

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

5 February 2005

Case document No. 5

International Federation for Human Rights (FIDH) v. Ireland
Complaint No. 42/2007

**RESPONSE OF THE FIDH TO THE GOVERNMENT'S
SUBMISSIONS THE ON THE MERITS**

Registered at the Secretariat on 4 February 2008

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OF THE COMPLAINT**

INTRODUCTION

- 1.1 The International Federation for Human Rights (IFHR/FIDH), which has initiated this Collective Complaint, hereby responds to the Submission on the Merits of the Complaint by the Government of Ireland.
- 1.2 The Complaint concerns the exclusion of non-resident recipients of Irish Contributory Old Age Pensions from the scheme providing for Free Travel within Ireland for pensioners and persons of pension age. It is to the effect that the Irish Government's exclusion of non-resident pension-holders is in breach of Article 23 of the Revised Social Charter, Article 23 in conjunction with Article E (non-discrimination), and Article 12.4.
- 1.3 The Committee of Social Rights having held that the Complaint is admissible, the Government now seeks the dismissal of the Complaint on five grounds:
 - That it does not concern persons who come within the scope of the Revised Social Charter;
 - That it does not relate to a right protected by the Charter;
 - That the Free Travel Scheme is not intrinsically linked with the old age pension in Ireland;
 - That the exclusion of non-resident pensioners from the Free Travel Scheme does not come under any of the prohibited grounds of discrimination as set out in Article E;
 - That the Committee should not consider the complaint because the exclusion complained of is required by Ireland's obligations as a member of the European Community.
- 1.4 In relation to the merits of the Complaint, the IFHR relies upon the original Complaint and its Submissions on the admissibility issue, where relevant, in addition to this Response to the Government's Submission on the Merits.
- 1.5 We would like at this stage to reiterate that this Complaint concerns the substantial number of persons who are in receipt of Irish Contributory Old Age Pensions (now called State Pensions) and who live outside the State. The great majority of these persons left Ireland to seek employment, thereby exercising a right protected by Article 18.4 of the Revised Social Charter, Protocol 4.2.2 of the European Convention on Human Rights, and Articles 18 and 39 of the EC Treaty. The largest number, around 31,000 now live in the UK, excluding Northern Ireland, with a smaller number, around 950, in other European states and some

8764 elsewhere. They are all, by definition, over 66 and many are quite elderly. They clearly come within the group protected by Article 23 of the Revised Social Charter, which requires Contracting states to adopt measures “to enable elderly persons to remain full members of society for as long as possible”, and to help them “to lead a decent life and play an active part in public, social and cultural life”.

- 1.6 A very important element in helping the elderly to remain full members of society and play an active part in social and cultural life in particular lies in assisting them to keep in touch with their families and friends. However, in this case many of their family and friends live in Ireland, often in the remoter areas of the country and the pensioners concerned often have to travel long distances to see them. It is important at this point to note that not all of the non-resident recipients of Irish pensions are Irish citizens. Some are nationals of other States Parties to the Charter, who have lived and worked in Ireland long enough to qualify for the Contributory Old Age Pension. They also may wish to return to Ireland to visit family members, relatives by marriage and friends.
- 1.7 The Free Travel Scheme, which was introduced in 1967 specifically for the benefit of old age and blind pensioners (but this Complaint deals only with recipients of Contributory Old Age Pensions), has been of great assistance to elderly persons in Ireland in enabling them to remain full members of society. It would also be of great assistance to non-resident pensioners when they return to Ireland, enabling them to visit their often scattered family members and friends, to attend weddings and funerals, which play a major role in Irish social life, especially for older persons, or to visit the graves of deceased family members and friends.
- 1.8 In that context we are somewhat concerned that the Government’s Submission on the Merits refers, at paragraph 1.3, to this Complaint as concerning persons “*visiting Ireland on holiday*”. This fails to reflect the importance of this issue for elderly and often isolated people whose circle of contemporaries is shrinking and who wish to keep in contact with those who remain and with the younger generations of their families.
- 1.9 We note as well that the Government’s Submission at paragraph 3.4 states that this Complaint “*relates to an Irish national (Ms Waddington and potentially to others in a similar situation)*”. We have already made clear, and the Committee has accepted in its decision on admissibility, that this is a Collective Complaint in relation to the large number of non-resident holders of Irish pensions. We cited the circumstances of one such person, Ms Waddington, as an illustration of how exclusion from the Free Travel Scheme affected non-resident pension holders.
- 1.10 Finally, in this introductory section, we would like to stress that what is at issue in this Complaint is access by non-resident holders of Irish pensions to the Free Travel Scheme *in Ireland*, not in any other state, something which seems to have

been lost sight of in some of the Government's arguments about extraterritoriality, with which we will deal more fully later in this Response.

