

DECISION ON THE MERITS

Adoption: 3 June 2008

Notification: 11 June 2008

Publicity: 12 October 2008

Mental Disability Advocacy Center (MDAC) v. Bulgaria

Complaint No. 41/2007

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 230th session attended by:

Mrs Polonca KONČAR, President
Mssrs Andrzej SWIATKOWSKI, First Vice-President
 Tekin AKILLIOGLU, Second Vice-President
 Jean-Michel BELORGEY, General Rapporteur
 Alfredo BRUTO DA COSTA
 Nikitas ALIPRANTIS
 Stein EVJU
Mrs Csilla KOLLONAY LEHOCZKY
Mssrs Lucien FRANCOIS
 Lauri LEPPIK
 Colm O'CONNOR
Mrs Monika SCHLACHTER
 Lyudmila HARUTYUNYAN

Assisted by Mr Régis BRILLAT, Executive Secretary,

Having deliberated on 1 April 2008 and 3 June 2008,

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

Delivers the following decision adopted on this last date:

PROCEDURE

1. The complaint dated 15 February 2007 was registered on 20 February 2007. The Mental Disability Advocacy Centre (MDAC) alleges that the situation in Bulgaria is not in conformity with Article 17§2 alone and in conjunction with Article E of the Revised European Social Charter (the "Revised Charter") because children living in homes for intellectually disabled children in Bulgaria receive no education.
2. On 26 June 2007, the Committee declared the complaint admissible.
3. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints ("the Protocol") and with the Committee's decision on the admissibility of the complaint, on 2 July 2007 the Executive Secretary communicated the text of the admissibility decision to the Bulgarian Government ("the Government"), the MDAC, the Contracting Parties to the Protocol and the states that have made a declaration in accordance with Article D§2 of the Revised Charter, and on 6 July 2007 to the international employers' organisations and trade unions referred to in Article 27§2 of the 1961 European Social Charter, i.e. the European Trade Union Confederation (ETUC), BusinessEurope (former UNICE) and the International Organisation of Employers (IOE).
4. In accordance with Article 31§1 of the Committee's Rules, the Committee set a deadline of 28 September 2007 for presentation of the Government's submissions on the merits. It also set 28 September 2007 as the deadline for the Contracting Parties to the Protocol, the states that have made a declaration in accordance with Article D§2 of the Revised Charter and the international employers' organisations and trade unions referred to in paragraph 2 of Article 27 of the 1961 European Social Charter to submit any observations on the merits.
5. The Government's submissions on the merits of the complaint were registered on 1 October 2007.
6. In accordance with Article 31§2 of the Rules, the President of the Committee invited the MDAC to reply to these submissions by 30 November 2007. The MDAC's reply was registered on 30 November 2007 and forwarded to the Government on 6 December 2007.

SUBMISSIONS OF THE PARTIES

a. *The complainant organisation*

7. The MDAC asks the Committee to find that the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children in Bulgaria violates Article 17§2 of the Revised Charter, alone and in conjunction with Article E.

b. *The Government*

8. The Government invites the Committee:

- i. to recognise its efforts to secure equal access to education;
- ii. to note the legal and practical steps that have been taken to overcome the problems of offering children living in homes for mentally disabled children access to schooling, and its political commitment to ensuring that these continue to be implemented and put into practice, in accordance with the objectives of the Revised Charter and subject to available resources;
- iii. to reject the MDAC's application as unfounded.

RELEVANT DOMESTIC LAW

9. The relevant provisions of Bulgarian law concerning access to education for mentally disabled children are as follows:

10. The Constitution of the Republic of Bulgaria of 13 July 1991;

Articles 6 and 53 of the Constitution read:

Article 6

"1. All persons are born free and equal in dignity and rights.

2. All persons shall be equal before the law. There shall be no privileges or restriction of rights on grounds of race, national or social origin, ethnic affiliation, sex, origin, religion, education, opinion, political affiliation, personal or social status or wealth."

Article 53

"1. Everyone shall have the right to education.

2. School attendance up to the age of 16 shall be compulsory.

3. Primary and secondary education in state and municipal schools shall be free. In circumstances established by law, higher educational establishments shall provide education free of charge.

