



European Social Charter

European Committee of Social Rights

Conclusions XVIII-1 (Germany)

Articles 1, 5, 6, 12, 13, 16 and 19 of the Charter

Introduction

The function of the European Committee of Social Rights is to judge the conformity of national law and practice with the European Social Charter. In respect of national reports, it adopts “conclusions” and in respect of collective complaints, it adopts “decisions”.

A presentation of this treaty as well as general comments formulated by the Committee figure in the General Introduction to the Conclusions¹.

The European Social Charter was ratified by Germany on 27 January 1965. The time limit for submitting the 23rd report on the application of this treaty to the Council of Europe was 30 June 2005 (reference period: 1 January 2003 to 31 December 2004) and Germany submitted it on 19 September 2005. An addendum to the report containing replies to questions addressed by the Committee was registered at the Secretariat on 2 February 2006.

This report concerned the rights forming part of the “hard core” provisions of the Charter:

- Article 1 (right to work),
- Article 5 (right to organise),
- Article 6 (right to bargain collectively),
- Article 12 (right to social security),
- Article 13 (right to social assistance),
- Article 16 (rights of the family),
- Article 19 (rights of migrants).

Germany has accepted all of these articles.

The present chapter on Germany contains 27 conclusions²:

- 12 cases of conformity: Articles 1§1, 5, 6§1, 6§3, 12§2, 13§2, 19§1, 19§2, 19§3, 19§5, 19§7, 19§9.
- 11 cases of non-conformity: Articles 6§4, 12§1, 12§3, 12§4, 13§1, 13§3, 16, 19§4, 19§6, 19§8, 19§10.

In respect of the other 4 cases, that is Articles 1§2, 1§3, 6§2 and 13§4 the Committee needs further information in order to assess the situation. It asks the German Government to communicate the answers to these questions before the 30 June 2007.

The next German report will concern the following provisions:

- Article 2 (right to just conditions of work),
- Article 3 (right to safe and healthy working conditions),
- Article 4 (right to a fair remuneration),
- Article 9 (right to vocational guidance),
- Article 10 (right to vocational training), and
- Article 15 (right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement) of the European Social Charter³.

It concerns the reference period 1 January 2001 - 31 December 2004.

The report should be submitted to the Council of Europe before 31 March 2006

¹ The conclusions as well as states reports can be consulted on the Council of Europe's Internet site (www.coe.int) under Human Rights.

² The 27 conclusions correspond to the paragraphs of the articles forming the hard core accepted by Germany, with the exception of Article 1§4, which is examined with Articles 9, 10 and 15 due to the links between these provisions.

³ It concerns the provisions of the first part of the “non-hard core” articles accepted by Germany. The report will also concern Article 1§4 due to its links with Articles 9, 10 and 15.

Article 1 – Right to work

Paragraph 1 – Policy of full employment

The Committee takes note of the information contained in the German report.

Employment situation

The GDP growth rate, which stood at 0% in 2003, increased to 1.6% in 2004. The inflation rate increased from 1% in 2003 to 1.8% in 2004.

The employment rate increased from 65.1% in 2003 to 65.5% in 2004. Unemployment continued to grow reaching 9% in 2003 and 9.5% in 2004.

Female unemployment was 10.1% in 2003 and 10.5% in 2004. Youth unemployment increased from 14.7% in 2003 to 15.1% in 2004. Long-term unemployment expressed as a percentage of total unemployment also increased from 47.7% in 2002 to 49.6% in 2003.

According to the report, there were 167,876 unemployed persons with severe disabilities in 2003 and 173,939 in 2004. The share of severely disabled persons of all the unemployed amounted to 3.8% in 2003 and to 4% in 2004, respectively. The Committee requests that the next report indicate the unemployment rate among persons with disabilities.

The Committee requests that next report include the unemployment rate among immigrants or ethnic minorities.

Employment Policy

The Committee notes from the 2004 German National Action Plan that, following the adoption of Job-AQTIV Act, and subsequent four Acts on Modern Services on the Labour Market, the Federal Government has been implementing far-reaching labour market reforms. Their aim is to improve the quality of job placement and to achieve the sustainable integration of the unemployed into the labour market. The important core elements of the reforms are:

- an increase in the preventive approach in labour market policy;
- pooling of unemployment assistance and social welfare for persons capable of work into a new benefit system;
- proactive labour market policy aimed at enhancing integration opportunities;
- transformation of the labour administration into a service agency whose task is to focus on job placement;
- flexible dismissal protection.

The Committee requests to be informed of the effects of the above-mentioned reforms.

The National Action Plan indicates that the activation rate for long-term unemployed young persons amounted to 41.7% whereas the activation rate for long-term unemployed adults amounted to approximately 16.4% in 2003. Since 1 July 2003 jobseekers have been obliged to register at an early stage, i.e. as soon as they become aware that they are losing their job. This has intensified and expedited the placement process. The Committee asks what specific steps are taken in order to ensure that a higher proportion of the long-unemployed adults are involved in active measures.

The Committee takes note of various active labour market policies for selected categories of persons. According to the report, 447,626 women participated in active employment promotion (mainly vocational further training) in 2003 and numerous new measures were introduced, such as wage supplements for vocational training, recruitment grants, job-creation measures and business start-up grants. As regards action taken in order to avoid and combat unemployment among the youth, the report refers, *inter alia*, to National Pact for Career Training and Skilled Manpower Development concluded by the German Government and the central business associations, which entails a three-year obligation to offer training to all young people who are willing and able to be trained. As far as older workers are concerned, measures taken include: wage safeguards, exemptions of the employer from paying unemployment insurance contributions, wage subsidies for workers with placement deficits, facilitating temporary employment contracts and promotion of further training. The report further states that in order to reduce long-term unemployment, additional integration assistance is offered adapted to the individual situation of a long-unemployed person. Finally, the report provides data concerning the participation of the severely disabled persons in various assistance measures and points out that the 2004 Act on the Promotion of Training and Employment of Severely Disabled Persons has improved the instruments for the integration of the persons with disabilities.

The Committee notes that according to Eurostat, the total expenditure on labour market policies represented around 3.2% both in 2002 and 2003, with the expenditure on active measures corresponding to 1% in 2002 and 0.9% in 2003.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 1§1 of the Social Charter.

Paragraph 2 – Freely undertaken work (non-discrimination, prohibition of forced labour, other aspects)

The Committee notes the information provided in Germany's report

1. Prohibition of Discrimination in employment

The Committee considers that under Article 1§2 legislation should prohibit discrimination in employment at least on grounds of race, ethnic origin, religion, disability, age, sexual orientation and political opinion.

Where a state party has accepted Article 15§2 of the Charter the Committee will examine legislation prohibiting discrimination on grounds of disability under this provision.

Legislation should cover both direct and indirect discrimination, in the context of indirect discrimination the Committee recalls that it has stated that in the context of Article E of the Revised Charter: "Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all" (*Autisme Europe v. France*, Complaint No. 13/2000, decision on the merits of 4 November 2003, §52).

