



DECISION ON THE MERITS

COMPLAINT NO. 1/1998

By the International Commission of Jurists
against Portugal

The European Committee of Social Rights, committee of independent experts of the European Social Charter established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 163rd session attended by:

Messrs. Matti MIKKOLA, President
Rolf BIRK, Vice- President
Stein EVJU, Vice-President
Ms Suzanne GRÉVISSE, General Rapporteur
Messrs. Konrad GRILLBERGER
Tekin AKILLIOGLU
Nikitas ALIPRANTIS
Alfredo Bruto DA COSTA
Ms Micheline JAMOULLE

Assisted by Mr Régis Brillat, Secretary to the Committee

In the presence of Mme ANCEL-LENNERS, observer of the International Labour Organisation

After having deliberated on 30 June, 8 and 9 September 1999;

Delivers the following decision adopted on 9 September 1999:

PROCEDURE

1. On 10 March 1999, the Committee declared the complaint admissible by the appended decision.
2. In accordance with Article 7 paras. 1 and 2 of the Protocol providing for a system of collective complaints and with the Committee's decision of 10 March 1999 on the admissibility of the complaint, the Secretary to the Committee communicated on 12 March 1999 the text of its admissibility decision to the Portuguese Government, to the International Commission of Jurists (ICJ), to the Contracting Parties to the Protocol as well as to the European Trade Union Confederation (ETUC), the Union of the Confederations of Industry and Employers of Europe (UNICE) and the International Organisation of Employers (IOE), inviting them to submit their observations on the merits of the complaint. The Secretary to the Committee also communicated the text of the decision to the Contracting Parties to the Charter for their information.
3. The Portuguese Government submitted its observations on the merits along with four appendices on 29 March 1999. The ETUC submitted observations on 28 May 1999, following an extension of the time limit. The complainant organisation submitted its observations along with one appendix on 7 June 1999 following an extension of the time limit. The Portuguese Government submitted supplementary observations along with an appendix on 29 June 1999, following an extension of the time limit.
4. In accordance with Article 7 para. 3 of the Protocol, each party received the observations of the other, as well as those of the ETUC.
5. The Portuguese Government and the ETUC suggested in their observations that the Committee organise a hearing in accordance with Article 7 para. 4 of the Protocol. On the basis of Article 10 of the rules of procedure, the Committee did not consider it necessary to organise such a hearing.

SUBMISSIONS OF THE PARTICIPANTS IN THE PROCEDURE

a) The complainant organisation

6. The ICJ requests the Committee to declare that Portugal is in violation of Article 7 para. 1 of the Charter, which reads as follows:

“With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

1. *to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals or education;“*

It alleges, as stated in the second paragraph of the admissibility decision, that “notwithstanding the statutory provisions adopted and the measures taken by Portugal to prohibit child labour and to ensure that this rule is enforced, a large number of children under the age of 15 years continue to work illegally in many economic sectors, especially in the north of the country. It further maintains that the Labour Inspectorate, which is the principal body for supervising compliance with the legislation on child labour, is not in a position to perform its functions effectively. It states that the working conditions imposed on these children are harmful to their health. It recalls that states which are bound by Article 7 para. 1 of the Social Charter are required not just to set the minimum age of admission to employment at 15 but also to take the necessary measures to ensure satisfactory application of this rule. Moreover, it recalls that the prohibition on employing children under the age of 15 also applies to children working in family businesses”.

7. The ICJ relies on various documents, including a report published by a non-governmental organisation in 1992¹, which estimates that, at that time, 200,000 children under the age of 15 worked in poor conditions which affected their health. It adds that the Labour Inspectorate has often been the target of allegations of corruption or simply lack of motivation and efficiency.

b) The Portuguese Government

8. In its observations on the merits of the complaint, the Government recalls firstly that Portugal has ratified many international conventions concerning the prohibition of child labour, which demonstrates its firm political intention to implement all of the provisions and principles of these conventions. It has ratified all of the provisions of the European Social Charter, including Article 7 which guarantees the right of children and adolescents to protection. It is one of the first states to have ratified the Protocol providing for a system of collective complaints. It has also ratified the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights of the United Nations, of which Article 24 and Article 10 para. 3 respectively concern the protection of minors. It has in addition ratified the United Nations Convention on the Rights of the Child as well as International Labour Organisation Convention No. 138 on minimum age, 1973.

