



January 2012

## **European Social Charter**

European Committee of Social Rights

Conclusions XIX-4 (2011)

(GERMANY)

Articles 7, 8, 16, 17 and 19 of the Charter

*This text may be subject to editorial revision.*



## Introduction

The function of the European Committee of Social Rights is to rule on the conformity of the situation in States 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 statements of interpretation formulated by the Committee appear in the General Introduction to the Conclusions.<sup>1</sup>

*The European Social Charter was ratified by Germany on 27 January 1965. The time limit for submitting the 28th report on the application of this treaty to the Council of Europe was 31 October 2010 and Germany submitted it on 21 December 2010.*

This report concerned the accepted provisions of the following articles belonging to the thematic group "Children, families and migrants":

- the right of children and young persons to protection (Article 7),
- the right of employed women to protection of maternity (Article 8),
- the right of the family to social, legal and economic protection (Article 16),
- the right of mothers and children to social and economic protection (Article 17),
- the right of migrant workers and their families to protection and assistance (Article 19).

Germany has accepted all Articles from this group with the exception of Articles 7§1, 8§2 and 8§4.

The reference period was 1 January 2003 to 31 December 2009 for Articles 7, 8 and 17 and 1 January 2005 to 31 December 2009 for Articles 16 and 19.

The present chapter on Germany concerns 23 situations and contains:

- 14 conclusions of conformity: Articles 7§2, 7§4, 7§6, 7§7, 7§8, 7§9, 7§10, 8§1, 8§3, 17, 19§1, 19§5, 19§7 and 19§9 ;
- 5 conclusions of non-conformity: Articles 7§5, 16, 19§6, 19§8 and 19§10.

In respect of the other 4 situations concerning Articles 7§3, 19§2, 19§3 and 19§4, the Committee needs further information in order to assess the situation. The Government is therefore invited to provide this information in the next report on the articles in question.

The next German report deals with the accepted provisions of the following articles belonging to the first thematic group "Employment, training and equal opportunities":

- the right to work (Article 1),
- the right to vocational guidance (Article 9),
- the right to vocational training (Article 10),
- the right of persons with disabilities to independence, social integration and participation in the life of the community (Article 15),
- the right to engage in a gainful occupation in the territory of other States Parties (Article 18),
- the right of men and women to equal opportunities (Article 1 of the Additional Protocol).

The deadline for the report was 31 October 2011.

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<sup>1</sup> *The conclusions as well as state reports can be consulted on the Council of Europe's Internet site ([www.coe.int/socialcharter](http://www.coe.int/socialcharter)).*

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 2 - Higher minimum age in dangerous or unhealthy occupations*

The Committee notes from the information provided in the report submitted by Germany that there have been no changes to the legal situation which it has previously held to be in conformity with Article 7§2 of the 1961 Charter.

#### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 7§2 of the 1961 Charter.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 3 - Prohibition of employment of young persons subject to compulsory education*

The Committee takes note of the information contained in the report submitted by Germany.

It notes from the report that there have been no changes to the legal situation which it has previously held not to be in conformity with Article 7§3 of the 1961 Charter.

The report recalls that pupils in compulsory full-time education in Germany are permitted to work a maximum of four weeks per year during the holidays and that the summer holidays in Germany last for approximately six weeks. It also underlines that the annual length of school holidays in Germany amounts to a total of 75 working days and that the rest period thus clearly exceeds half of the period of annual school holidays. The report acknowledges that the four working weeks allowed each year may be taken in full during the summer holidays.

The Committee refers to its interpretative statement on Article 7§3 in the General Introduction. It asks the next report to indicate whether the situation in Germany complies with the principles set out in this statement. In particular, it asks whether the rest period free of work has a duration of at least two consecutive weeks during the summer holiday. It also asks what are the rest periods during the other school holidays.

The Committee recalls also that during school term, the time during which children may work must be limited so as not to interfere with their attendance, receptiveness and homework. Thus, allowing children aged 15 years still subject to compulsory education to deliver newspapers from 6 a.m. for up to 2 hours per day, 5 days per week before school is not in conformity with the Charter (Conclusions XVII-2, Netherlands). The Committee asks that next report indicate whether children still subject to compulsory education are allowed to work before school, and, if the case arises, under what conditions.

#### *Conclusion*

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

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 4 - Working time for young persons under 16*

The Committee notes from the information provided in the German report that there have been no changes to the legal situation which it has previously held to be in conformity with Article 7§4 of the 1961 Charter.

#### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 7§4 of the 1961 Charter.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 5 - Fair pay*

The Committee takes note of the information contained in the report submitted by Germany.

#### **Young workers**

Under Article 7§5 wages paid to young workers aged 15 or 16 must not be less than 30% of an adult's starting wage or the adult minimum wage, and a difference of 20% is accepted for those aged between 16 and 18 (Conclusions 2006, Albania). In its last conclusion (Conclusions XVII-2) the Committee noted that, on the basis of the figures given in the report, in 2002 the lowest net wages paid to young workers were, on average, very close to the starting wages of adult workers who had completed their training (less than 10% lower). Noting that the current report does not address the question, the Committee requests that the next report give up-to-date information on the wages paid to young workers, so as to make it possible to determine whether the situation in this respect is still in conformity with the 1961 Charter.

#### **Apprentices**

Under Article 7§5, the allowance paid to apprentices must be at least one third of an adult's starting or minimum wage at the beginning of their apprenticeship and reach at least two thirds by the end (Conclusions 2006, Portugal). In accordance with the methodology adopted with regard to Article 4§1, wages are taken into account after deduction of both social security contributions and taxes. The Committee recalls its opinion that, where the adult reference wage is very low, the wage of young workers cannot be considered fair (Conclusions XII-2, Malta). The same applies to apprentices. The Committee points out that it has concluded that the situation in Germany is not in conformity with Article 4§1 of the 1961 Charter on the ground that the lowest wage paid is manifestly unfair (Conclusions XIX-3).

It can be seen from the information on different economic sectors contained in the report that, in 2010, apprentices at the beginning of an apprenticeship could receive more than one third of the adult starting wage (with the sole exception of the craft bakeries sector in North-Rhine-Westphalia). However, at the end of the apprenticeship the allowance is far lower than the required two thirds (except in the paper industry in Bavaria, the textile industry in southern Bavaria and the building industry throughout Germany). The report states that in addition to the amount of the allowance paid by the employer account must be taken of the vocational training allowance payable under Article 59 of Book III of the Social Code (SGB III). The Committee nonetheless considers that this does not suffice to offset the too low allowances paid by employers since the vocational training allowance is not awarded to all apprentices, as only those not living with their parents are entitled to it.

#### *Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 7§5 of the 1961 Charter on the ground that the allowance paid to apprentices is inadequate.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 6 - Inclusion of time spent on vocational training in the normal working time*

The Committee notes from the information provided in the German report that there have been no changes to the legal situation which it has previously held to be in conformity with Article 7§6 of the 1961 Charter.

#### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 7§6 of the 1961 Charter.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 7 - Paid annual holidays*

The Committee notes from the information provided in the German report that there have been no changes to the legal situation which it has previously held to be in conformity with Article 7§7 of the 1961 Charter.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 7§7 of the 1961 Charter.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 8 - Prohibition of night work*

The Committee takes note of the information contained in the report submitted by Germany.

It notes that the authorisation that had to be obtained from the supervisory authority to institute exceptions to the prohibition on night work for young people under the age of 18 has been eliminated under Section 7d of the Act of 21 June 2005 on the implementation of the regions' proposals for reduced bureaucracy and for deregulation (*Gesetz zur Umsetzung von Vorschlägen zu Bürokratieabbau und Deregulierung aus den Regionen*). The Committee asks that the next report indicate the manner in which supervision of the implementation of exceptions to the prohibition on night work for young people under the age of 18 is now exercised.

### *Conclusion*

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 7§8 of the 1961 Charter.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 9 - Regular medical examination*

The Committee notes from the information provided in the report submitted by Germany that there have been no changes to the legal situation which it has previously held to be in conformity with Article 7§9 of the 1961 Charter.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 7§9 of the 1961 Charter.

## **Article 7 - Right of children and young persons to protection**

### *Paragraph 10 - Special protection against physical and moral dangers*

The Committee takes note of the information contained in the report submitted by Germany.

### ***Protection against sexual exploitation***

The Committee notes from the report that the Action Plan to protect children and adolescents against violence and sexual exploitation was launched in 2003 and is being extended. The main objective of the Action Plan is to implement concrete measures to improve protection of children and youth against violence and exploitation. The plan focuses on two main areas, prevention and intervention. The Government, in cooperation with stakeholders, formed a panel on 'sexual abuse of children' in 2010. The Committee wishes to be informed of the activities of this panel.