The Government's Submission on the Merits:

We will now seek to address the points raised in the Government's Submission on the Merits of the Complaint in the order in which they were made.

Personal Scope of the Charter:

2.1 The Government's submission at Section 3 claims that the persons who are the subjects of the Complaint (non-resident holders of Irish Contributory Pensions) are not covered by the Revised Social Charter *ratione personae*. In saying this, the Government relies on the 1st paragraph of the Appendix to the Revised Social Charter, which states that Articles 20 to 23 of the Charter "*include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned...*"

2.2 This argument is misconceived for a number of reasons.

Firstly, the above proviso does not apply to Article 12.4 of the Charter as it is stated to be without prejudice to Article 12.4 and Article 13.

Secondly, the majority of the persons who are the subject of the Complaint, i.e. non-resident holders of Irish pensions, are not "foreigners", but Irish citizens who are not resident in Ireland. Restrictions specifically stated to apply to "foreigners" are not relevant to them.

Thirdly, insofar as some of the persons to whom the Complaint refers are non-Irish citizens, they are persons who have lived and worked in Ireland for long enough to acquire pension rights in the same way as the non-resident Irish citizens and so should not be treated any differently from them, and indeed Article 12.4 of the Revised Social Charter should preclude any different treatment of them. To the extent that these persons may be described as foreigners, the second sentence of paragraph 1 of the Appendix: "*This interpretation would not prejudice the extension of similar facilities to other persons by any of the parties*" actually enables the extension of benefits to them. We submit that, as mentioned above, Article 12.4, and other human rights provisions such as Article 1 of Protocol 1 of the European Convention on Human Rights, in conjunction with Article 14, would then preclude the Government from treating non Irish citizens differently and that the extension of the benefit in question to non-Irish citizens is provided for by the second sentence of paragraph 1 of the Appendix.

Fourthly, the Government's Submission omits the final section of the first sentence of paragraph 1 of the Appendix, which states that the Articles mentioned there, including Article 23, must be interpreted in light of the provisions of Articles 18 and 19 of the Charter. Article 18 provides that "*with a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake ... to ... recognise: 4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties*". We suggest that this right should preclude the Government from penalising or discriminating against any of its nationals who have exercised it, as to do so would prevent the *effective exercise* of the right.

- 2.4** At paragraph 3.2 the Government appears to argue that because the first paragraph of the Appendix limits the obligations imposed by the Charter in relation to "foreigners" to those who are lawfully resident or working regularly in a particular state, this allows states to limit all benefits covered by the Charter to persons who are resident or working regularly in their territory. Once again we point out that the paragraph in question refers specifically to "foreigners" and cannot be taken as justifying restrictions on a state's "own nationals", to use a term used in Article 12.4 of the Charter. Indeed, it would be meaningless if it did, as it refers to persons being "lawfully resident" in a contracting Party and all Irish nationals living in Ireland, for however short a period, would be 'lawfully resident'. We suggest that the Appendix does not provide any general licence to impose residence conditions on the eligibility of a state's "own nationals" for social security benefits. Such a fundamental limitation on social rights would have to be expressly stated in the Charter.
- 2.5** A State may, of course, impose conditions for the receipt of particular benefits by its nationals but where such conditions discriminate between nationals who are otherwise equally qualified, then that discrimination must meet the conditions for objective and reasonable justification, including serving a legitimate purpose, necessity in a democratic society, and proportionality. The Government has made no attempt to justify discriminating against non-resident pension-holders, other than in relation to its EU obligations, with which we will deal later. It has instead relied upon arguing that it is not actually obliged to allow them access to the Free Travel Scheme. It is our contention that this exclusion amounts to impermissible discrimination against Irish citizens who hold Irish pensions. And we would stress again that if the Government concedes that this discriminatory treatment of Irish citizens should end, then Article 12.4 of the Charter and the provisions of the European Convention on Human Rights would prohibit discrimination between categories of non-resident pension holders on the basis of nationality or citizenship, with the result that all non-resident recipients of Irish pensions should be given access to the Free Travel scheme.
- 2.6** At paragraph 3.4 the Government bluntly states that an Irish national who is resident in a Contracting Party other than Ireland is not entitled to invoke Article