9. The Government considers that this places it in an unfavourable position in relation to states that have not ratified the above-mentioned instruments and, in particular, to Contracting Parties to the Charter that have not accepted Article 7 in its entirety and who are consequently not subject to any international supervision in this area.

¹ Suzanne Williams, *Child Workers in Portugal*, n° 12 in Child Labour Series, London, Anti-Slavery International, 1992.

10. The Government then proceeds to analyse the evidence provided by the complainant organisation. It maintains that some of the appendices should not be taken into account as they contain evidence relating to the period 1994-95, covered by Recommendation R Ch S(98) 5 of the Committee of Ministers. The Committee should only consider, according to the Government, those appendices which contain evidence dating from after the Recommendation.

11. It asserts that in any event the statistics on child labour in these documents are not reliable. It relies on the results of the statistical survey carried out in October 1998 (the period of reference being the last week of September) in collaboration between the statistics department of the Portuguese Ministry of Labour and the International Labour Organisation (statistical service and the International Programme on the Elimination of Child Labour (IPEC)). In its view, the Committee should in the present case take account of the information and statistics on child labour produced by this survey only.

12. The Government explains the methodology chosen for the survey. Covering 26,569 families, the survey recorded the statements of heads of household and of children. All minors from the age of 6 up to and including 15 years performing an activity which contributed to the national product for more than one hour per week were considered by the survey as children performing an economic activity. The survey did not distinguish between the "light work" permitted by the Charter under Article 7 para. 1 and prohibited work.

13. The Government then presents the results of the survey, which found that:

- 46.6% of the children who declared that they performed an economic activity were 13 or 14 years old;
- 90.8% of the children aged between 6 and 14 years who declared that they performed an economic activity did so as unpaid family members while 9.8% were paid workers;
- Among the unpaid family members, 93.6% attended school and 6.4% had left, of which 3.1% had completed compulsory education. 68% of the paid workers aged between 6 and 14 years attended school;
- 66% of the children aged between 6 and 14 years who declared that they performed an economic activity worked in the agricultural sector, 9.6% in restaurants, 9.2% in retail, 7.1% in manufacturing, 2.7% in construction and 5.5% in other activities
- 73.6% of the children aged between 6 and 14 years who declared that they performed an economic activity in the agricultural sector worked on average for three hours or less daily; 21.9% worked for between four and six hours and 4.5% of these children worked more than six hours. 58.1% of the children engaged in manufacturing worked on average for three hours daily or less; 22.6% worked for between four and six hours and 19.4 % worked for more than six hours. 33.3% of children engaged in construction worked on average for three hours or less daily; 33.3% worked for between four and six hours and 33.3% worked for more than six hours per day. 60% of children engaged in retail

worked on average for three hours or less daily; 14.3% worked for between four and six hours and 10% worked for more than six hours. 69% of children engaged in the hotel and restaurant sector worked on average for three hours or less daily; 14.3% worked for between four and six hours and 16.7% worked for more than six hours. Lastly, 68.4% of these children worked on average for three hours or less daily across all sectors.

14. In the Government's view, the results of the survey show that the number of children aged between 6 and 14 years, who are covered by Article 7 para. 1 of the Charter, who performed an economic activity during the reference period of the survey, is relatively small and far below that alleged in the complaint. This number is between 12,000 (according to statements made by parents) and 27,500 (according to statements made by children, of whom 25,000 performed unpaid work as part of the household economy and 2,500 performed paid work. The Government maintains that unpaid activity within the family does not come within the scope of Article 7 para.1. The only family work covered by this provision is that performed in family businesses and the work of domestic employees, which are different from helping out the family. It asserts that the results of the survey prove that child labour in Portugal occurs almost completely within the context of helping out the family. It adds that in any event the activities performed in this setting are "light work, occasional or for a short duration which does not affect the completion of compulsory education", i.e. this is "light work" authorised by Article 7 para. 1. It considers that just the 2,500 children who, according to the survey, performed a paid activity worked in conditions which were incompatible with the requirements of Article 7 para. 1, as work performed by children as part of helping out the family constitutes a different problem which comes under Article 7 para. 10 of the Charter.

15. The Government describes the measures to combat child labour taken since 1995 (the measures adopted beforehand have already been assessed by the European Committee of Social Rights as part of its examination of national reports).