The Committee had previously noted that a single statute on the prohibition of all forms of discrimination in employment would be drafted. The Committee asks the next report to provide full details of this legislation and in particular information on:

- how the concept of indirect discrimination has been defined and interpreted by the courts;
- how discrimination on grounds of age has been interpreted;
- whether exceptions to the general prohibition on discrimination are made for genuine occupation requirements, and in other cases to permit positive action measures;
- whether associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that equal treatment within the meaning of Article 1§2 of the Charter is respected have the right to obtain a ruling that the prohibition of discrimination has been violated;
- whether national law provides for an alteration of the burden of proof in discrimination cases.

The Committee recalls that under Article 1§2 of the Charter remedies available to victims of discrimination must be adequate, proportionate and dissuasive. It therefore considers that the imposition of pre defined upper limits to compensation that may be awarded not to be in conformity with the Charter as in certain cases these may preclude damages from being awarded which are commensurate with the loss suffered and not sufficiently dissuasive.

The Committee asks for further information on the remedies in discrimination cases and as to the existence of upper limits to compensation.

The Committee asks for information on any measures taken to promote equality in employment.

As regards discrimination on grounds of nationality the Committee recalls that under Article 1§2 of the Charter, while it is possible for states to make foreign nationals' access to employment on their territory subject to possession of a work permit, they cannot ban nationals of States party in general from occupying jobs for reasons other than those set out in Article 31. The only jobs from which foreigners may be banned are therefore these that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.

The Committee requests further clarification of the situation; i.e. can national of other states Parties to the Charter be employed in the civil service, local government etc, where such positions are not concerned with national security, exercise of public authority to guarantee public order and security.

The Committee previously found that the situation was not in conformity with Article 1§2 of the Charter on the grounds that former officials of the German Democratic Republic (GDR) could be excluded from the civil service under the extraordinary provisions of the Reunification Treaty, because of their past political or public

activities that exceeded those provided for under Article 31; restrictions on the rights guaranteed by the Charter are admitted only if they are prescribed by law, serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. The Committee had noted that the exceptional provisions remained in force.

The current report states that these provisions of the Reunification Treaty are no longer in force since the specified period during which they could be applied has elapsed. It further states that an amendment of the Reunification treaty is not possible as the partner to the Reunification Treaty; the GDR no longer exists.

Taking note of the explanation that although they still appear in the treaty, these provisions can by no means be applied again the Committee considers that the situation no longer infringes the Charter.

2. Prohibition on Forced Labour

The Committee had previously found that the situation was not in conformity with Article 1§2 of the Charter on the grounds that prisoners could be made to work in workshops run by private enterprises without their consent and in conditions far removed from those normally associated with a private employment relationship.

The report states that there are too few employment opportunities available for prisoners, only 50% of all prisoners are offered jobs, therefore in practice if a prisoner does not wish to work he/she will not be obliged to. Not all work done by prisoners is for private enterprises; the majority of prisoners work for enterprises run by the penal institution or are employed in the penal institution in another way (e.g. house cleaning services, bakeries, laundries, etc.) Any work performed outside the prison for a private enterprise requires the consent of the prisoner.

Employed prisoners' working hours correspond to those in the civil service and are subject to the statutory provision on occupational health and safety.

The report provides no up to date information on levels of remuneration. The Committee asks to receive up to date information on remuneration levels as well as more precise information on the types of work that prisoners could in theory be required to perform for private enterprises inside prisons.

The Committee invites the Government to reply to its question in the General Introduction to these Conclusions on this issue.

3. Other Aspects of the right to earn one's living in an occupation freely entered into

The Committee invites the Government to reply to its question in the General Introduction to these Conclusions as to whether legislation against terrorism precludes persons from taking up certain employment.

Conclusion

Pending receipt of the information requested the Committee defers its conclusion.

Paragraph 3 – Free placement services

The Committee takes note of the information contained in the German report.

The Federal Employment Agency, BA, started a process of reform in 2002 which aims at enhancing placement process, reducing duration of unemployment and concentrating on the key activities of counselling, placement and benefits. Another important objective is to support job placement services with modern technology.

A total of 496,500 persons were placed in jobs by the BA in 2004 in comparison to 676,700 in 2003. In view of the fact that the number of the registered unemployed increased during the same period, the Committee would like to know the reasons for the drop in the number of placements. It also asks that the next report indicate the placement rate, i.e. the ratio of placements made by BA to the number of registered vacancies.

According to the report, the average length of unemployment was 38.1 weeks in 2004 compared to 37.6 weeks in 2003. The duration of time in which a vacancy was filled was reduced by 12 days to 39 days in 2004.

The report finally states that since 2002 there has been no obligation to collect statistical data in the field of private job placements.

Pending receipt of the information requested, the Committee defers its conclusion.

Article 5 – Right to organise

The Committee notes from the German report that there have been no changes to the situation which it has previously found to be in conformity with the Charter (Conclusions XVII-1, p. 201).

Noting that Germany has provided no information on the situation in law and in practice since 2004, the Committee asks that the next report provide updated information on Article 5.

The Committee concludes that the situation in Germany is in conformity with Article 5 of the Charter.

Article 6 – Right to collective bargaining

Paragraph 1 – Joint consultation

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 6§1 of the Charter.

Paragraph 2 – Negotiation procedures

The Committee takes note of the information provided in the German report.

The Committee has previously asked (Addendum to Conclusions XV-1 and Conclusions XVI-1) how far seafarers on board ships registered in the International Shipping Register were covered by collective agreements concluded by German trade unions. The ECSR has stated that under Article 6§2 of the Charter equal treatment "for all nationals of other contracting parties lawfully resident or working regularly within the territory in the enjoyment of the benefits of collective bargaining is one of the fundamental principles of the Charter" (Conclusions XII-1, Denmark). The Committee noted from the previous report, that a distinction was drawn between seamen who are paid under German law and those whose pay is governed by their own countries' legislation. It asked the next report to explain the legal basis for this distinction and its implications for the application of collective agreements negotiated by German trade unions.

The report specifies in this respect that pursuant to Article 21§4 of the Law on the Flag Act (*Flaggenrechtsgesetz*) in conjunction with Article 30§2 of the Introduction Act to the Civil Code (*EGBGB*), on board a ship registered in the German International Shipping Register, the labour law provisions of the country with which the employment relationship with a foreign seafarer has the closest connection applies to the individual employment contract. When seafarers are recruited abroad, this would as a general rule be the labour law of their respective country of origin. As far as collective agreements concluded by German ship owners with German trade unions are concerned, the report confirms that German trade unions are entitled to enlist foreign seafarers as members and to represent them. German ship owners can also conclude collective agreements pursuant to foreign law with foreign trade unions which shall only be subject to the German Collective Bargaining Act if the parties have agreed that German collective labour law shall apply and that the collective agreement shall be subject to the competence of the German courts. The Committee considers that the situation in Germany is in conformity with the Charter in this respect.

The Committee further considered in Conclusions XVI-1 and Conclusions XVII-1 that the situation in Germany is not in conformity with Article 6§2 of the Charter on the grounds that post and rail employees with civil servant status who do not exercise public authority do not enjoy the right to bargain collectively. The Committee notes from the report that the number of civil servants working with the privatised German Mail and Railway enterprises decreases constantly since any new vacancies are filled by salaried employees without civil servant status.