23 of the Charter against Ireland. This would appear again to be based on paragraph 1 of the Appendix to the Charter, but once more it ignores the fact that the paragraph in question refers specifically to “foreigners”. Moreover the paragraph itself specifically states that it is to be interpreted in light of Article 18 of the Charter, which requires states to recognise the right of their nationals to leave the country to take up work in another Contracting Party. It would be strange if the exercise of the right conferred by Article 18 would then deprive the person concerned of his/her rights under Article 23 or other articles of the Charter.

- 2.7 Finally, in relation to the issue of Personal Scope, the Government’s Submission looks to the European Convention on Human Rights (ECHR) to interpret the scope of the Charter and the persons covered by it. The submission argues that the jurisdiction of the ECHR is primarily territorial “*and extra-territorial jurisdiction is ‘exceptional’*” (paragraph 3.7). In that connection it refers to the European Court of Human Rights’ decision in the case of *Banković v Belgium & Others (Application No. 52207/99) [ECHR] 21st December 2001*. The Submission argues that the scope and extent of the Charter should be similar to that of the ECHR and that this would exclude the present Complaint.
- 2.8 We suggest that the Government’s argument here is fundamentally misconceived and that this is well illustrated by the case cited in support of it. The *Bankovic* case sought to hold States parties to the ECHR responsible for deaths caused by a NATO bombing in the Former Republic of Yugoslavia. This was a clearly extra-territorial action taken outside the territory of each of the states concerned and indeed outside the territory of any State Party to the Convention. The present Complaint, however, concerns the exclusion by the Irish Government of the persons concerned, when they are in Ireland, from access to a service provided by Irish public authorities within Ireland. No question of extraterritoriality arises and there is no comparison between the situations. We submit that the Complaint is fully within the scope of the Revised Social Charter in so far as the persons affected are concerned.
- 2.9 At paragraph 3.8 the Government Submission appears to argue that the use of the wording “*to secure to their populations*” in the third paragraph of the Preamble to the Revised Charter means that the obligations of each contracting State are limited to securing the rights protected by the Charter to the population within its own territory and that those rights are subject to the added requirements of lawful residence or regular work in that territory. In fact, the added requirements are not contained in the Preamble but in the Appendix to the Charter, where they are introduced in relation to “foreigners” only. And we submit that the use of the word “populations” in the Preamble can and should be taken to refer to the populations of all the contracting Parties to the Charter. In other words, we suggest that the contracting States are committed to securing collectively, through the Charter, the rights in question throughout the area covered by all the contracting States. Such an interpretation would, we suggest, be more in keeping with the objectives of the Charter.