It stresses that combating child labour is considered to be a priority by the Government as well as the social partners (Programme of the Thirteenth Government, strategic co-operation agreement of December 1996, creation of the Plan to Eliminate the Exploitation of Child Labour and the National Council Against the Exploitation of Child Labour). It states that a bill to extend to the self-employed sector the prohibition on child labour under the age of sixteen and another to increase the sanctions applicable in cases of illegal work, non-compliance with compulsory schooling or with the legislation and rules concerning light work are currently before the National Assembly. It also lists many measures adopted to combat academic failure and "dropping out", to combat poverty and social exclusion (introduction in 1996 of the minimum income benefit, the payment of which is linked to attendance at school by the children of the families in receipt of benefit) as well as measures in the fields of social security and employment (for example, linking the level of family benefit to family income).

16. The Government further contests the ICJ's allegation that the Labour Inspectorate is incapable of carrying out effective supervision. It points to improvements in the staffing levels and training of labour inspectors. It recalls that they make many unannounced visits which focus specifically on the detection of illegal child labour, and request trade unions, non-governmental organisations and schools to

inform it of any cases of illegal child labour, failure to attend school or “dropping out” which they may be aware of. Labour inspectors have the authority to inspect the home of the employer, since the legislation on child labour applies to declared work in the home. The Government stresses however that the Labour Inspectorate cannot make inspection visits to private dwellings where children work illegally. This is the responsibility of other public services such as the educational, health, social security, employment and vocational training services.

17. The Government criticises vigorously the allegations of bribery and corruption made against the Labour Inspectorate in the complaint. It observes that no evidence is produced in support of these allegations. It states that no complaint or allegation of corruption has ever been made against labour inspectors.

18. In conclusion, the Government affirms that although some instances of child labour still exist within the state, it would be unfair to conclude that the situation in Portugal fails to comply with Article 7 para. 1 in the light of the measures implemented to eradicate this problem.

c) The European Trade Union Confederation (ETUC)

19. In its observations, the ETUC recalls that it places great importance on the Charter in general and on the new developments in the supervisory system in particular. It wishes to contribute to the Charter becoming a living instrument to strengthen basic social rights in practice.

20. It invites the Committee to give a clear interpretation of Article 7 para. 1 which covers all areas of activity without exception, including activities carried out within the family (apart from domestic chores in the proper sense).

21. As to the situation in Portugal, the ETUC recalls that in 1974 trade unions carried out a review of the social situation, underlining the seriousness of child labour. It notes that in recent years legislative and practical measures have improved the effectiveness of the struggle against child labour, as demanded by trade union organisations.

22. The ETUC nonetheless takes the view that in spite of the efforts deployed by the Portuguese Government, the situation still fails to comply in practice with the requirements of Article 7 para. 1.

ASSESSMENT OF THE COMMITTEE

23. The Committee acknowledges firstly the legal obligation assumed by the Government in accepting all of the European Social Charter and, more particularly, all of the paragraphs of Article 7, as well as in ratifying the Protocol providing for a system of collective complaints. It observes that to date, few states have accepted as many international commitments under the Charter.

24. It observes however that the examination of the present complaint does not entail any comparison between the case of Portugal and that of the other states which have ratified the Charter, nor any assessment of the situation in these states in respect of Article 7 para. 1.

25. The Committee recalls the aim and scope of Article 7 para. 1 of the Charter as specified in its Conclusions in examining national reports.

26. This provision prohibits child labour under the age of fifteen, with certain exceptions. It aims to ensure the protection of children and adolescents against the risks associated in performing work which may have negative repercussions on their health, their moral welfare, their development and their education (Conclusions V, p. 55).

27. The prohibition relates to:

- all economic sectors and all types of enterprises, including family businesses, as well as all forms of work, whether paid or not (see in particular Conclusions VII, p. 41),
- agricultural and domestic work, which the Committee has declared cannot be automatically considered to be light work within the meaning of this paragraph (Conclusions I, p. 42),
- homeworking and sub-contracting.

28. Work within the family (helping out at home) also comes within the scope of Article 7 para. 1 even if such work is not performed for an enterprise in the legal and economic sense of the word and the child is not formally a worker. Although the performance of such work by children may be considered normal and even forming part of their education, it may nevertheless entail, if abused, the risks that Article 7 para. 1 is intended to eliminate. The supervision required of states must, in such cases, as the Portuguese Government itself observes, concern not just the Labour Inspectorate but also the educational and social services.

