

DECISION ON THE MERITS

COMPLAINT No. 14/2003

By the International Federation of Human Rights Leagues (FIDH)
v. France

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (hereafter referred to as "the Committee"), during its 203rd session attended by:

Messrs	Jean-Michel BELORGEY, President
	Nikitas ALIPRANTIS, Vice-President
Ms	Polonca KONCAR, Vice-President
Messrs	Stein EVJU, General Rapporteur
	Rolf BIRK
	Matti MIKKOLA
	Konrad GRILLBERGER
	Alfredo BRUTO DA COSTA
	Tekin AKILLIOĞLU
Ms	Csilla KOLLONAY LEHOCZKY
Messrs	Gerard QUINN
	Lucien FRANCOIS
	Andrzej SWIATKOWSKI

Assisted by Mr Régis BRILLAT, Executive Secretary of the European Social Charter

After having deliberated on the 24 May, 6, 7 and 8 September 2004,

On the basis of the report presented by Mrs Polonca KONCAR,

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint, lodged by the International Federation of Human Rights Leagues (FIDH), was registered on 3 March 2003. On 16 May 2003, the Committee declared it admissible.
2. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints and with the Committee's decision on the admissibility of the complaint of 16 May 2003, the Executive Secretary communicated, on 21 May, the text of the admissibility decision to the French Government ("the Government"), to FIDH, to the Contracting Parties to the Protocol, to the states that have made a declaration in accordance with Article D§2 of the revised European Social Charter, 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. In accordance with Article 25§2 of the Committee's Rules of Procedure, the President fixed a deadline of 30 September 2003 for the presentation of observations.
3. At the request of the Government, the President extended this deadline to 24 October 2003. On this date, the Government presented its observations on the merits of the complaint.
4. The President set 1 December 2003 as the deadline for FIDH to present its observations in response to the Government. The observations were registered on 15 December 2003.
5. The Government presented supplementary observations on 1 April 2004.
6. On 28 July 2004, FIDH addressed supplementary observations to the Committee.

SUBMISSIONS OF THE PARTIES TO THE PROCEDURE

a) The Complainant Organisation

7. FIDH asked the Committee to rule that the legislation and practice at stake contravene to the provisions of Articles 13 and 17 of the Revised Social Charter.

b) The defending Government

8. The Government invites the Committee to reject the complaint as unfounded.

RELEVANT DOMESTIC LAW

9. Section 57 of Part II – "Other Provisions" – of the 2002 Finance (Amendment) Act, No. 2002-1576 of 30 December 2002 reads:

I. Article L. 251-2 of the Social Action and Family Code is amended as follows:

1. In the first sub-paragraph, after the words "which qualifies for exemption from advance payment", insert the words "other than the part covered by the patient contribution". In the second sub-paragraph (1) the words "7 and 8" are deleted.

2. At the end of sub-paragraph 2, add the words "for young persons and, for the other beneficiaries, subject to the conditions laid down in the final sub-paragraph of this article".

3. Add two additional sentences:

"Other than in the case of expenses incurred on behalf of a child or young person or in one of the cases mentioned in paragraphs 1 to 4, 10, 11, 15 and 16 of the Social Security Code, recipients of state medical assistance shall pay a contribution to their costs as provided for in Article L. 322-2 and section 2 of chapter II of title II of book III of that Code.

The expenses remaining to be met by the beneficiary in accordance with this Article shall be limited as provided for by decree.

II. Sections a and b of Article L. 111-2 and in the same sub-paragraph of this Article the words "to b of the same sub-paragraph" are deleted.

III. In the first sub-paragraph of Article L. 251-1 of the Code, the words "other than those referred to in Article L. 380-5 of this Code" are deleted. Article L. 380-5 of the Social Security Code is repealed.

IV. The provisions of I, II and III are applicable from the date on which the implementing decree comes into force.

10. Section 97 of the 2003 Finance (Amendment) Act, No. 2003-1312 of 30 December 2003 introduced further changes to Articles L. 251-1, L. 252-3, L. 253-2 and L. 254-1 of the Social Action and Family Code.