Material Scope

- 3.1 Under this heading, the Government’s Submission deals with Article 12.4 (which is not affected by paragraph 1 of the Appendix to the Revised Charter). The Submission cites another qualification contained in the Appendix, however. This states that in relation to benefits not conditional upon insurance contributions, but which are provided under bilateral and multilateral agreements, “*a Party may require the completion of a prescribed period of residence before granting such benefits to the nationals of other Parties*”. We suggest that this qualification is irrelevant to the present Complaint because (a) the Complaint does not concern benefits provided under such agreements, and (b) the majority of the persons who are the subject of the Complaint are not nationals of other parties. Some, of course, are nationals of other Parties but, as we have already argued, if non-resident Irish nationals who are in receipt of Irish pensions were given access to the Free Travel Scheme, then to refuse access to non-nationals in receipt of the same pension would constitute impermissible discrimination.
- 3.2 We reiterate at this stage the argument made in our original submission that, while Article 12.4 of the Charter is formally directed at securing equal treatment for “*nationals of other Parties*” in respect of social security rights, “*whatever movements the persons protected may undertake between the territories of the Parties*”, this of necessity implies as well a duty on Contracting States to secure such benefits for their own nationals within their own territory “*whatever movements [they] ... may undertake between the territories of the Parties*”. This should apply in particular to movements aimed at exercising their right under Article 18 of the Charter to engage in gainful occupations in other States, which right would be undermined if persons who have exercised that right are, upon returning to Ireland, denied benefits to which they are otherwise entitled. And, once again, if such rights are secured to non-residents who are Irish nationals, Article 12.4 would then require equal provision for “non-national” Irish pension-holders.
- 3.3 The Government Submission also seeks to argue (*at paragraph 4.5*) that non-resident pensioners are outside the scope of Article 23 of the Charter because that Article is directed at ensuring that measures are taken “*to enable elderly persons to remain full members of society for as long as possible*”. The Submission argues that “*society*” in this context refers only to the “*society*” in which the elderly persons are currently resident and appears to suggest that the Irish Government’s view is that it has no obligation or responsibility towards elderly persons who are either Irish citizens or have spent a significant period of time in Ireland so long as those persons do not actually reside in Ireland, and, in particular, no obligation to assist those persons to be full members of society in Britain, Ireland or wherever they now reside. There is, however, nothing in the wording of Article 23 to suggest such a narrow and regressive interpretation of the

term “society”. It is not qualified by the definite article “the”, or by any adjectives such as “their own”, which might suggest a narrow geographical meaning. We suggest that “society” in Article 23 should be read in a broad and inclusive way to mean the general human family, or at the least, that part of it which is to be found in the territories covered by the Revised Social Charter. Thus Article 23 would seek to enable elderly persons to remain full members of society in any part of the area covered by the Charter. This would accord better with the objectives of the Charter and would recognise the reality that elderly persons may well have links with and be regarded as members of society in more than one contracting State, as is the position of the people who are the subjects of this Complaint.

- 3.4** In any event, when the persons to whom this Complaint relates are within Ireland, they must become part of Irish “society” for the purposes of the Charter, conspicuously so if they are citizens of Ireland. For the sake of clarity, we should emphasise again that this Complaint does not seek the provision of benefits outside Ireland, but rather access to the Free Travel scheme in Ireland, where many of the elderly people concerned are seen as forming part of Irish “society”, when they visit relatives or friends, in addition to their membership of “society” where they reside in the UK or elsewhere. We are surprised by the narrow position taken by the Government Submission on what constitutes “society” as the Irish Government regularly funds organisations catering for Irish emigrant communities in Britain, including a number which cater specifically for elderly Irish people. We attach a copy of a press release from the Irish Department of Foreign Affairs dated 17th November 2004 announcing grants to organisations assisting the Irish community in Britain, including Camden Elderly Irish Network, Kilburn Irish Pensioners Club, London Irish Elders Forum, Southwark Irish Pensioners Project, and Tara Irish Pensioners Club (*Appendix 1*). We also attach a copy of the 2007 Guidelines for applying for grants from the DŌn Fund, through which the Irish Government assists Irish community groups in Britain (*Appendix 2*). One of the key project areas mentioned in the Guidelines is “Elderly Irish people”.

Nature of the Free Travel Scheme

- 4.1** One of the matters relied on in this Complaint is the fact that the administration of the Free Travel Scheme in Ireland has been and is inextricably linked with the Old Age Pension (now called State Pension). It was so stated at its inception in 1967 and although eligibility for the scheme has happily been extended to include other persons over 66, the vast bulk of people holding Free Travel Passes on age grounds are still people in receipt of Old Age Pensions.
- 4.2** The closeness of the link is demonstrated by the fact that the Department of Social and Family Affairs Guidelines for processing applications for Free Travel Passes which were in force at the time this Complaint was registered in February 2007

stated at paragraph 3.3: “*A Free Travel Pass will be issued automatically if the Applicant is getting a pension from this Department*”. At paragraph 4.1 the Guidelines repeated that “*where a person is receiving a Pension from this Department, a Free Travel Pass will be automatically issued on his/her 66th birthday*” (See Document no.14 attached to the initial statement of Complaint).