29. If Article 7 para. 1 provides for an exception to the prohibition on work under the age of fifteen years in respect of "prescribed light work", this can only mean work which does not entail any risk to the health, moral welfare, development or education of children. The light nature of the work is assessed on the basis of the circumstances of each case.

30. The nature of the work is a determining factor. Work which is unsuitable because of the physical effort involved, working conditions (noise, heat, etc.) or possible psychological repercussions may have harmful consequences not only on the child's health and development, but also on its ability to obtain maximum advantage from schooling and, more generally, its potential for satisfactory integration in society. In order to comply with Article 7 para. 1, states are therefore required, under the supervision of the Committee, to define the types of work which may be considered light, or at the very least to draw up a list of those which are not.

31. Work considered to be “light” in nature ceases to be so if it is performed for an excessive duration. States are therefore required to set out the conditions for the performance of “light work”, especially the maximum permitted duration and the prescribed rest periods so as to allow supervision by the competent services. Even though it has not set a general limit on the duration of permitted light work, the Committee has considered that a situation in which a child under the age of fifteen years works for between twenty and twenty-five hours per week during school term (Conclusions II, p. 32), or three hours per school day and six to eight hours on week days when there is no school is contrary to the Charter (Conclusions IV, p. 54).

32. Finally, the Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact. In this regard, it considers that the satisfactory application of Article 7 cannot be ensured solely by the operation of legislation if this is not effectively applied and rigorously supervised (see for example Conclusions XIII-3, pp. 283 and 286). It considers that the Labour Inspectorate has a decisive role to play in effectively implementing Article 7 of the Charter.

33. In the light of these principles, the Committee notes first that, according to the information provided by the Government and mentioned by the Committee in Conclusions XIII-5, in Portugal only young people who are already aged fifteen (as of 1 January 1997) and who have completed compulsory schooling of nine years may be employed in light work. Accordingly, any work, including light work, performed by a child under the age of fifteen is illegal. The statutory measures adopted in Portugal to implement Article 7 para. 1 are rigorous, which the Committee can only welcome.

34. However, the Committee observes from the evidence contained in the file that in Portugal, children under the age of fifteen actually perform work. It notes that the Government does not dispute this. In order to seek to establish the exact dimensions of this problem and its characteristics, it may take account of all information submitted by the parties, whatever the period it relates to. In the present case, it considers it sufficient to rely on the results of the 1998 survey which provides the most recent evidence and the validity of which is not disputed by the International Commission of Jurists, even if its interpretation of the results differs from that given by the Government.

35. It emerges from this survey that in September 1998 several thousand children under the age of fifteen years performed work in breach of the requirements of Article 7 para. 1 of the Charter and Portuguese law. The Committee considers in particular that the 25,000 children who, out of an estimated total of 27,500, performed unpaid work as part of helping out the family must be taken into account under Article 7 para. 1.

36. The Committee notes further that, according to the survey, a not insignificant number of children under the age of fifteen years who declared that they performed an economic activity work in the agricultural (66%), manufacturing (7.1%) and construction (2.7%) sectors. These sectors may, by their very natures, give rise to certain types of work which may have negative consequences on the children’s health as well as on their development.

37. The Committee observes lastly that, taking all sectors together, the duration of work declared exceeds that which may be considered compatible with children's health or schooling: 31.6% of the children concerned worked on average for more than 4 hours per day across all sectors. This percentage is particularly high in the construction sector and the manufacturing sector where, respectively, 66.6% and 42% of the children concerned worked on average for more than four hours per day. The Committee notes that among the children aged between 6 and 14 years who performed paid work, just 68% attended school.

38. With particular regard to child labour as part of helping the family out, which occurs mainly in agriculture and the restaurant sector, according to the Government, the Committee has no reason to presume that by its nature or the conditions in which it is performed (duration, working hours) it can in all cases be considered light work within the meaning of Article 7 para. 1.

39. The Committee then considers whether the measures taken by the Government rectify the situation criticised.

40. It acknowledges that the Government, especially in recent years, has taken many legal and practical measures to combat child labour, tackling its many diverse and complex causes. These measures have brought about a progressive reduction in the number of children working illegally, an improvement which is not in dispute. However, it is clear that the problem has not been resolved.