4. Higher educational establishments shall enjoy academic autonomy.

5. Citizens and organisations shall be free to found schools in accordance with conditions and procedures established by law. The education they provide shall comply with the requirements of the state.

6. The state shall promote education by opening and financing schools, by supporting capable school and university students, and by providing opportunities for occupational training and retraining. It shall exercise control over all kinds and levels of schooling.

11. National Education Act 1991, as amended by the Act of 2002

Article 4:

“(1) All citizens shall have the right to education. They shall be entitled to constantly heighten their education and qualifications.

(2) Restrictions or privileges based on race, nationality, sex, ethnic and social origin, religion and social status shall be inadmissible.”

Article 7:

“(1) Schooling up to the age of 16 shall be compulsory.

(2) (Amended Official Journal (OJ) No. 36/1998) Schooling shall start at the age of 7, where such age shall have been attained in the year of enrolment in the first (1st) grade. Children who have turned 6 shall also be entitled to enrolment in the first (1st) grade provided their physical and mental development, at their parents’ or guardians’ discretion, so allows.”

Article 9:

“(1) Every citizen shall exercise his right to education in the school and type of education of his choice in keeping with his personal preferences and potential.

(2) The right pursuant to Paragraph (1) for minors shall be used by their parents or guardians.”

Article 14:

“Schools and kindergartens shall create conditions for the normal physical and mental development of children and pupils.”

Article 16:

“State educational requirements shall be applicable to: (...)

8. (Amended, OJ No. 90/2002) teaching of children and pupils with special educational needs and/or chronic conditions”

Article 21:

(Amended, OJ No. 90/2002)

“(1) Children with special educational needs and/or chronic conditions shall be enrolled at kindergartens pursuant to Article 18.

(2) Kindergartens under Paragraph (1) shall be obligated to accept children with special educational needs and/or chronic conditions.

(3) Special kindergartens and auxiliary units may also be established for children with special educational needs and/or chronic conditions.

(4) Children with special educational needs and/or chronic conditions shall be enrolled in the kindergartens and auxiliary units under Paragraph (3) only where all other opportunities for education at state-owned or municipal kindergartens and auxiliary units have been exhausted and where the parents or guardians have expressed such a wish in writing.”

Article 27:

(Amended, OJ No. 90/2002)

“(1) Children with special educational needs and/or chronic conditions shall be offered integrated education at the schools under Article 26, Paragraph (1), Items 1 through 10.

(2) Schools under Paragraph (1) shall be obligated to accept children with special educational needs and/or chronic conditions.

(3) Special schools and auxiliary units may also be established for children with special educational needs and/or chronic conditions.

(4) Children with special educational needs and/or chronic conditions shall be enrolled in the schools and auxiliary units under Paragraph (3) only where all other opportunities for education at state-owned or municipal schools have been exhausted and where the parents or guardians have expressed such a wish in writing.”

Article 43:

“(1) (Previous Article 43, OJ 36/1998, amended, OJ No. 90/2002) The Ministry of Education and Science shall ensure favourable conditions for identifying and training particularly gifted children. It shall establish furtherance funds to award scholarships to gifted children, as well as scholarship funds for children with chronic ailments and for children with special educational needs.

(2) (New, OJ No. 36/1998) The Ministry of Education and Science shall ensure additional educational opportunities for potential drop-out students.”

12. Integration of Disabled Persons Act

Act of 14 September 2006 amending and extending the Integration of Disabled Persons Act of 17 September 2004.

Chapter II - Education and vocational training**Article 16**

“(1) Teams for the comprehensive educational assessment and integrated education of children with disabilities shall be set up at the regional inspectorates of the Ministry of Education and Science.

(2) Special integrated education centres, under the authority of the Ministry of Education and Science, shall be opened with a view to facilitating the integrated education of children with disabilities.”