- 4.3** We acknowledge that paragraph 3.1 of the Guidelines also stated that “[T]he Free Travel Scheme ... allows people who are aged 66 and over and who are permanently resident in the State, to travel free of charge...”. Paragraph 3.2 said that a person must apply for a Free Travel Pass and would obtain it if living permanently within the State and aged 66 or over. However, this appeared to be qualified immediately by paragraph 3.3, quoted above, which exempted persons in receipt of a pension from the need to apply. Moreover, the Application Form for a Free Travel Pass issued by the Department of Social and Family Affairs stated (and still states) quite specifically that persons in receipt of a pension from that Department should not complete the Form as a Pass would be issued to them automatically (See Document No. 10. attached to the initial Statement of Complaint). It did not say anything about a further residential condition.
- 4.4** The Government has attached new Guidelines to its Submission on the Merits, but these Guidelines are dated 28th November 2007, some nine months after the registration of this Complaint. They have been altered to state at paragraph 3.3 that “[A] Free Travel Pass will be issued automatically at age 66 if the applicant is getting a Pension from this Department and is living permanently in the State”. The words underlined have been added since the previous version of the Guidelines. In that regard, however, we submit that in considering this Complaint, the Committee should take the view that the entitlements of persons to whom the complaint relates must firstly be ascertained as of the date when the Complaint was registered. We would also suggest that the alteration of the Guidelines after the registration of the Complaint is in itself an acknowledgement that the previous version did link the Free Travel Scheme intimately with the Old Age Pension. We would point out as well that the Application Form for a Free Travel Pass referred to above was still in use by the Department of Social and Family Affairs at the time of drafting this Response, and still informed potential applicants that persons in receipt of a pension from the Department did not need to apply as they would automatically be issued with a Pass.
- 4.5** We have argued in the initial Complaint that admission to the Free Travel scheme was and is so intimately linked to receipt of the Irish Old Age (State) Pension that it amounts to a form of secondary benefit attached to the pension. The Government Submission argues against this on the basis that the pension is a statutory entitlement whereas the Free Travel scheme is a purely discretionary benefit. We have already made the case, however, that a discretionary scheme that has been in existence for over 40 years and has been so intimately linked with receipt of the pension that the Department administering it says that it will be paid automatically on qualification for the pension, has effectively ceased to be

genuinely discretionary and has become an entitlement for pension-holders. We submit that the fact that persons aged over 66 and not in receipt of a pension from the Irish state have also been admitted to the scheme has not severed the link with the Old Age Pension.

- 4.6 The closeness of the link between the pension and the Free Travel scheme is illustrated by the wording of the Free Travel application form which says that a Free Travel Pass will be issued automatically to pension-holders, and the wording of the original Guidelines for the scheme which were confused and even contradictory on the subject. The Government's amendment of the Guidelines is an admission of the confusion contained therein. The great majority (82.5%) of the persons holding Free Travel Passes on the age ground are recipients of Irish Old Age Pensions and all recipients of Irish Old Age Pensions are given Free Travel Passes automatically, except those who are not resident in the State, who are singled out for exclusion on the basis of their place of residence.
- 4.7 We submit that to exclude one group of pension holders from the Free Travel Scheme solely on the basis of their place of residence amounts to discrimination against that group. We have already acknowledged that discrimination may be permissible if it is prescribed by law, serves a legitimate purpose and is not disproportionate in the circumstances, but the Government has not attempted to show justification for this discrimination other than to claim that it is necessitated by Ireland's EU obligations, an argument which we will deal with below. It has been acknowledged that the financial argument once put forward to justify excluding non-resident pensioners no longer has any validity, if it ever had, and there would be no administrative difficulty in extending the scheme as all the persons concerned are already in receipt of pensions from the Department and it would probably be simpler to issue them all with Free Travel passes than to have to single them out and exclude them from the scheme.
- 4.8 In any event, irrespective of whether the Free Travel pass is to be treated as part and parcel of the pension (as it is, in general, administratively treated) or as a discretionary benefit, it is our submission that it remains within the scope of the Charter and in particular can still constitute a "right" to "social security" within the meaning of Article 12. Irish caselaw has established that even non-statutory discretionary schemes can give rise to enforceable rights: see for example *Latchford v. Minister for Industry and Commerce [1950] I.R. 33*. In any event, non-statutory schemes clearly come within the scope of "measures" of "social protection" under Article 23.