When the public railway and post services were privatised, the civil servants concerned had the choice of becoming employees under normal private law contracts or of retaining their status as civil servants. The latter category could be assigned in different ways (e.g. *zugewiesen/beliehen*) and pursuant to complex regulations for working in the privatised enterprises in which case their wages and employment conditions are governed by law as is the case for all civil servants and they are deprived of the right to collective bargaining. The report explains in this context that the Constitution of the Federal Republic of Germany and the complementary regulations do not provide for differentiations within the notion of civil servant or the status of civil servants and the related rights and duties. An employee of the privatised post and rail enterprises who chose to keep his civil servant status would in principle be regarded as a civil servant assigned to the privatised undertaking without prejudice to his legal status as civil servant and his rights and duties following from this status, including the duty of loyalty towards the Federal Government as his employer.

Civil servants having retained their status as civil servants after privatisation of the public railway and post services may also be granted leave in order to take up work under a private law contract. The report refers to a case brought before the Federal Administrative Court, on the occasion of which the court examined the consequences of retaining the civil servant status in the event a civil servant is given a position in a privatised enterprise. In the case examined, the civil servant had been granted special leave in order to take up work under a private law contract with one of the newly set up daughter companies after the German Federal Mail (*Deutsche Bundespost*) had been split up. In its decision of 7 June 2000 the Court held that "from the nature and type of the special leave – i.e. work with a limited liability company - ...certain restrictions of other civil service duties can arise which go beyond releasing the employees from the duty to perform their service. Where the civil servant is obliged on account of his contract of employment – with the consent of the employer – to increase the profit of the private enterprise – also in competition with other private enterprises, it cannot

be expected of him to e.g. perform his work only impartially and in the common public interest (section 52 §1 of the Federal Civil Servants Act). Where special leave was granted in the area of privatised successor enterprises to Deutsche Bundespost in order to be in a position to conclude a contract of employment that is not subject to the constraints of public service law and where this same person on leave receives i.e. performance-related premiums for having won new customers, it cannot be expected of him to perform his duties on a benevolent basis within the meaning of section 54 §2 of the Federal Civil Servants Act. Also, with a private employer, he is generally not subject to the prohibition to strike. Already at the time when the reasons for section 12 of the Foundation of DB AG Act (*Deutsche Bahn Gründungsgesetz – DBGrG*) were presented it was said that civil servants on leave from service enjoy the same freedom of association rights pursuant to section 9 of the Basic Law as other workers during the time they are on leave from service. This applies *mutatis mutandis* for persons on leave in the postal services sector.”

The Committee acknowledges that the above mentioned court decision implies that the restrictions on the right to collective action and freedom of association rights applying to civil servants shall not be imposed on those civil servants that have been granted special leave in order to take up work under a private law contract with the privatised companies of the German Mail and Railway. It understands that conceding to this category of civil servants the right to strike and “the same freedom of association rights pursuant to section 9 of the Basic Law as other workers during the time they are on leave from service” implies the right to collective bargaining and wishes the next report to confirm that this is actually the case.

The Committee asks whether the scope of application of the court decision extends to all post and rail employees with civil service status who do not exercise public authority or whether there are civil servants, assigned to posts in privatised enterprises who have not been granted leave to take up work under a private law contract and who are denied the right to collective bargaining and collective action. Meanwhile, it reserves its position on this point.

The Committee further wishes the next report to provide information on any further development in jurisprudence or practice establishing that employees of privatised companies who retained civil servant status but do not exercise public authority do enjoy the right to bargain collectively.

Pending receipt of the information requested, the Committee defers its conclusion.

Paragraph 3 – Conciliation and arbitration

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 6§3 of the Charter.

Paragraph 4 – Collective action

The Committee takes note of the information provided in the German report.

Meaning of collective action - Permitted objectives of collective action

As regards the principles of proportionality and fairness applied by the Federal Labour Court when ruling on the lawfulness of strikes, the Committee recalled in the previous conclusion on Article 6§4 of the Charter its responsibility to ensure that the interventions of domestic courts do not affect the very substance of the right to strike, thus depriving it of its effectiveness. It asked for a detailed description of examples of decisions of the Federal Labour Court declaring strikes unlawful because of failure to respect the proportionality principle. The report refers to the information provided in the previous report on a single court decision and states that the Government does not have any further information in this respect. The Committee wishes the next report to provide detailed information on decisions of domestic courts, if any, declaring strikes unlawful because of their failure to respect the proportionality principle.

The Committee notes that the German law pertaining to collective action, based on Article 9§3 of the Constitution as interpreted by the courts, still forbids strikes which are not concerned with the conclusion of collective agreements. The Committee has regularly invited the German authorities to comply with its conclusions as the Committee of Ministers recalled in Recommendation R ChS (98) 2 addressed to the German Government. The report states that strikes with the aim of enforcing demands that cannot be the subject of collective bargaining are of no practical importance in Germany. The report specifies that a change of legislation in this respect, which would in fact call for a codification of the right pertaining to collective action, is not envisaged since for the time being such codification would not be supported by a consensus in German society.

However, as regards the relevant jurisprudence, the report makes reference to a decision of the Federal Labour Court of 10 December 2002 explicitly referring to the Committee’s conclusions on the situation in

Germany as regards the prohibition of strikes not concerned with the conclusion of collective agreements. The Court states in this decision that “ ..., the generalised statement that strikes are only permitted in order to achieve collective agreement objectives, may require a review in the light of Part II Article 6§4 of the European Social Charter”. According to the report the abovementioned decision of the Federal Labour Court could be an indication that the court might review its present case-law on the scope of lawful strikes and the Committee wishes to be informed on any development in this respect. Since the situation has not changed during the reference period, the Committee still finds the situation not to be in conformity with Article 6§4 of the Charter.

Who is entitled to take collective action?

In its previous conclusions, the Committee has taken note of the conditions laid down by the courts before trade unions can call lawful strikes (see Addendum to Conclusions XV-1, p. 29) and has found that these are difficult to satisfy. It observes that the situation has not changed in this respect and given that a group of workers may not readily form a union for the purpose of a strike, considers the situation not to be in conformity with the Charter.

Restrictions on the right to strike

In its previous conclusion, the Committee asked for specified information on labour court injunctions prohibiting strikes under certain circumstances, in particular the reasons for the injunctions. The report refers to the information provided in the previous report and states that the Government does not have any further information in this respect. The Committee wishes the next report to provide updated and detailed information on injunctions, if any, by domestic courts prohibiting strikes.

As regards the absolute strike ban applied to civil servants employed in privatised postal and rail undertakings which the Committee held not to be in conformity with the Charter, it refers to its observations in its conclusion regarding Article 6§2 with respect to the decision of the Federal Administrative Court of 7 June 2000 stating that a civil servant who is being granted leave to take up work under a private law contract with the privatised companies of the German Mail and Railway “is generally not subject to a prohibition to strike”. The Committee reiterates its question whether the scope of application of the court decision extends to all post and rail employees with civil service status who do not exercise public authority or whether there are civil servants, assigned to posts in privatised enterprises without being granted leave to take up work under a private law contract who are denied the right to collective action. Meanwhile, it reserves its position on this point.