41. The Committee acknowledges that many measures have been taken by the Government to increase the efficiency of the Labour Inspectorate. It observes that in 1997 labour inspectors carried out 1,462 visits in enterprises and found 167 children under the age of 16 years working illegally there. In 1998, they carried out 2,475 visits in enterprises and found 191 cases of children under the age of 16 working illegally. The Committee considers that, in the light of the results of the 1998 survey and the fact that the existing legislation and rules cover family businesses, these figures are modest.

42. As regards the allegation of the ICJ that the Labour Inspectorate is corrupt, which is vigorously disputed by the Government, it is not supported by evidence.

43. Finally, as the Government recognises, efforts must be maintained to increase the effectiveness of supervision of children's work within the family and in private dwellings. The Committee is aware of the difficulty of this task, which involves the Labour Inspectorate or the educational and social services as appropriate.

44. The Committee considers that the other arguments advanced by the parties are secondary and do not modify its assessment of the situation.

CONCLUSION

45. The Committee concludes that the situation in Portugal is not in conformity with Article 7 para. 1.

Suzanne GREVISSE
Rapporteur

Matti MIKKOLA
President of the Committee

Régis BRILLAT
Secretary to the Committee

In accordance with Rule 30 of the Committee's Rules of Procedure, a dissenting opinion of Mr Alfredo BRUTO DA COSTA is appended to this decision.

DISSENTING OPINION OF Mr Alfredo BRUTO DA COSTA

1. The establishment of the collective complaints system (Additional Protocol of 9 Nov. 1995) presupposes that the complainant organisation is capable of supplying the Committee with information and/or evidence that would not be available through the reporting system.

In the present case, however, the European Committee of Social Rights built up its entire argument without drawing on any piece of information or evidence provided by the International Commission of Jurists (ICJ). In this sense, notwithstanding the fact that the ICJ was recognised “as having particular competence” in the matter, the complaint must be seen as without merit.

Thus, the complaint objectively served as a mere pretext for the Committee to arrive at a “negative” conclusion based on information gathered elsewhere (specifically supplied by the Portuguese Government). Thus, the Committee supplied the complaint with the argument that it lacked, and made an improper use of the system of collective complaints.

2. By adopting a conclusion focused on the “situation in Portugal”, the Committee did not respond to what is demanded from it in Article 8 of the Additional Protocol. The article refers to a conclusion “as to whether or not the Contracting Party concerned has ensured the satisfactory application of the provision”, which relates more to the performance of the Contracting Party than to the actual situation. Furthermore, the term “satisfactory” admits a certain flexibility that the assessment of the compliance in terms of “yes or no” does not.
3. The Committee adopts a static and narrow concept of “legality”, ignoring the natural and unavoidable viscosity of social changes, and the need of taking account of the dynamic aspect of social problems. Hence the fact that the progress achieved in the area (child work) in Portugal is mentioned but is not properly evaluated by the Committee.

Indeed, of all information on the quantitative dimension of the problem mentioned in the “various documents” provided by the ICJ, the Committee only quotes the number of 200 000 working children in 1992. On the other hand, it refers to the number of 27 500 working children that, according to a survey undertaken by the Portuguese Government, existed in 1998. The Committee did not take sufficient account of the dramatic fall from 200 000 to 27 500 working children (a decrease of around 86%) over a period of 6 years in terms of assessing whether or not the Contracting Party has ensured a “satisfactory application of the provision”. Rather, the conclusion seems to go no further than observing that “the problem has not been solved” and, therefore, that the situation is not in conformity with the article concerned.

4. It is regrettable that, in the context of a discussion on social rights, the Committee has no word of criticism to the International Commission of Jurists, after verifying that the allegation of the ICJ that the Labour Inspectorate is corrupt “is not supported by evidence”.

In conclusion:

- the conclusion of the Committee is not in compliance with Article 8 of the Additional Protocol
- the complaint did not supply the Committee with any piece of information or evidence that was relevant for supporting its conclusion;
- objectively, the Committee made improper use of the system of collective complaints;
- and finally, the Committee adopted a narrow and static concept of legality, unsuited to the purpose of legally assessing social situations and problems.