Article E and residence as "other status"

- 5.1 This Complaint argues that non-resident holders of Irish pensions are discriminated against on the basis of their residence outside the State, which has

resulted in almost all cases from their leaving Ireland to seek work in other countries. We suggest that this discrimination is in breach of the right of the persons concerned under Article 12.4 of the Charter to retain benefits without regard to their movements between the territories of the Contracting Parties. It is also in breach of their right to benefit from adequate measures to enable them to remain full members of society as provided for by Article 23, interpreted in light of Article 18, which protects the effective exercise of the right to take up gainful employment in the territory of another Contracting Party. We suggest that the discrimination in question, namely on the grounds of residence outside the State, comes under the heading of “other status” as listed in Article E of the Charter and accordingly it is in breach of Article E in conjunction with Article 23.

- 5.2** The Government’s Submission claims that the prohibition of discrimination on the ground of “other status” under Article 23 does not include discrimination based on residence. The Submission argues that the Committee of Social Rights has not yet considered the question of discrimination based on residence and that in the circumstances it should be guided by the practice of the European Court of Human Rights. The Government states that the case law of the Strasbourg Court suggests that it does not regard residence as a ground of discrimination prohibited by Article 14 of the ECHR and that it is only discrimination based on “personal characteristics” that is prohibited under the “other status” heading in Article 14 (*Kjeldsen, Busk Madsen and Pedersen V Denmark (1976) 1 EHRR*).
- 5.3** In fact, however, the Strasbourg Court considered discrimination based on residence in the case of *Darby v Sweden (1990) 13 EHRR* and held that the differential treatment for tax purposes of a Finnish doctor working in Sweden, but continuing to live in Finland amounted to discrimination on the basis of the Applicant’s place of residence. The Court found a violation of the Applicant’s rights under Article 14. As for the question of what constitute ‘personal characteristics’ and other status, the Strasbourg Court appears to have broadened its view of this over time and has held that marital status (*Sahin v Germany (2003) 36 EHRR*), ownership of a particular type of dog (*Bullock v UK (1996) 21 EHRR*), military status (*Engel v Netherlands (1979-80) 1 EHRR*) and conscientious objection (*Thlimmenos v Greece (2000) 31 EHRR*) all amounted to prohibited discrimination on the grounds of “other status”.
- 5.4** The Government’s submission cited a number of other cases before the European Court of Human Rights in support of its claim that Article 14 of the ECHR does not cover discrimination based on residence but none of the cases cited, namely *Sunday Times v United Kingdom (No.2) (1991) 14 EHRR*, *Magee v United Kingdom (2001) 31 EHRR* and *Johnston v Ireland (1987) 9 EHRR*, were comparable to the situation involved in the current Complaint. In so far as the issue of discrimination arose, the first two cases involved attempted comparisons of the treatment of ostensibly similar situations under different laws in different jurisdictions, albeit that in the Magee case the different jurisdiction (Northern Ireland) was part of the UK. Again in relation to discrimination, the applicants in

the third case (*Johnston v Ireland*) complained that the Irish courts recognised foreign divorces while not allowing divorce in Ireland. The Strasbourg Court held that the situations were not analogous. It said that the Irish courts, under the rules of private international law, were recognising decrees of foreign courts under the laws of the countries concerned in relation to people domiciled abroad. The Court said this was not comparable to the Applicants' position and it had not found any instance of recognition of foreign divorces obtained by persons domiciled in Ireland. Happily that unfortunate situation has been resolved by the introduction of divorce in Ireland. In any event, none of the cases in question concerned the refusal by a Contracting State to allow access to services provided in its territory to persons, who otherwise qualified for those services and were in receipt of closely related services, simply based on their residence in another state.

- 5.5 In addition, in response to the Government's argument, we must point out that the Revised Social Charter differs somewhat from the ECHR in that it provides specifically for the protection of social rights in the context of movement by nationals of the Contracting States across frontiers and seeks to specifically protect social security benefits in such situations. This makes the issue of discrimination on the basis of residence much more central to what it is seeking to achieve. This is evidenced by the inclusion of Articles dealing precisely with issues arising out of transfrontier mobility in the text of the Charter (Articles 12.4 and 18). The prevention of discrimination based on residence is closer to the core of the work of the Charter than of the ECHR, although, as we have seen, the Strasbourg Court has in any event condemned such discrimination in the *Darby v Sweden* case.