Procedural requirements pertaining to collective action - Consequences of collective action

As regards the procedural requirements pertaining to and the consequences of collective action, the Committee refers to its assessment of the situation in Conclusions XV-1 and XVI-1.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 6§4 of the Charter on the following grounds:

- strikes not aimed at achieving a collective agreement are prohibited;
- the requirements to be met by a group of workers in order to form a union satisfying the conditions for calling a strike constitute an excessive restriction to the right to strike.

Article 12 – Right to social security

Paragraph 1 – Existence of a social security system

The Committee takes note of the information provided in the German report.

The Committee notes that the number of branches covered by the social security system is sufficient. The system rests on collective funding as it is funded by contributions (employers, employees and the state) and also by the State budget.

The Committee recalls that, under Article 12§1, the social security system should protect a significant proportion of the population in the following branches: health care, sickness, unemployment, old age, employment injury, family, and maternity. According to the information provided in the report, in 2003, there were 33.4 million actively insured persons. In 2004, about 15.6 million persons received old-age pensions. The Committee asks the next report to provide figures, for the period of reference, for every branch in percentages in order to be able to assess the effective coverage of the population (sickness insurance and family benefits) and of the active population (sickness and maternity benefits, unemployment benefits, pensions, and work accidents or occupational diseases benefits).

The report provides information on the level of social security benefits calculated for a “typical” beneficiary and affirms that they comply with the replacement rates required by ILO Convention No. 102. In particular, it indicates that, in 2004, the replacement rate of old-age benefits for a standard beneficiary with a 35 year qualifying period was 50.1% in the old Länder and 49.3% in the new Länder. Replacement rates for invalidity pensions were, respectively, 59.8% and 60.1%; and those for survivors’ pensions were, respectively, 58.5% and 58.9%.

The Committee notes that the levels of the benefits for the typical beneficiary are generally higher than minimum benefits. It repeats its question for information on all social security benefits, including information on their minimum level (sickness, unemployment, old-age, invalidity, survivors and accidents at work and occupational diseases) and recalls that Article 12§1 requires that social security benefits are effective, which means that, when they are income-replacement benefits, their level should be fixed such as to stand in reasonable proportion to the previous income and should never fall below the poverty threshold defined as 50% of median equivalised income and as calculated on the basis of the Eurostat at-risk-of-poverty threshold value.

According to MISSOC¹, sickness and maternity benefits are part of the compulsory social insurance scheme for employees. The benefits rely on the principle of the continuation of payment of wages and salaries by the employer. Payment starts from the 4th day of illness and there is no qualifying period. The sickness benefit amounts to 70% of the normal salary (i.e. wages and income from work, normally received during the last three months) and it may not exceed 90%. The length of sickness benefits for the same illness is limited to 78 weeks over a three-year period.

The Committee examines maternity benefits under Article 8 (Conclusion XVII-2, Germany, Article 8, p. 267).

Unemployment benefits corresponded to 67% of the standardised net wage for unemployed persons with families and to 60% for the others. The report reiterates that unemployment benefits may be suspended and eventually withdrawn if an individual gives up or refuses a job, or rejects or drop out of vocational training measures. The Committee recalls its previous conclusion under Article 1§2 where it stated that: “for a reasonable initial period job seekers must be entitled to refuse offers that do not correspond to their occupation and skills, without risking suspension of their unemployment benefits” (Conclusions XVII-1, Germany, Article 1§2, p. 199).

In reply to the Committee, the report states that an individual is required to change occupational sector in cases of obsolete qualifications and after non-successful efforts to find a work matching skills. Similarly, geographical mobility is generally not required when there are important family reasons preventing it and within the first three months of unemployment, if the unemployed – according to the labour agency forecast – has a possibility to find a job within the daily commuting range.

The Committee concludes that there is a discrepancy between the legislation, which has formally abolished the time-limited protection of the occupation and skills of the unemployed, and the practice of employment services, which first try at reintegrating the unemployed accordingly with their qualifications (see also Resolution Res CSS (2005)7 of the Committee of Ministers on the application of the European Code of Social

¹ European Commission publication, MISSOC, Social Protection in the 25 Member States of the European Union, in the European Economic Area, and in Switzerland, Situation on 1 May 2004, Comparative Tables, http://ec.europa.eu/employment_social/missoc/missoc2004_may_en.pdf.

Security by Germany). Notwithstanding the difference in practice, the legislation is not in conformity with the Charter since there is no reasonable initial period during which the unemployed may refuse a job not matching with his previous occupation and skills without losing his unemployment benefits. The Committee considers this measure to undermine the adequate coverage of the unemployment risk for which every worker has contributed during his working activity.

The Committee asks the next report to provide information on minimum level of old age pension introduced by the 2004 Pension Insurance Sustainability Act. Invalidity pension is a compulsory social insurance scheme for employees and certain groups of self-employed persons with earning-related cash benefits. The Committee asks whether the 2004 Act mentioned above also affects invalidity and survivors' pensions.

The Committee recalls that the scope and level of family benefits are assessed under Article 16.

The Committee concludes that the situation in Germany is not in conformity with Article 12§1 of the Charter on the grounds that there is no reasonable initial period during which the unemployed may refuse a job not matching with his previous occupation and skills without losing his unemployment benefits.

Paragraph 2 – Maintenance of a social security system at a satisfactory level at least equal to that required for ratification of International Labour Convention No. 102

The Committee notes from Resolution Res CSS(2005)7 of the Committee of Ministers on the application of the European Code of Social Security by Germany (period from 1 July 2003 to 30 June 2004) that Germany continues to give effect to Parts II, III, IV, VI, VII and VIII of the Code, and that it ensures also the application of Parts V, IX, and X, subject to receiving statistical information on the level of long-term benefits. In so doing, Germany maintains a social security system that meets the requirements of ILO Convention No. 102.

The Committee concludes that the situation in Germany is in conformity with Article 12§2 of the Charter.

Paragraph 3 – Development of the social security system

The Committee takes note of the information provided in the German report.

During the reference period, new legislation deeply reformed the social security system. The Committee recalls that the criteria it takes into account to assess the conformity of restrictions on the right to social security as a result of economic and demographic factors are listed in the General Introduction to Conclusions XIV-1, §8, p. 11. They are:

- the nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths, etc.);
- the reasons given for the changes and the framework of social and economic policy in which they arise; the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
- the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
- the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13);
- the results obtained by such changes.

The Committee will therefore consider the changes occurred during the reference period in the light of the above criteria.

During the reference period, the Statutory Health Insurance Modernisation Act was adopted. In particular, it aimed at strengthening the independence of patients, improving the quality of patient care, reforming the organisational structures, rearranging fees and the supply of pharmaceuticals, dentures and aids, and reorganising the financing. The Committee asks the next report to provide information on the reform of health care on the basis of the criteria outlined above, in particular if it introduced restrictions.

