to the Charter

20. Article 18§3: recognition of certificates, qualifications and diplomas

The Committee asks States Parties to provide information in the next report about the measures eventually adopted (either unilaterally, or by way of reciprocity with other States Parties to the Charter) to liberalise regulations governing the recognition of foreign certificates, professional qualifications and diplomas, with a view to facilitating the access to national labour market. Such information shall concern the category of dependant employees, as well as the category of self-employed workers, including workers wishing to establish companies, agencies or branches in order to engage in a gainful occupation.

21. Article 1 of the 1988 Additional Protocol: equal pay comparisons

The Committee asks whether legislation permits, in equal pay cases, comparisons of pay to be made outside the company directly concerned, and under what conditions.

22. Article 1 of the 1988 Additional Protocol: positive action measures

The Committee asks States Parties to provide information in the next report on positive action measures taken to promote gender equality in employment.

Statement on deferred conclusions

23. The Committee recalls that its assessments of national situations in accordance with Article 24 of the Charter as amended by the Turin Protocol give rise to two types of conclusions only: conclusions of conformity and conclusions of non-conformity. Having regard to the fact that the Committee in several cases had to defer its conclusion due to lack of information in the national report, it wishes to emphasise that the absence of the requisite information amounts to a breach of the reporting obligation entered into by the States Parties concerned under the Charter.

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Next report

24. The next reports on the accepted provisions, which were due before 31 October 2012, concern the following Articles belonging to the thematic group “Health, social security and social protection”: 3, 11, 12, 13, 14 and Article 4 of the 1988 Additional Protocol.

1The conclusions in respect of the Caribbean part and Curacao appear in the chapter on the Netherlands in Conclusions 2012 (Revised Charter). In the absence of a report no conclusions were adopted in respect of Aruba and St. Maarten.