11. The provisions of chapter 1, "entitlement to state medical assistance", of Title V of the Social Action and Family Code, as modified by the Acts of 30 December 2002 and 30 December 2003, are as follows:

“Chapter 1: Entitlement to state medical assistance

Article L. 251-1

Any foreign national who has resided in France for an uninterrupted period of more than three months, without meeting the conditions for lawful residence specified in L. 380-1 of the Social Security Code and whose income does not exceed the maximum specified in Article L. 861-1 of that Code, shall be entitled, both for himself and his dependents within the meaning of Articles L. 161-14 and L. 313-3 of this Code, to state medical assistance.

In addition, any person not residing in France but present in French territory whose state of health so requires, may, by individual decision of the minister responsible for social action, be granted state medical assistance in accordance with Article L. 252-1. In such a case, only part of the costs referred to in Article L. 251-2 may be met.

Similarly, any person in police custody in French territory, whether or not residing in France, whose state of health so requires, may be granted state medical assistance, as provided for by decree.

Article L. 251-2

(Act, No. 2002-1576 of 30 December 2002, Section 57)

The cost of treatment, payment for which qualifies for exemption in advance, other than the part covered by the patient contribution, concerns:

1. The costs specified in sections 1, 2, 4 and 6 of Article L. 321-1 and Article L. 331-2 of the Social Security Code, after applying the rates on which the calculation of health insurance benefits is based;

2. The daily hospital in-patient charge, instituted by Article L. 174-4 of the Social Security Code for young persons and, for the other beneficiaries, subject to the conditions laid down in the final sub-paragraph of this article.

Other than in the case of expenses incurred on behalf of a child or young person or in one of the cases mentioned in paragraphs 1 to 4, 10, 11, 15 and 16 of the Social Security Code, recipients of state medical assistance shall pay a contribution to their costs as provided for in Article L. 322-2 and section 2 of chapter II of title II of book III of that Code.

The expenses remaining to be met by the beneficiary in accordance with this Article shall be limited as provided for by decree.

...

Chapter 4: Cost of urgent treatment

Article L. 254-1

(Act, No. 2003-1312 of 30 December 2003, Section 97.2a)

The cost of urgent treatment provided by a health establishment in accordance with Article L. 251-1 to foreign nationals who do not meet the conditions for lawful residence specified in L. 380-1 of the Social Security Code, when failure to provide such treatment could be life-threatening or result in a serious and lasting deterioration in the health of the individual concerned or of an unborn child, shall be met in accordance with the conditions specified in Article L. 251-2. For this purpose, a fixed payment shall be made by the state to the employees' national health insurance fund.

12. Following these changes, the arrangements applicable to the cost of medical treatment of persons in need may be summarised as follows:

- After three months' residence, French nationals and foreign nationals lawfully resident in the country who satisfy the means test requirements qualify for universal medical coverage (CMU). The CMU offers entitlement to:

a) health insurance for all persons residing in France who are not affiliated to an existing health insurance scheme (basic CMU);

b) subject to a means test, free supplementary health insurance with exemption from advance payment (supplementary CMU);

- foreign nationals unlawfully resident in the country who can establish three months' continuous residence and who satisfy the means test requirements are entitled to state medical assistance (AME);

- foreign nationals unlawfully resident in the country who satisfy the means test requirements but cannot establish the three months' continuous residence requirement for entitlement to state medical assistance (AME) are eligible for treatment for emergencies and life threatening conditions.

AS TO THE LAW

13. Article 13 §§ 1 and 4 read as follows:

“With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

(...)

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.”

14. Article 17 reads as follows:

“With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1. a. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;

b. to protect children and young persons against negligence, violence or exploitation;

c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;

2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.”

15. Paragraph 1 of the Appendix to the Revised Social Charter reads as follows:

“1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.”

A – Arguments of the parties

i As concerns Article 13 of the Charter

16. The FIDH submits that the provisions of the Act of 30 December 2002 constitute a violation of the right to medical assistance provided for by Article 13 of the Revised Charter in that they ended the exemption of illegal immigrants with very low incomes from all charges, and beneficiaries now have to pay a flat-rate charge (*ticket modérateur*) for medical treatment outside hospital and a daily charge (*forfait journalier*) for in-patient hospital treatment.