Employment services and the unemployment benefits scheme have been thoroughly reorganised by several acts, including the Third Act for Modern Services on the Labour Market (entered into force in 2003), the Job-AQTIV Act, and the Labour Reform Act. The Act on Reforms on the Labour Market, which entered into force in 2004, restricted, as from the beginning of 2006, the period of entitlement to unemployment benefit from 32 months to 12 months and 18 months for those over 55 years. The Third Act for Modern Services on the Labour Market introduced a common qualifying period of pre-insurance of 12 months over the two previous years instead of three.

The Committee notes that legislative amendments sharply reduced the length for which unemployment benefits are paid and introduced a new qualifying period. On the basis of the criteria mentioned above as regards restrictions carried out to the right to social security, it considers that the report fails to sufficiently

explain and justify the measures taken, in particular as regards the reasons and the extent of the changes and their necessity. In the absence of such justification, the Committee considers that the situation is not in conformity with Article 12§3.

Two new grounds for the suspension of unemployment benefit have been adopted. Benefit may now be suspended if the beneficiary makes too little effort in seeking employment or fails to attend appointments with the person responsible for his/her file. Furthermore the job refusal rules apply also to those who are in employment but registered as job seekers.

The Committee underlines that, under Article 12§1, it considered that the situation was not in conformity on the grounds that the legislation concerning the suspension of unemployment benefits weakened the coverage of the unemployment risk. Further it considers that the new restrictions have not been sufficiently justified. Therefore it considers that the situation is not in conformity with Article 12§3.

The Committee notes that, in 2003, pensions were adjusted by 1.04% in old Länder and 1.19% in the new Länder; they rose therefore faster than consumer prices and wages. A package of measures adopted at the end of 2003 included *inter alia* the suspension of adjustment of pensions for 2004 in order to keep stable the contribution rate at 19.5% in the short-term.

The report provides information on legislative changes to the old-age pension scheme. The statutory pension insurance scheme was changed by the 2004 Pension Insurance Sustainability Act, which is a further step in the programme to safeguard the welfare system. The Act provides for measures which in the medium and long-term will respond to the challenges posed by the demographic development and ensure the sustainability of the pension insurance scheme. In particular, the act modified the pension adjustment mechanism by introducing the sustainability factor and linking the pension rate to the gross sum of wages and salaries liable for contributions. The factor takes into account the ratio between the number of pension recipients and the number of employees liable to pay contributions. The Committee asks the next report to respond to the questions enumerated above as regards this reform.

The Committee asks the next report to indicate whether the difference in value between the level of pensions in the old Lander and new Lander has been reduced and if not how the new adjustment mechanism for pensions described above will improve the situation.

The report indicates that the result of this new mechanism will be a decrease in the “net pre-tax pension level” and for this purpose a minimum pre-tax level was introduced in the legislation. The Committee considers that in order to assess the reform of the adjustment mechanism it needs first to assess the minimum level of old-age pension under Article 12§1; it therefore reserves its position on this issue.

The Act also increased the age of retirement to 63 years as from 2006 and restricted the value of the periods credited for training at school.

The report indicates that the second and third pillars of the pension reforms, i.e. occupational pensions and state-supported private pensions (*Riester* pensions), have been particularly successful during the period of reference. About 57% of employees have accrued occupational pension rights, and about 4.2 million persons subscribed to private pension schemes.

The Committee concludes that the situation in Germany is not in conformity with Article 12§3 of the Charter on the ground of the restrictions introduced in the social security system with respect to unemployment benefits.

Paragraph 4 – Social security of persons moving between states

The Committee takes note of the information provided in the German report.

The Committee notes that relations with the other member states of the enlarged EU in the field of social security are governed by Regulation (EEC) No. 1408/71 and Regulation (EEC) No. 574/72. During the reference period Regulation (EC) No. 859/2003 entered into force. The Committee notes that this regulation makes Regulation No. 1408/71 applicable to third country nationals, as well as to their family members, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State (Article 1). This means that EU member States must guarantee to at least those nationals of other States party to the Charter and to the Revised Charter equal treatment with respect to social security rights provided they are legally resident. The Committee asks the next report to provide information about the extension in practice of the equal treatment principle to the third country nationals.

As regards the other States party to the Charter or to the Revised Charter not covered by Community legislation, during the reference period, bilateral agreements existed with Bulgaria, Croatia, “the former

Yugoslav Republic of Macedonia”, Romania and Turkey. According to the report, these agreements ensure equal treatment, retention of accrued benefits and aggregation of insurance or employment periods.

No bilateral agreements guaranteeing equal treatment, retention of accrued benefits and aggregation of insurance or employment periods existed during the reference period with Albania, Andorra, Armenia, Azerbaijan, Georgia, and Moldova. The Committee recalls that States party can comply with their obligations not only through bilateral or multilateral agreements, but also through the adoption of unilateral measures.

As regards the payment of family benefits, the Committee considers that according to Article 12§4, any child resident in a defined country is entitled to the payment of family benefits on an equal footing with nationals of the country concerned. Therefore, whoever is the beneficiary under the social security system, i.e. whether it is the worker or the child, state party are under the obligation to secure through unilateral measures the actual payment of family benefits to all children residing on their territory. In other words, imposing an obligation of residence of the child concerned on the territory of the state is compatible with Article 12§4 and its Appendix. However since not all countries apply such a system, states applying the 'child residence requirement' are under the obligation, in order to secure equal treatment within the meaning of Article 12§4, to conclude within a reasonable period of time bilateral or multilateral agreements with those states which apply a different entitlement principle. The Committee therefore asks the next report to indicate whether such agreements exist with the following countries: Albania, Armenia, Georgia and Turkey, or, if not, whether it is envisaged to conclude them and in what time delay.

The Committee asks information on whether length of residence or employment requirements non-EU/EEA nationals of States party to the Charter or the Revised Charter are imposed in general for receipt of social security benefits. As regards family benefits, the Committee refers to its conclusion under Article 16 in this volume.

The report states that the exportability of old-age pensions is also possible outside bilateral agreements, though at a reduced rate of 70%. This reduction is justified by fact that certain components of the statutory pension insurance system are financed via tax revenues rather than through contributions. The Committee repeats its question about retention of accrued rights with respect to the other social security benefits, other than unemployment benefits.

The Committee recalls that in its previous conclusion (Conclusion XVII-1, p. 211) it found that no accumulation of insurance or employment periods was guaranteed beyond Community legislation or bilateral agreements and therefore the situation is not in conformity with Article 12§4. The report confirms that the situation did not change. Since bilateral agreements do not currently exist with Albania, Andorra, Armenia, Azerbaijan, Georgia, and Moldova, the situation is still not in conformity with the Charter.

The Committee concludes that the situation in Germany is not in conformity with Article 12§4 of the Charter on the grounds that the legislation does not provide for the accumulation of insurance or employment periods completed by the nationals of States party not covered by Community regulations or bound by agreement with Germany.