Article 17

“The Ministry of Education and Science shall provide:

(1) Education for children with disabilities at pre-school and school age in the schools and kindergartens referred to in Article 26, paragraph (1)3, and Article 18 of the National Education Act;

(2) An environment conducive to integrated education for children with disabilities;

(3) Appropriate remedial speech and hearing therapy and corrective treatment for children suffering from partial or total loss of visual acuity;

(4) Modern schoolbooks, teaching materials, technologies and technical tools for the education of children with disabilities up to the age of 18 or until the end of their secondary education;

(5) Vocational training for children with disabilities.”

Article 18

“The Ministry of Education and Science shall make provision for the education of children with special educational needs who are not integrated into the mainstream education environment.”

13. Implementing regulation of the National Education Act (revised)
(published on 30 July 1999 and amended on several occasions, the last on 8 November 2005)

Article 6a

(new Article, adopted in 2003)

“The team in charge of assessing difficult cases in terms of educational needs may:

...

(4) single out up to two pupils with special educational needs per class; these pupils shall be transferred to the least crowded classes.

...

(8) ... (b) facilitate the integrated education of children with special educational needs by co-ordinating, supervising and providing methodological assistance to teams in kindergartens and schools into which children with special educational needs and/or chronic conditions have been integrated.”

Article 7

(text amended in 2003)

“Kindergartens, schools and auxiliary units shall work with funding authorities to provide an environment conducive to the integrated education of children with special educational needs and/or chronic conditions.”

Article 26

“(1) Kindergartens are preparatory institutions forming part of the national education system, in which children are educated and taught from the age of three up to their entry into the first year of primary school.

(2) (text amended in 2003) Children with special educational needs and/or chronic conditions shall be integrated into the kindergartens described in paragraph (1) above, which are legally required to accept them.

Article 27

“(1) Kindergartens may be:

1. full-time, part-time or organised on a weekly basis;
2. (text amended in 2003) special schools for children with special educational needs and/or chronic conditions.”

Article 28

(text amended in 2003)

“(2) The kindergartens referred to in Article 27, paragraph (1)2, shall admit children with special educational needs and/or chronic conditions, subject to the written consent of parents or guardians, where all other possibilities of attending the kindergartens referred to in Article 27 (1)1 have been exhausted.

(3) The kindergartens referred to in Article 27 (1)1 shall cater for up to two children with special educational needs per group.”

Article 50

“(6) (text amended in 2001) State and municipal schools shall cater for up to five pupils with chronic physical or sensory conditions per class. Vocational schools shall also cater for children placed in orphanages.

(7) (text amended in 2003) In cases other than those provided for in paragraph (6) above, state and municipal schools may also provide integrated education for two pupils per class with special educational needs on a proposal by the team in charge of comprehensive educational assessment.”

14. Order no 6 on children with special educational needs and/or chronic conditions (published in August 2002)

Article 2

- (1) Children with special educational needs and/or chronic conditions shall be given an integrated education in mainstream kindergartens, schools and auxiliary units.
 (2) Children with special educational needs and/or chronic conditions may be educated in special kindergartens, schools and auxiliary units.
 (3) Children shall attend special schools only where all other possibilities of attending mainstream kindergartens and schools have been exhausted, subject to the explicit consent of parents or tutors."

15. Case-law

Case no 13789/06, Sofia court of first instance, decision of 18 May 2007

"The court finds that the requirement for the Ministry of Education to create a conducive environment is a prerequisite to integrated schooling. Therefore, the equal right to education of children with disabilities is only effective if such an environment is created in every school ... and the failure to create such an environment amounts in itself to unequal treatment of children with disabilities in that they do not then have the same opportunities as children without disabilities" (pages 7-8).

THE LAW

THE ALLEGED VIOLATION OF ARTICLES 17§2 AND E OF THE REVISED SOCIAL CHARTER

16. Article 17§2 of the Revised Charter reads:

Article 17 – The right of children and young persons to social, legal and economic protection

Part I: "*Children and young persons have the right to appropriate social, legal and economic protection.*"

Part II: "*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:*

(...)

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

17. Article E of the Revised Charter reads:

Article E – Non-discrimination

"*The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.*"

A. Submissions of the parties

a. The complainant organisation

18. The MDAC maintains that Bulgaria's failure to provide education for the children falling within the subject matter of the scope of the complaint violates its obligations under Article 17§2 of the Revised Charter, alone and in conjunction with Article E. It argues that Article 17§2 of the Revised Charter requires the Government to provide primary education for all children, including children with intellectual disabilities.