17. The FIDH considers that under Article 13§4, the condition of lawful presence in the territory of the Party concerned only relates to the right to medical assistance on an equal footing with nationals. In other words, the fact that the persons concerned are unlawfully present may constitute a reason under Article 13, paragraph 4 for them not to be entitled to exactly the same treatment as nationals, but in no way would it justify denying them all medical assistance.

18. The Government submits that illegal immigrants do not fall within the scope of the definition of protected persons given in the Appendix to the Charter and are not, therefore, covered by any of the rights guaranteed by the Charter. The Government sees particular evidence for the argument that illegal immigrants are not covered by the Charter in Article 13, paragraph 4 of which restricts the scope of paragraphs 1, 2 and 3 of the same Article, even for non-residents lawfully within the territory. In the Government's opinion, the following four conditions must be fulfilled simultaneously for Article 13§4 to apply:

- the person must be “without sufficient resources”, within the meaning of Article 1 of the European Convention on Social and Medical Assistance;
- the person must be lawfully present in the territory of the State from which he or she is requesting medical assistance;
- moreover the person concerned must be a national of a Party to the Charter;
- and then the said Party must have ratified the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

19. The Government also maintains that the state medical assistance scheme, which applies to illegal immigrants who have been present in the country for three months, is in conformity with Article 13§4 of the Charter.

20. In its further observations registered on 15 December 2003, the FIDH:

- disputes the Government's position and considers that on no account is it necessary for the four conditions which the Government believes to be required for Article 13§4 to apply to be fulfilled simultaneously;

- considers that the 2003 Finance (Amendment) Act has made the situation even worse by abolishing the system of immediate admission to the assistance scheme, requiring that individuals must spend an uninterrupted period of three months in France before being entitled to state medical assistance and restricting the emergency medical care covered to hospital treatment to situations which involve an immediate threat to life.

21. In its supplementary observations of 1 April 2004, the Government maintains its position and disputes the FIDH's arguments.

ii As concerns Article 17 of the Charter

22. The FIDH submits that the restriction on the rights of children and young persons arising from the Act of 31 December 2002 constitutes a violation of Article 17, as the introduction of patient charges denies them the rights set out in Article 17.

23. The FIDH maintains that, because young foreign nationals living in France, being under the age of sixteen, are not required to hold a residence permit, they satisfy the condition set in the Appendix to the Charter that they must be lawfully within French territory. It infers from this that Article 17 applies to them.

24. The Government disputes the FIDH's submissions. Its main argument is that the fact that there is no requirement for children to hold a residence permit does not make them ipso facto lawfully present in French territory. Consequently, for the same reasons as those indicated in respect of Article 13, Article 17 does not apply to them. The Government further submits that the effect of the reform in the Act of 30 December 2002 is to ensure that the medical costs of children will be met in full, without any patient contribution, even if their presence is unlawful, and that the FIDH is wrong to assert otherwise.

25. In its further observations registered on 15 December 2003, the FIDH lists three differences between the arrangements made for the exercise of the right to medical assistance by French children and those made for the exercise of the same right by the children of illegal immigrants:

- firstly, spectacles and dental prostheses for the children of illegal immigrants are not covered under the medical assistance scheme, whereas French children's costs in this respect are covered by the supplementary component of the universal medical coverage scheme;

- secondly, children of illegal immigrants are only admitted to the medical assistance scheme after a certain time, and this rules out prevention and delays care, or even leads individuals to go without;
- lastly, medical care for the children of illegal immigrants is provided only in situations that involve an immediate threat to life.

The FIDH infers from this that the situation constitutes a violation of Article 17 in conjunction with Article E.

B – Assessment of the Committee

i. On the interpretation of the Appendix to the Charter

26. The present complaint raises issues of primary importance in the interpretation of the Charter. In this respect, the Committee makes it clear that, when it has to interpret the Charter, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties. Article 31§1 of the said Convention states:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

27. The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it : dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention of Human Rights.