Membership of the European Community

- 6.1 The Government claims that the exclusion of non-resident pension-holders from the Free Travel Scheme is necessitated by its obligations under European Community (EC) law and argues that the Committee should accord a presumption of compliance with the Charter to such actions taken on foot of EC obligations. This argument was first made at the admissibility stage when the Government argued that the Committee should be guided by the jurisprudence of the European Court of Human Rights on this issue and relied upon that Court's decision in the case of *Bosphorus Airways v Ireland* (2006) 42 EHRR.

We make two points in reply: Firstly, the Committee should not give any undue deference to EC law in this area, and, secondly, the existing structure of the Free Travel Scheme is not necessitated by EC law in any event.

No special deference required

- 6.2** In essence the Government's argument appears to be that because the institutions of the EC, and in particular the European Court of Justice, take into account the provisions of the ECHR, then actions required by membership of the EC should be granted an assumption of compliance with the ECHR and, by extension, with the Revised Social Charter. We would note first of all that the Charter and the ECHR, though complementary, are not co-extensive. The Charter requires wider and more specific protection of social and economic rights than the ECHR. We have already noted above that protection of rights in the context of transfrontier mobility is an important aspect of the Charter. Moreover, the institutions of the EC have not committed themselves in the same way and to the same degree to take into account the provisions of the Revised Social Charter in the way they take account of the ECHR. Accordingly, we suggest, with great respect for the institutions of the EC, that the Committee of Social Rights is not required to accord any special deference to the actions of the EC in this area, and, in any event, it is not required to accord the same degree of deference to actions required by EC membership as may be given by the European Court of Human Rights.
- 6.3** In relation to the *Bosphorus Airways* case, we pointed out at the admissibility stage that the situation which has given rise to this Complaint is quite different to that in the *Bosphorus* case, where the Irish authorities were acting on foot of specific EC legislation when they detained an aircraft owned by Yugoslav Airlines. In relation to this Complaint, the Irish authorities seek a presumption that their exclusion of non-resident pension holders from the Free Travel Scheme is compliant with the Social Charter based only on the fact that they have been engaged in discussions with the European Commission, which discussions, it seems, are still ongoing. It is also noteworthy here that the policy in question had been adopted and put into effect by the Irish authorities before those discussions had begun at the beginning of 2006 and so cannot be said to have been adopted specifically in response to recent EC requirements.

Another significant difference with the present case is that in *Bosphorus*, the State was obliged to implement an EC Regulation which was directly effective and binding from the moment of publication in the official journal. In the present case Ireland has its own internal scheme which is merely being discussed with the EC Commission and which is not the subject of any EC law specifically. The presumption in *Bosphorus* that EC law is Convention-compatible therefore has no relevance whatsoever to this case. To apply it would be to create a presumption that states have not breached the Charter in any case where there are any issues which warrant discussion with the EC Commission. Such a test would fundamentally undermine the Charter.

There are also cases where Council of Europe institutions have directly intervened in EC matters, such as the question of the right to vote in European Parliament

elections – see *Matthews v U.K. (24833/94)*, judgment of 18th February 1999. The fact that a particular subject or area is – or might be – relevant to EC law is not a reason for excessive or undue deference on the part of the Committee or other Strasbourg institutions.

Indeed, the complexity of this area in EC law terms (see further below), in our view, argues against granting a presumption of compliance with the Charter on the basis of conformity with EC law, where the requirements of that law are not clear. We have already made the point at the admissibility stage that if the Committee was to withdraw from consideration of Complaints whenever a Contracting Party was involved in ongoing or inconclusive discussions with EC institutions, it would render itself redundant and put an end to what should be an important dialogue and interaction between the EU institutions and a body specifically dedicated to enhancing the protection of social rights in the European context. We would request the Committee, while respecting the institutions of the EC, to consider this Complaint in its own right and against the provisions of the Revised Social Charter and the case law developed therefrom, and with what assistance can be derived from the European Convention on Human Rights and its jurisprudence.