19. The MDAC restricts the scope of its complaint to the situation of children with moderate, severe or profound intellectual disabilities living in homes for mentally disabled children (hereafter "HMDCs"), thus excluding children with mild intellectual disabilities and those not living in HMDCs.

20. The MDAC states that HMDCs come under the authority of the Ministry of Labour and Social Policy. They admit children aged over 2. Most of these children have been diagnosed as having moderate, severe or profound intellectual disabilities and have been either abandoned by their parents or orphaned. The HMDCs are residential establishments open throughout the year, in which the children spend all their time. There are other kinds of centres for intellectually disabled children in Bulgaria but they are not the subject of the complaint. The complaint concerns the 28 HMDCs throughout the country. According to the MDAC no education is provided in HMDCs and the Government has made little effort to educate children in these homes.

21. According to the MDAC, in order to meet certain quality standards education systems must satisfy the criteria of availability, accessibility, acceptability and adaptability, as laid down by the UN Committee on Economic, Social and Cultural Rights in its general comment no. 13 on the right to education (E/C.12/1999/10 of 8 December 1999, §6).

22. The MDAC states that until a reform in 2002, children with moderate, severe or profound intellectual disabilities were considered to be uneducable and hence given no access to education. Under the National Education Act 2002, the Bulgarian state has undertaken to provide these children with education.

23. The complaint is based on various sources, in particular the 2005 report of the Bulgarian child protection agency. This included figures on the situation in 18 HMDCs. According to the data in this report, only 32 children (i.e. 2.8%) living in the HMDCs which were visited were being taught in mainstream primary schools while 39 children (i.e. 3.4%) were in special schools, meaning that a total of only 71 children were attending any kind of school. In certain establishments, as in Sofia, none of the children attended schools, whereas in others, such as the one in Turnava, all the children were in school, though this was solely attributable to the personal initiative of the director. The MDAC claims that certain children are refused admission even though they want to go to school and are apt, in that they are able to write

their full names and ages despite never having attended school. It concludes that the existing education system in Bulgaria is clearly depriving these children of access to education, which is a direct infringement of their right to education without discrimination.

24. The complainant also alleges that ordinary schools are not equipped to the abilities and needs of children from HMDCs. Teacher training is inadequate and teaching materials for intellectually disabled children are either totally unavailable or unsuited to their needs. According to the MDAC, this means that Bulgaria is in direct violation of the right to education and directly discriminates against these children on account of their disability.

25. In respect of the children who do not attend an outside educational structure, the complainant highlights that HMDCs are not educational institutions and therefore the children are ineligible for a diploma attesting completion of primary school education. They are therefore legally prevented from entering secondary education. The MDAC concludes that the treatment of children in HMDCs does not satisfy the criterion of the acceptability of the education provided and cannot be considered to be a form of education.

26. Finally, the MDAC maintains that the Government cannot rely on lack of resources or argue that it is implementing these rights gradually to show that it is not discriminating against disabled children with regard to their access to education. It notes firstly that certain measures are not expensive, such as informing directors of HMDCs of the contents of the 2002 legislation so that they know that from now on the children in their charge are not only "educable" but also entitled to be educated in ordinary or special schools. The same applies where it comes to informing the municipal officials to whom HMDCs are accountable as well as local schools. The MDAC states that, in practice, HMDC directors and municipal officials know little or nothing about the changes created by the 2002 legislation. The MDAC also states that the Government has chosen to use the resources that are available for educating disabled children to improve access to schools for children with physical disabilities while spending very little on the education of intellectually disabled children. According to the MDAC, the Government's failure to provide education for children with moderate, severe or profound intellectual disabilities is the result of serious and unreasonable policy failures and not of the alleged resource shortages.

b. The Government

27. The Government describes its efforts to implement the right of intellectually disabled children to equal access to education.