In accordance with Article 21-1§3 of the Committee's Rules of Procedure, a dissenting opinion by Mr Jean-Michel BELORGEY, joined by Mr Nikitas ALIPRANTIS, Mrs Csilla KOLLONAY-LEHOCZKY and Mr Lucien FRANÇOIS, is appended to these conclusions. A dissenting opinion by Mr Tekin AKILLIOGLU is also appended.

Article 13 – Right to social and medical assistance

Paragraph 1 – Adequate assistance for every person in need

The Committee takes note of the information in the German report.

Level of social assistance

To assess the situation during the reference period, the Committee takes account of the following information:

- basic benefit: according to MISSOC¹, in 2003, the average levels of subsistence aid (*Hilfe zum Lebensunterhalt*) per month in the former *Länder* were as follows: € 342 for a person living alone, € 618 for a childless couple, € 848 for a couple with one child, € 1,078 for a couple with two children, € 1,338 for a couple with three children, € 572 for a single parent with one child and € 920 for a single parent with two children;
- supplementary benefits: the basic amounts were supplemented by additional allowances to cover housing and heating expenses, which in 2003 came to € 306, 403, 471, 523 or 584, depending on the number of persons in the household;
- medical assistance: special assistance in the event of illness, examined by the Committee in Conclusions XIV-1 (pp. 318-323) ;
- poverty threshold, defined as 50% of median equivalised income and as calculated on the basis of the Eurostat at-risk-of-poverty threshold value: estimated at € 689 per month in 2003.

In the light of the above data, the Committee considers that the level of social assistance in the former *Länder* is adequate.

However, in order to assess the situation in Germany, it needs the same information for the new *Länder*. In the mean time, it reserves its position on this point.

The Committee notes that legislation of 26 June 2001 introduced a guaranteed income for elderly persons. It asks for the next report to indicate whether the reform of the retirement pension system considered under Article 12§3 has had an impact on social assistance to elderly persons. If so, it asks for up-to-date information on the guaranteed income for elderly persons.

Personal scope

Since Conclusions XIV-1 the Committee has concluded that the situation is not in conformity, on the grounds that nationals of other States party are not granted the same social assistance benefits as Germans (the reasons are in Conclusions XIV-1, pp. 318-323 and the Addendum to Conclusions XV-1, pp. 40-41).

The Committee previously noted the stipulation made by the Federal Social Assistance Act of 30 June 1961 (Bundessozialhilfegesetz, BSHG) relating to foreigners that foreigners effectively resident in Germany must be granted aid for subsistence, illness, pregnancy, breast-feeding and dependent care needs. Furthermore, social assistance may be granted to the extent justified by personal circumstances. The statutory provisions conferring a right to social assistance, apart from the aforementioned, remain unaffected. The German Government stresses that this provision does not give rise to any discrimination and secures equal treatment to foreigners effectively and lawfully resident in Germany.

The Committee points out, however, that its finding of non-conformity is based on Germany's reservation when ratifying the 1953 Convention on Social and Medical Assistance. The reservation limits the scope of Section 120§1 BSHG. It is worded as follows: "The Government of the Federal Republic of Germany does not undertake to grant to the nationals of the other Contracting Parties, equally and under the same conditions as to its own nationals, assistance designed to enable the beneficiary to make a living [assistance referred to in Section 30 BSHG], or assistance to overcome particular social difficulties [assistance referred to in Section 72 BSHG], under the Federal Social Assistance Act for the time being in force. Notwithstanding the above, such assistance may be granted in appropriate cases."

The Government argues that there is no discrimination because German nationals do not enjoy a right to the assistance referred to in Section 30 BSHG either. Under the Act, this assistance is granted on a discretionary basis according to claimants' personal circumstances, regardless of whether they are foreign or German nationals. In reply to the question put by the Committee in its letter, the Government points out that, as well as taking account of the claimants' personal circumstances, the investigation conducted by the authorities is

¹ Publication of the European Commission, MISSOC, Social Protection in the Member States of the European Union, of the European Economic Area and in Switzerland, Situation on 1 May 2004, comparative tables (http://ec.europa.eu/employment_social/missoc/missoc2004_may_en.pdf).

based on objective criteria linked to the chances of the claimants' plans succeeding. In 2002 and 2003, 80 and 20 foreign nationals respectively received assistance under Section 30 BSHG.

In reply to the Committee's question as to why it abides by its reservation in respect of the Convention on Social and Medical Assistance, the Government states that, as the BSHG has been amended on several occasions since the ratification of the Convention, the reservation has made it possible to avoid misunderstandings.

The Committee considers that the information provided by the Government fails to demonstrate that foreign nationals are granted the assistance referred to in section 30 BSHG on an equal footing with German nationals because it has not established that the authorities do not apply different criteria according to nationality when examining claimants' personal circumstances. It therefore maintains its conclusion that the situation is not in conformity.

The Committee examines the other assistance referred to in the reservation, i.e. assistance to overcome particular social difficulties (Section 72 BSHG) under Article 13§3.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 13§1 of the Charter on the grounds that nationals of other States party are not granted the same social assistance benefits as nationals.

Paragraph 2 – Non-discrimination in the exercise of social and political rights

The Committee notes from the Germany report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in the Germany is in conformity with Article 13§2 of the Charter.

Paragraph 3 – Prevention, abolition or alleviation of need

The Committee takes note of the information in the German report.

The Committee has previously concluded that the situation is not in conformity with Article 13§3 on the grounds that Germany's reservation when ratifying the 1953 Convention on Social and Medical Assistance states that assistance for overcoming particular social difficulties (section 72 of the BSHG) is not available to nationals of States party "equally and under the same conditions as to its own nationals".

The Committee construes the German Government's line of reasoning in these terms: relying in particular on the reservation which specifies that it is possible that "such assistance may be granted in appropriate cases", the Government argues that foreigners are not treated differently from Germans since the latter do not themselves enjoy a right to the assistance provided for in section 72 BSHG and only receive it when this is warranted by their personal circumstances, which it is left for the competent authorities to determine. To clarify the situation, the Committee put a number of questions to the Government in a letter. Its replies are examined in the Committee's conclusion with regard to Article 13§1, to which it hereby refers. *Mutatis mutandis*, the Committee considers that the information provided by the Government fails to demonstrate that foreign nationals are granted the assistance referred to in section 72 BSHG on an equal footing with German nationals because it has not established that the authorities do not apply different criteria according to nationality when examining claimants' personal circumstances. It therefore maintains its conclusion that the situation is not in conformity.

With regard to the other aspects taken into consideration by the Committee to assess conformity with Article 13§3, the Committee, relying on the information examined in Conclusions XIV-1 (pp. 343-345), considers that the situation is in conformity with this provision. However, it asks for the next report to contain updated information.

The Committee concludes that the situation in Germany is not in conformity with Article 13§3 of the Charter on the grounds that nationals of other States party are not granted the same social assistance benefits as Germans.

Paragraph 4 – Specific emergency assistance for non-residents

The Committee takes note of the information provided in the German report.