Current scheme is not in any event necessitated by EC law

- 6.4** The Government Submission states that the European Commission has indicated that “*the form of extension*” of the Free Travel Scheme sought by this Complaint “*would likely fall foul of Community law*”. This is very different from acting on foot of a binding EC Directive or Regulation, especially as the Government does not itself appear to regard this as necessarily the final position of the EC institutions. In its Programme for Government, adopted following a General Election in June 2007, the current Government committed itself to “*urgently examine the introduction of Free Travel for Irish citizens of pension age, particularly those in the UK, when visiting Ireland, and to press the European Commission to examine a similar EU-wide scheme*” (see attached extract from the Programme for Government, Appendix 3). The Government has not said whether the European Commission had indicated that any other form of extension of the scheme would be more likely to comply with European Community law. In addition, the fact that the scheme has now been extended to U.K. or Irish citizens who live in Northern Ireland, which is part of the United Kingdom, appears to undermine the contention that there would be any insurmountable obstacle to conferring rights under the scheme upon persons living in any other part of the U.K. or indeed elsewhere in the EU.
- 6.5** The Government’s Submission also refers to discussions about an EU-wide Free Travel Scheme and such a scheme would, of course, be very welcome, though preferably extended to all the contracting Parties to the Revised Social Charter. However, there is no indication that agreement on such a scheme will be reached

- at an early date and we suggest that the Committee should deal with this Complaint on the basis of the position as it was when the Complaint was lodged, and still is today.
- 6.6** Rather strangely, given that it was the Government Submission on admissibility which introduced the topic of EU/EC requirements and their relationship with obligations under the Charter, the Government (at paragraph 7.7) does not seem to want the Committee to discuss EC law any further. It dismisses two European Court of Justice authorities referred to in the initial Complaint, (*C-520/04 Turpeinin* and *C-224/02 Pusa*), as not being comparable to the matters raised herein and refers to the complexity of EU/EC law in this area. However, the very complexity of EC/EU law is one of the reasons why it is by no means obvious that extension of the Free Travel scheme as suggested would necessarily be in breach of Community law.
- 6.7** Towards the end of its discussion of the relevance of membership of the European Community, the Government's submission refers to a comment in the IFHR Response to its Submission on Admissibility. The comment referred to Article 12.4 of the Charter and the Government seems to have misunderstood the point made by us on Page 4 of our Response. We were arguing that whereas Article 12.4 requires Contracting Parties to treat nationals of other Parties equally with their own nationals in relation to the retention of social security benefits regardless of their movements between countries, it (Article 12.4) also requires, by necessary implication, those same Contracting parties to allow their own nationals to retain such benefits in the first place. Thereafter, it requires the Contracting Parties to treat other nationals on a par with their own nationals.
- 6.8** The Government places some stress (*at paragraph 7.8*) on our use of the term "*their own nationals*" and suggests that what we are seeking is for the Irish Government to give a preference to Irish nationals "*to the exclusion of nationals from other Member States*". This is not correct. We simply used the terminology of Article 12.4 of the Charter itself and we have repeatedly made the point that if the Government allows Irish citizens who are non-resident recipients of Irish pensions to retain the entitlement to use the Free Travel Scheme, which we suggest they acquired when they qualified for the Old Age Pension, then the provisions of the Social Charter and ECHR will require the authorities to extend that entitlement as well to pension holders who are not Irish citizens.
- 6.9** Finally, we note again that the fact that the Government is discussing the issue which is the subject of this Complaint with the European Commission, together with its commitment in the Programme for Government to actively pursue this matter, is a clear indication that the exclusion of non-resident pensioners from the benefits of the Free Travel Scheme is widely regarded as unfair and a serious anomaly which undermines for a substantial number of vulnerable people the undoubted social benefits of this much appreciated scheme.

Conclusion

- 6.10** In conclusion, we respectfully ask the Committee to uphold this Complaint that the exclusion of non-resident holders of Irish pensions from the Free Travel scheme is in breach of Ireland's obligations under Articles 12.4 and 23 of the Revised Social Charter and constitutes prohibited discrimination under Article E of Part V of the Charter taken in conjunction with Article 23.

Dated this 31st day of January 2008

Signed: ***Michael Farrell***_____

Michael Farrell
Solicitor, Free Legal Advice Centres Ltd.

On behalf of the International Federation of Human Rights (FIDH)