28. In particular, it argues that Bulgarian legislation offers sufficient safeguards. Article 6 of the Constitution embodies the principle of equality before the law and prohibits all discrimination. Article 53 establishes the right to education. The Government also refers to the legislative and practical steps it has taken to overcome the problems of access to education of children living in HMDCs. In particular, the National Education Act 1991, as amended by the

Act of 10 September 2002, requires schools to admit disabled children and create the conditions for their integration. The Government has also adopted several action plans. It refers specifically to the national plan for integrating children with special educational needs and/or chronic conditions into the national education system, approved by the government in December 2003, which implements Regulation No. 6 and lays down a timetable for integration from 1 January 2004 to 1 January 2007. It also cites the action plans on Bulgarian mental health policy (2004-2012) and on equal opportunities for disabled persons (2006-2007 and 2008-2015).

29. The Government also refers to its political commitment to these measures and to ensuring that they are implemented, in accordance with the Revised Charter and subject to available resources.

30. The Government says that the trend is towards integrating most children with disabilities into mainstream schools. Its education policy is to reduce the number of special schools and increase the number of children with special educational needs in mainstream schools. This calls for the adaptation of premises to these children's specific needs, appropriate school textbooks and other written material and equipment, and specialist staff qualified to work with children with disabilities. Teams to assess the needs of disabled children are gradually being introduced. Training has been organised for regional education inspectorates, nursery school heads, teachers and representatives of local government.

31. The Government acknowledges that a high number of children do not attend school or leave school very early. However this does not just concern intellectually disabled children and so, according to the Government, the MDAC's contention that such children are being systematically discriminated against is unfounded.

32. The Government reiterates that it has a consistent and clearly defined policy on the integration of children living in special institutions, which extends to its education policy. This is an ongoing process, the visible results of which will become evident in the long term and which will require considerable financial input. The Government hopes to achieve the Revised Charter's objectives "within a reasonable period of time", with measurable progress and with the fullest possible use of available resources.

B – Assessment of the Committee

i – The alleged violation of Article 17§2 of the Revised Charter

Preliminary remarks

33. Referring to its admissibility decision and the issue of the delimitation of the material scope of Articles 15 and 17, the Committee considers that the fact that the right to education of persons with disabilities is guaranteed by

Article 15§1 of the Revised Charter does not exclude that relevant issues relating to the right of children and young persons with disabilities to education may not be examined in the framework of Article 17§2, *inter alia*.

34. The Committee begins by pointing out that both the first and the second paragraphs of Article 17 of the Revised Charter guarantee children's right to education. The Committee considers that Article 17§2 applies fully in this case as it covers all children and hence concerns children with intellectual disabilities. The Committee recalls in this respect that:

"Therefore Article 17 as a whole requires states to establish and maintain an education system that is both accessible and effective. In assessing whether the system is effective the Committee will examine under Article 17: ... whether, considering that equal access to education should be guaranteed for all children, particular attention is paid to vulnerable groups such as children from minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty etc. and whether necessary special measures have been taken to ensure equal access to education for these children" (Conclusions 2003, Bulgaria, Article 17§2).

"States need to ensure a high quality of teaching and to ensure that there is equal access to education for all children, in particular vulnerable groups" (Conclusions 2005, Bulgaria, Article 17§2).

35. Firstly, as regards taking special account of children with disabilities, the Committee points out that, while it is acceptable for a distinction to be made between children with and without disabilities in the application of Article 17§2, the integration of children with disabilities into mainstream schools in which arrangements are made to cater for their special needs should be the norm and teaching in specialised schools must be the exception (*Autism-Europe v. France*, Complaint No.13/2000, decision on the merits of 4 November 2003, §49).

36. In addition, for any special education that is set up to be in conformity with Article 17§2, the children concerned must be given sufficient instruction and training and complete their schooling in equivalent proportions to those of children in mainstream schools (Conclusions 2005, Bulgaria, Article 17§2).

37. The Committee considers that all education provided by states must fulfil the criteria of availability, accessibility, acceptability and adaptability. It notes in this respect General Comment No. 13 of the Committee on Economic, Social and Cultural Rights of the United Nations International Covenant on Economic, Social and Cultural Rights on the right to education (document E/C.12/1999/10 of 8 December 1999, §6). In the present case, the criteria of accessibility and adaptability are at stake, i.e. educational institutions and curricula have to be accessible to everyone, without discrimination and teaching has to be designed to respond to children with special needs.