The Committee had previously considered the situation to be in conformity with Article 13§4 (Conclusions XVII-1, p. 214). It had nevertheless noted that under the terms of section 120§3 of the Federal Social Assistance Act (*Bundessozialhilfegesetz*, BSHG), "foreigners who have entered Germany to claim social assistance have no right" and asked how this provision is implemented in practice. The information presented

in the report does not answer this question. The Committee specifies that under Article 13§4 of the Charter, States are required to grant emergency social assistance (food and accommodation) to anyone in their territory pending possible repatriation. The Committee wishes to know whether the persons referred to by section 120§3 BSHG can receive such assistance if in need.

The report states that foreigners proven to have entered German territory for the purpose of obtaining social assistance can receive medical assistance limited to treatment essential to survival.

The Committee invites the Government to reply to the question posed in the General Introduction to these Conclusions on the social and medical assistance available to foreigners who are not lawfully in the territory.

Pending receipt of the requested information, the Committee defers its conclusion.

Article 16 – Right of the family to social, legal and economic protection

The Committee takes note of the information provided in the German report.

With reference to the principles of interpretation of Article 16 set out in the general introduction, the Committee asks for information in the next report on the steps taken to ensure social, legal and economic protection for vulnerable families, including Roma families.

Social protection of the family

Housing for families

The Committee notes that the supply of social housing, particularly for families on low incomes, and the financial support granted by the authorities increased during the reference period. Families benefited particularly from the home-ownership allowance. The number of low income households receiving housing benefit also rose. The Committee would like future reports to continue to supply detailed information on the various aspects of the situation of families regarding housing. In particular, the next report should specify what steps are taken to ensure that the most vulnerable segments of the population, including foreign and Roma families, are treated equally.

Childcare facilities

In its last conclusions (XVII-1, p. 216), the Committee asked about the childcare coverage for children aged 0-6. The report supplies data for 2002 (outside the reference period). The Committee notes that the Day Care Expansion Act came into force on 1 January 2005. Under the Act, starting in 2005 € 1.5 billion per year will be allocated to day care for children under 3. The Committee asks for detailed and up-to-date information in the next report.

Participation of associations representing families

The Committee would like up-to-date information on how far families' point of view is taken into account in drawing up family policies. In particular, it asks whether all organisations representing families are consulted.

Legal protection of the family

Rights and obligations of spouses

The Committee notes that the Ministry of Justice intends to reform the law on non-contentious proceedings to extend the powers of the family courts. They would thus take over responsibility from the civil courts for the division of assets between spouses in divorce cases. The Committee asks to be informed of the implementation of this reform.

Mediation services

According to the report, one in three marriages in Germany is dissolved. This concerns 100,000 children, 80% of them aged under 12. To help children to cope with the burden of divorce, emphasis is placed on family mediation to enable spouses to settle their differences on the basis of consensus. The Committee notes that the legislation will reinforce mediation, and asks for detailed information in the next report, which it will consider in the light of the principles of interpretation of Article 16 laid down in the General Introduction.

Domestic violence against women

The Committee notes that the Protection against Violence Act of 1 January 2002 includes restraining orders for perpetrators. When the victim and the aggressor share the same dwelling, the former can apply for exclusive use of that dwelling for six months. The federal justice ministry has carried out a study of the effectiveness of these measures that shows that they can be considered adequate and appropriate. The Committee emphasises the importance of restraining orders to deal with this phenomenon. However, it notes from another source¹ that there are cases of female death following violence by their partner.

The Committee invites the Government to provide an extensive description of the situation in accordance with the request contained in the general introduction.

¹ Parliamentary Assembly of the Council of Europe, report of the Committee on Equal Opportunities for Women and Men, "Campaign to combat domestic violence against women in Europe", 16 September 2004, Doc. 10273.

Economic protection of the family

Family benefits of a sufficient amount

The Committee examined in detail the different family benefits and tax allowances (Conclusions XVII-1, p. 216). It recalls that, to comply with Article 16, child benefit must be an adequate income supplement representing a significant percentage of the median equivalised income. It previously found that that child benefit, which represented 9.7% of this income, was sufficient. Since the benefit level (€ 154 for the first three children and € 179 per child thereafter) remains the same¹, and represents 11% of median equivalised income for 2003, according to Eurostat, the Committee considers these benefits to be adequate.

Vulnerable families

The Committee notes the introduction in 2004 of a new tax relief of € 1,308 for one parent families. It also notes that following a ruling of the Constitutional Court tax-free allowances apply equally to all families since more favourable treatment for unmarried couples with children would not be compatible with the principle of equality. The Committee would like the next report to clarify the consequences of this reform.

The Committee had previously found that the situation in Germany was not in conformity with the Charter because non-nationals (other than European Union and European Economic Area nationals, who were treated as Germans) were discriminated against with regard to the supplementary child-raising allowances paid by certain Länder (Baden-Württemberg and Bavaria). In its last conclusion, it found that equal treatment was now guaranteed with respect to Turkish nationals. However, it noted that equal treatment was not guaranteed to other nationals of States party to the Charter and the Revised Charter who were not treated as German citizens.

In the case of Baden-Württemberg, the report states that supplementary child-raising benefit is paid to EU and EEA nationals and nationals of countries with which Germany has bilateral agreements. According to information supplied by the report in connection with Article 12§4, such agreements have been concluded with Bulgaria, Croatia, Romania, "the former Yugoslav Republic of Macedonia" and Turkey. On the other hand, there are no agreements with Albania, Andorra, Armenia, Azerbaijan or Moldova. The Committee therefore considers that there is still no guarantee of equal treatment with regard to family benefits, as provided for in Article 16 of the Charter in conjunction with the Appendix.

In the case of Bavaria, the Committee notes that new legislation that came into force on 1 April 2004 extended entitlement to the child-raising allowance to anyone for whom equal treatment was required under international or Community agreements. The Committee asks for the next report to confirm that the legislation in question applies the principle of equal treatment as embodied in the Charter with respect to nationals of the States party to 1961 Charter and the Revised Charter.

From information on other *Länder* where this allowance exists (Thuringia and Saxony), in principle the federal Family Allowances Act applies. The Committee wishes to receive exact information on the condition imposed on non nationals of States party to the Charter and the Revised Charter.

In connection with basic child allowances, the Committee refers to two recent judgments of the European Court of Human Rights (*Niedzwiecki v. Germany* and *Okpisz v. Germany* of 25 October 2005). The Court found that the fact that the Federal Child Benefits Act (*Bundeskindergeldgesetz*) granted foreigners entitlement to child benefits if they were in possession of a residence permit (*Aufenthaltsberechtigung*) or a provisional residence permit (*Aufenthaltsurlaubnis*) but not if they only had a limited residence title for exceptional purposes was in violation of Article 14 of the European Convention on Human Rights in conjunction with Article 8 (right to respect for private and family life). The Court ruled that there was no objective and reasonable justification for different treatment of foreigners who were not in possession of a stable residence permit. In a ruling of 6 July 2004 that came after the application to the European Court of Human Rights, the federal Constitutional Court followed the same line of reasoning and found that such difference of treatment was incompatible with Article 3 of the German Basic Law, which establishes the principle of equality. It held that there was no justification for this difference of treatment, particularly as possession of a limited residence title was not a sufficient basis to predict the duration of an individual's stay in Germany. The Constitutional Court urged parliament to undertake the necessary reforms before 1 January 2006.