28. Indeed, according to the Vienna Declaration of 1993, all human rights are “universal, indivisible and interdependent and interrelated” (para. 5). The Committee is therefore mindful of the complex interaction between both sets of rights.

29. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i. e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.

30. As concerns the present complaint, the Committee has to decide how the restriction in the Appendix ought to be read given the primary purpose of the Charter as defined above. The restriction attaches to a wide variety of social rights in Articles 1-17 and impacts on them differently. In the circumstances of this particular case, it treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment.

31. Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the European Convention of Human Rights and health care is a prerequisite for the preservation of human dignity.

32. The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.

ii. On the alleged violation of Articles 13 and 17 of the Charter

33. As regards Article 13 the Committee notes that the legislation in question does not deprive illegal immigrants of all entitlement to medical assistance, since it does provide for:

- state medical assistance (AME) to meet certain costs incurred by any foreign national resident in France for an uninterrupted period of more than three months, without meeting the lawful residence conditions;
- treatment for other illegal immigrants for emergencies and life threatening conditions.

34. It is true that the concept of emergencies and life threatening conditions is not sufficiently precise and that the competent body to take decisions in this field is not clearly identified. It is also true that there are numerous difficulties in the implementation in practice of the provisions applicable to illegal immigrants in France for more than 3 months and that the costs to be met by the state are narrowly defined. However given the existence of a form of medical assistance benefiting these persons, the Committee, being in doubt, considers that France does not violate Article 13 of the Revised Charter.

35. With respect to Article 17 the Committee recalls that several provisions of the Revised Charter guarantee the Rights of Children and young persons. The text of Part I provides that:

“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 :

(...)

7 Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed

(...)

17 Children and young persons have the right to appropriate social, legal and economic protection. (...)”

36. Article 17 of the Revised Charter is further directly inspired by the United Nations Convention on the Rights of the Child. It protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance. Yet, the Committee notes that

a) medical assistance to the above target group in France is limited to situations that involve an immediate threat to life;

b) children of illegal immigrants are only admitted to the medical assistance scheme after a certain time.

37. For these reasons, the Committee considers that the situation is not in conformity with Article 17.

38. In respect of both Article 13 and Article 17, the Committee considers that the other arguments advanced by the parties are secondary and do not modify its assessment of the situation.

CONCLUSION

For these reasons, the Committee concludes

1. by 9 votes to 4 that there is no violation of Article 13 of the Revised Charter;
2. by 7 votes to 6 that there is a violation of Article 17 of the Revised Charter.

Polonca KONCAR
Rapporteur

Jean-Michel BELORGEY
President

Régis BRILLAT
Executive Secretary

In accordance with Rule 30 of the Committee's rules of Procedure:

- a dissenting opinion of Mr Stein EVJU, joined by Mrs Polonca KONCAR and Mr Lucien FRANCOIS,
- a dissenting opinion of Mr Rolf BIRK,
- a dissenting opinion of Mr Tekin AKILLIOĞLU and
- a dissenting opinion of Mr Jean-Michel BELORGEY

are appended to this decision.

APPENDIX

**Dissenting opinion of Mr Stein EVJU
joined by Mrs Polonca KONCAR and Mr Lucien FRANCOIS**

While concurring in the finding that in the present case there is not a violation of Article 13 of the Charter, I am unable to agree with the exposition of the construction of the provisions involved on which the conclusion of the Committee's majority rests. For the same reason, I disagree with the majority finding that there is a violation of Article 17 in the case before us.

The substantive issues involved in the present case are on the personal scope of Articles 13 and 17, which on this point must be read in conjunction with Paragraph 1 of the Appendix to the Revised Charter. The latter makes clear that the obligation of a State accepting the said provisions, as far as it is relevant in the present context, pertains only to nationals of other Contracting Parties "lawfully resident" on its territory. The function of the Appendix in this regard is precisely to specify and concretize the reach of the social rights guaranteed by the Charter, and thus also the scope of a Contracting Party's undertakings pursuant to the Charter. Similarly, Paragraph 4 of Article 13 explicitly covers only nationals of other Parties "lawfully" within the territory of a Contracting Party. Neither provision extends to persons not lawfully present or resident within the territory of a Contracting Party. By their wording, both provisions are unambiguous. And they do not, in my view, lend themselves to such expansive construction as propounded here by the Committee's majority. Due regard being had to the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, and in particular its Article 31§1, in my opinion they do not offer support for the interpretation of the Charter provisions relied on by the majority.