38. As regards the respect for the right to education of intellectually disabled children residing in HMDCs, the Committee takes note of the efforts made by the Government, particularly through the adoption of legislation and the setting up of action plans. It considers this to be a necessary first step but

one that is insufficient to bring a situation into conformity with the Revised Charter. It reiterates 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” (International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999, §32). Consequently, the manner in which this legislation and these action plans are implemented is decisive.

39. The Committee points out that when it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter, the measures taken by the state to achieve the Revised Charter’s aims must fulfil the following three criteria: “(i) a reasonable timeframe, (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources” (European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §37; Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53). It also recalls that “States Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities” and that they must also take “practical action to give full effect to the rights recognised in the Charter” (Autism-Europe v. France, Complaint No.13/2000, decision on the merits of 4 November 2003, §53). Similarly, “States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards to the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources” (European Roma Rights Centre v. Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §35).

40. The Committee points out that where precise facts are used to support allegations that a state has infringed the Revised Charter, it is for the Government to answer the allegations using specific evidence such as measures introduced, statistics or examples of relevant case-law (see European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §50). The MDAC has submitted precise elements to the Committee with a view to demonstrate that the manner in which Bulgaria’s legislation and action plans are implemented is highly inadequate. The Committee notes that the Government, however, has failed to provide evidence to refute these.

41. In addition, the Committee notes that the Government describes the situation of children with disabilities in general and not the specific case of children with moderate, severe or profound intellectual disabilities residing in HMDCs, who are the subjects of this complaint.

42. To be able to assess the situation of these children, the Committee must therefore rely on the data referred to in the 2005 report of the Bulgarian national child protection agency, which is mentioned by the MDAC in its complaint and not disputed by the Government.

43. The Committee refers to Order No. 6 on children with special educational needs and/or chronic conditions, 2002, which entitles children with any type of intellectual disability to be educated in special schools or mainstream schools of their parent's or tutor's choice. The Committee notes that only 2.8% of the children with intellectual disabilities residing in HMDCs are integrated in mainstream primary schools, which is extremely low whereas integration should be the norm. Mainstream educational institutions and curricula are not accessible in practice to these children. There also appears to be insufficient evidence to show real attempts to integrate these children into mainstream education. The Committee considers therefore that the criterion of accessibility is not fulfilled.

44. For the very few children integrated into mainstream primary schools, the way in which they are dealt with should be suited to their special needs. The Committee finds on this point in particular that teachers have not been trained sufficiently to teach intellectually disabled children and teaching materials are inadequate in mainstream schools. These schools are therefore not suited to meet the needs of children with intellectual disabilities and hence to provide their education. The Committee concludes that neither therefore is the criterion of adaptability met.

45. The Committee notes that only 3.4% of children with intellectual disabilities residing in HMDCs attend the special classes set up for them. Despite the fact that special classes should not be the norm but only an exception to mainstream education, the figure is very low and demonstrates that special education is not accessible to children with intellectual disabilities residing in HMDCs.

46. As to the educational activities that intellectually disabled children follow within the HMDCs, the Committee takes note that the HMDCs are not themselves to be regarded as educational institutions, that, consequently, the children are ineligible for a diploma attesting completion of primary school education and that they are therefore prevented from entering secondary education. The Committee notes, in addition, that the programmes of activity implemented at HMDCs were drawn up by the Ministry of Labour and Social Policy before the 2002 reform, at a time when intellectually disabled children were still officially regarded as being "uneducable". The Committee also notes that it has been confirmed by various eye-witness reports and studies that the children do not receive any education in the HMDCs. The Committee concludes that the activities pursued by intellectually disabled children living in HMDCs who attend neither a mainstream school nor a special class cannot be considered to be a form of education.