The Committee also notes the reservation made by Germany in connection with Council Regulation (EC) No. 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No. 1408/71 and Regulation (EEC)

¹ Publication of the European Commission, Social Protection in the Member States of the European Union, of the European Economic Area and in Switzerland, Situation on 1 May 2004, comparative tables (http://ec.europa.eu/employment_social/missoc/missoc2004_may_en.pdf).

No. 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality. Germany has declared that in the case of family benefits, the new regulation will only apply to nationals of third countries with residence permits in the *Aufenthaltserlaubnis* or *Aufenthaltsberechtigung* categories, as defined in German law.

The Committee takes note of this information. However, since it lacks precise details on the conditions governing foreign nationals' eligibility for basic child allowances, particularly following the entry into force on 1 January 2005 of the new Immigration Act, it is unable to assess the situation regarding parties to the 1961 Charter and the Revised Charter. It asks for up-to-date information in the next report indicating how nationals of state party to the Charter and the Revised Charter are entitled to equal treatment in this area. Pending receipt of this information, it reserves its opinion on this matter.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with the Charter because equal treatment is not guaranteed regarding supplementary child-raising allowances to nationals of other States party to the Charter and the Revised Charter.

Article 19 – Right of migrant workers and their families to protection and assistance

Paragraph 1 – Assistance and information on migration

The Committee takes note of the information provided in the German report.

The Government has initiated a funding programme called XENOS, combining measures related to the labour market with activities against xenophobia, racism and racial discrimination. XENOS provides funding for projects carried out by a variety of social institutions. The projects include seminars on intercultural competences, vocational training of members of disadvantaged groups and development of anti-discrimination policies. The Committee notes that the role of the Works Councils in combating racial discrimination has been strengthened, including tasks such as the promotion of the integration of foreign workers and to put in place measures to combat racism and xenophobia at work. The Committee asks that the next report provide information on the evaluation of the XENOS programme and the activities of the Works Councils in the field of combating racial discrimination misleading propaganda.

The Committee notes from another source¹ that the fight against racism and racial discrimination has featured prominently in the training programmes of academies for judges, prosecutors and other legal professions. The Committee repeats its request for information on whether public servants who were in contact with immigrants are also given such training.

The Committee notes that on 1 January 2005 the new Immigration Act entered into force in Germany. It wishes to be kept informed on the implementation of the Act as well as any anti-discrimination legislation with regard to the combat of misleading propaganda and xenophobia.

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 19§1 of the Charter.

Paragraph 2 – Departure, journey and reception

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 19§2 of the Charter.

Paragraph 3 – Co-operation between social services of emigration and immigration states

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 19§3 of the Charter.

Paragraph 4 – Equality regarding employment, right to organise and accommodation

The Committee notes the information provided in the German report.

Previously, the Committee found that since the provisions of the Employment Protection Act on Military Service (*Arbeitsplatzschutzgesetz*) are applicable only to Germans and to nationals of countries which are members of the EU or parties to the EEA agreement, the Act does not secure for migrant workers of all other Contracting Parties lawfully within their territories treatment not less favourable than that of their own nationals regarding *inter alia* employment conditions relating to those who return from military service.

Membership of trade unions and enjoyment of the benefits of collective bargaining

The Committee notes from the German report and previous reports that there have been no changes to the situation regarding membership of trade unions and enjoyment of the benefits of collective bargaining which it had previously found to be in conformity with the Charter.

Accommodation

The Committee notes from the report that there have been no changes to the situation regarding accommodation which it had previously found to be in conformity with the Charter. The Committee asks that the next report provide up-dated information on access to housing for migrants who have temporary residence in Germany as well as information on all measures taken to ensure equal access and opportunities in housing for migrants workers.

¹ ECRI (European Commission against Racism and Intolerance) Third report on Germany, CRI (2004)23, in www.coe.int/T/Ehuman_rights/ECRI.

Conclusion

The Committee concludes that the situation in Germany is not in conformity with Article 19§4 of the Charter, on the grounds that nationals of certain States party are excluded from the scope of the Employment Protection Act on Military Service and consequently are not secured treatment not less favourable than that of nationals.

Paragraph 5 – Equality regarding taxes and contributions

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 19§5 of the Charter.

Paragraph 6 – Family reunion

The Committee notes the information provided in Germany's report. The Committee has considered the situation not to be in conformity with the Charter since 1984 (Conclusions VIII) with respect to the age for family reunion, and since 1991 (Conclusions XI-2) with respect to other conditions for family reunion. The situation in Germany is not in conformity with Article 19§6 of the Charter for other reasons (see below).

The report provides information on the new Residence Act, and amendments to the Immigration Act, and the Free Movement Act/EU.

The Committee will examine these texts when examining Article 19§6 next time (Conclusions XIX-1, to be published in 2008). In the meantime, it notes that the situation has not changed.

The Committee concludes that the situation in Germany is not in conformity with Article 19§6 of the Charter on the following grounds:

- children of migrant workers, aged between 18 and 21 years, nationals of Contracting Parties to the Charter who are not covered by Community regulations, are not admitted in practice for the purposes of family reunion;
- young persons with only one parent residing in Germany, have no right to family reunion except in special cases;
- there is no right to family reunion for spouses of second-generation foreigners.

Paragraph 7 – Equality regarding legal proceedings

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 19§7 of the Charter.

Paragraph 8 – Guarantees concerning deportation

The Committee takes notes of the information provided in Germany's report.

The Committee recalls that a migrant worker may be expelled in circumstances where there is no danger to national security nor to offence against public order or morality within the meaning of the Charter and that this situation is not in conformity with Article 19§8.

The report provides information on the new Residence Act and the Free Movement Act/EU which both came into force in January 2005. Since the Acts came into force outside of the reference period, the Committee will examine them in detail in the next assessment of Article 19§8 (Conclusions XIX-1 to be published in 2009).

The Committee concludes that the situation in Germany is not in conformity with Article 19§8 of the Charter on the grounds that migrant workers who are nationals of Contracting Parties may be expelled for reasons which are not permitted by the Charter.

Paragraph 9 – Transfer of earnings and savings

The Committee notes from the German report that there have been no changes to the situation, which it has previously considered to be in conformity with the Charter.

The Committee concludes that the situation in Germany is in conformity with Article 19§9 of the Charter.

Paragraph 10 – Equal treatment for the self-employed

On the basis of the information contained in the German report and previous reports under the European Social Charter of 1961, the Committee notes that there continues to be no discrimination between migrant employees and self-employed migrants.

However, in the case of equal treatment between wage-earners and self-employed migrants and between self-employed migrants and self-employed nationals, a finding of non-conformity under §§1-9 of Article 19 leads to a finding of non-conformity under §10 since the same grounds for non-conformity as described under the aforementioned paragraphs applies to self-employed workers.

In its conclusion under Articles 19§§4, 6 and 8, the Committee has concluded that the situation in Germany is not in conformity with the Charter.

Accordingly, the Committee concludes that the situation in Germany is also not in conformity with Article 19§10 of the Charter.