Admittedly, it may be considered as regrettable, or even deplorable, if persons, even if not lawfully within the territory of a State, are wholly excluded from any and all such aid and assistance as are at issue in the present case. That being said, it must however be noted that obviously, even if not being obliged by the Revised European Social Charter, a State may have an obligation by virtue of a different international treaty or, in any case, it may freely decide to provide such aid and assistance beyond its strict obligations in international law. But, in the legal supervision of a specific treaty, the Charter, specific provisions therein should not be thus applied in contradiction of their explicit wording.

Dissenting opinion of Mr Rolf BIRK

I do not agree with the majority's decision that there has been a violation by France of Article 17 of the revised European Social Charter. I therefore join the dissenting opinion of Mr. Stein Evju. I wish to add some further remarks.

The majority of the Committee departs from the clear wording of the text of Article 17 in conjunction with Article 1 of the Appendix to the revised European Social Charter. Article 17 is applicable only to "nationals of other Parties lawfully resident [...] within the territory of the Party concerned". By referring to Article 31§1 of the Vienna Convention on the Law of Treaties, the majority's decision extends the applicability of Article 17 to include persons not lawfully resident or present in the territory of a State Party, i.e France.

Reference to Article 31§1 of the Vienna Convention cannot however set aside the clear wording of the Appendix to the revised European Social Charter. This provision does not allow the Committee to disregard the text of Point 1 of the Appendix to the Charter. There is nothing in the wording of the text to suggest that a further interpretation or reformulation is called for. The majority's arguments therefore fail. If one is not satisfied with the scope of Article 17 not extending to persons not lawfully resident or present in the territory of a State Party – which indeed may and can be considered regrettable or even deplorable – than it is up to the State Parties to modify that situation through a revision of the text of Point 1 of the Appendix and not up to the Committee to do so. Firstly, there is no room for the Committee to extend the scope defined by a clear text. Furthermore, the majority's reasoning cannot be considered an interpretation or construction of the Revised European Social Charter but creates new obligations for a State Party not foreseen at the time of ratification of this provision. By taking this step, the Committee therefore misunderstands its function in the supervisory procedure. Finally, I am of the opinion that it is not the role of the Committee to alter the precise wording of the text of the revised European Social Charter for merely social motives.

Dissenting opinion of Mr Tekin AKILLIOĞLU

I cannot subscribe to the reasoning of the majority, according to which (para 34): "*...given the existence of a form of medical assistance benefiting these persons, the Committee, being in doubt, considers that France does not violate Article 13 of the Revised Charter*". This reasoning runs counter to the principle recently adopted by the Committee for the interpretation of the personal scope of the Charter (see the General Introduction to Conclusions 2004, pp.9 and 10).

According to the aforementioned interpretation principle, "*Parties to the Charter can extend its scope beyond the minimum laid down in the Appendix*". Once the scope has been extended, it naturally follows that legislation and the relevant practice must not allow discrimination. But in this case, the impugned provisions of the "Social Action and Family Code" create multi-faceted discrimination:

- between nationals and foreigners without entitlement because they fail to meet the residence or means conditions,
- between illegal immigrants satisfying the means conditions and those who do not, and
- between the children of nationals and the children of illegal immigrants. The question can also be raised of whether the residence condition is reasonable in respect of the medical assistance to which Article 13 of the Charter refers.

For all these reasons, I consider that the situation is also contrary to Article 13 of the Revised Social Charter.

Dissenting Opinion M. Jean-Michel BELORGEY

I refer to the finding of a violation of Article 17 of the Charter and for the same reasons, I consider that the situation equally constitutes a violation of Article 13 of the Charter.