47. As to the Government's argument that the right of children with intellectual disabilities residing in HMDCs to education is being implemented progressively, the Committee is aware of Bulgaria's financial constraints. It notes however that any progress that has been made has been very slow and mainly concerns the adoption of legislation and policies (or action plans), with little or no implementation. It would have been possible to take some specific steps at no excessive additional cost (for example HMDC directors and the

municipal officials to whom HMDCs and primary schools are accountable could have been informed about and given training on the new legislation and action plans). The choices made by the Government resulted in the situation described above (see in particular §§ 43 et 45). Progress is therefore patently insufficient at the current rate and there is no prospect that the situation will be in conformity with article 17§2 within a reasonable time. Consequently, the Committee considers that the measures taken do not fulfil the three criteria referred to above, i.e. a reasonable timeframe, measurable progress and financing consistent with the maximum use of available resources. In view of this situation, the Committee considers that Bulgaria's financial constraints cannot be used to justify the fact that children with intellectual disabilities in HMDCs cannot enjoy their right to an education.

48. Consequently, the Committee holds that the situation in Bulgaria constitutes a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in HMDCs do not have the effective right to an education.

ii – The alleged violation of Article 17§2 of the Revised Charter read in conjunction with Article E

49. Article E prohibits any discrimination in the enjoyment of the rights set forth in the Revised Charter. Although disability is not explicitly included in the list of grounds of discrimination prohibited by Article E, the Committee has found previously that it is “adequately covered by the reference to ‘other status’” (*Autism-Europe v. France*, Complaint No.13/2000, decision on the merits of 4 November 2003, §51).

50. The Committee has previously observed that:

“The wording of Article E is almost identical to the wording of Article 14 of the European Convention on Human Rights. As the European Court of Human Rights has repeatedly stressed in interpreting Article 14 and most recently in the *Thlimmenos v. Greece* [GC], no 34369/97, ECHR 2000-IV, §44], the principle of equality that is reflected therein means treating equals equally and unequals unequally. In particular it is said in the above mentioned case:

‘The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different’.

In other words, human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.” (*Autism-Europe v. France*, Collective Complaint No. 13/2002, decision on the merits of 4 November 2003, §52).

51. Therefore, the Committee notes that failure to take appropriate measures to take account of existing differences may amount to discrimination.

52. The Committee recalls its case law regarding disputes about discrimination in matters covered by the Revised Charter, adopted in the framework of reporting procedure, that the burden of proof should not rest entirely on the complainant, but should be the subject of an appropriate adjustment. It also applies to the collective complaints procedure. The Committee therefore relies on the specific data sent to it by the complainant organisation, such as its statistics which show unexplained differences. It is then for the Government to demonstrate that there is no ground for this allegation of discrimination.

53. The Committee refers to the data cited above, according to which only 6.2% of the intellectually disabled children living in HMDCs are educated in mainstream primary schools or in special schools. It notes that, in reply, the Government states that a high percentage of children in Bulgaria do not go to school and that this does not just apply to children with intellectual disabilities. However, the Government fails to support this assertion with statistical data or to specify whether this is already a problem at primary school level or affects only secondary schools. The Committee underlines that it has already noted that, for the period 1997-2000, primary school attendance rates were 93% for girls and 95% for boys, despite a regrettable, excessively high drop-out rate (Conclusions 2005, Article 17§2, Bulgaria). The disparity between these figures is so great that it demonstrates that there is discrimination against children with intellectual disabilities residing in HMDCs in comparison with all other children with regard to access to education in Bulgaria.

54. Consequently, the Committee holds that the situation in Bulgaria constitutes a violation of Article 17§2 of the Revised Charter read in conjunction with Article E because of the discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs as a result of the low number of such children receiving any type of education when compared to other children.

CONCLUSION

55. For these reasons the Committee concludes

- unanimously that there is a violation of Article 17§2 of the Revised Charter because children with moderate, severe or profound intellectual disabilities residing in HMDCs do not have an effective right to education;
- by 12 votes to 1 that there is a violation of Article 17§2 of the Revised Charter taken in conjunction with Article E because there is discrimination against children with moderate, severe or profound intellectual disabilities residing in HMDCs as a result of the low number of such children receiving any type of education when compared to other children.

Polonca KONČAR
President and Rapporteur

Régis BRILLAT
Executive secretary