The Committee notes that ECPAT<sup>1</sup> identifies the areas where further strengthening of legal framework and practice is needed to improve protection of children from sexual exploitation. Among others, ECPAT names training of judges and prosecutors on various aspects of handling sexual crimes against children with a view to ensuring that child victims are not further victimised during criminal proceedings. As regards child pornography, according to ECPAT, law on child pornography must be amended to include all depictions of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child, rather than just child sexual abuse images. The law must also cover electronic and digital child pornographic images. As concerns trafficking, according to ECPAT, German law on trafficking in children could be strengthened by combining all relevant provisions into one streamlined law. The Committee requests that the next report provide comments on these observations.

### ***Protection against the misuse of information technologies***

According to the report, a law on combating child pornography in communication was adopted in 2010 to allow providers of internet to make access to the sites containing child pornography more difficult. The Committee wishes to be informed about the concrete results of the implementation of this law.

According to ECPAT, increased action to prevent child abuse through new technologies is required, in particular to ensure that internet service providers undertake responsibility to install filtering software to protect children from entering websites that contain pornography. Besides, training school staff regarding online safety by integrating such information into school curricula is important to ensure protection of children in the online environment. Provisions must also be included to allow for the monitoring and interception of telecommunications related to inducing child sexual abuse via internet and to disseminating child pornography online. The Committee wishes to be informed about measures taken in this regard.

### ***Protection from other forms of exploitation***

The Committee notes from the report that provision for the basic needs of street children, including food and clothing, ensuring their health care as well as measures to monitor and care for street children, is guaranteed by the Book VIII of the Social Code (SGB VIII). Social services undertake to integrate children and adolescents who are mostly from disadvantaged families, into supervised accommodation facilities, to minimise the detrimental influence of the street environment and to prevent their return to the streets.

### ***Conclusion***

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 7§10 of the Charter.

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<sup>1</sup> [http://www.ecpat.net/EI/Csec\\_onlineDatabase.asp](http://www.ecpat.net/EI/Csec_onlineDatabase.asp)

## **Article 8 - Right of employed women to protection**

### *Paragraph 1 - Maternity leave*

The Committee takes note of the information contained in the report submitted by Germany.

The report indicates that there have been no changes to the situation which was previously found to be in conformity with Article 8§1. The same regime applies to women employed in both the private and public sectors. The Committee asks for a full update in the next report.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 8§1 of the 1961 Charter.

## **Article 8 - Right of employed women to protection**

### *Paragraph 3 - Time off for nursing mothers*

The Committee takes note of the information contained in the report submitted by Germany.

The report indicates that there have been no changes to the situation which was previously found to be in conformity with Article 8§3. The same regime applies to women employed in the private and public sectors. The Committee asks for a full update to be provided in the next report.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 8§3 of the 1961 Charter.



## **Article 16 - Right of the family to social, legal and economic protection**

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

As the notion of the "family" is variable according to the different definitions in domestic law, the Committee considers it necessary to know how this notion is defined with a view to verifying that it is not unduly restrictive. The Committee therefore asks that the next report indicate how the "family" is defined in domestic law.

### ***Social protection of families***

#### ***Housing for families***

The Committee has consistently interpreted the right to economic, legal and social protection of family life provided for in Article 16 as guaranteeing the right to adequate housing for families, which encompasses secure tenure supported by law (Centre on Housing Rights and Evictions (COHRE) v. Croatia, complaint No. 52/2008, decision on the merits of 22 June 2010, § 53).

The Committee takes note that, in 2008, support benefits for low-income families in the form of housing benefit or the payment of housing costs totalled approximately 16 billion Euros for approximately 5 million households. Large families, single-parent families and families with one or more members with a disability were given priority for these benefits. Under the 2001 federal Act on the provision of social housing, low-cost housing was rented through the public and private markets to low-income households, households with children, single-parent families or persons with disabilities, on condition that they held a certificate of entitlement to social housing issued on the basis of their income. Social housing may also be purchased. From 1 September 2006 onwards, responsibility for social housing assistance passed to the federal states (*Bundesländer*), the federal government supporting the development of such housing through financial assistance. In order to prevent or remedy situations in which persons remain homeless, municipalities are authorised to take necessary measures, often in co-operation with private bodies and church associations.

Under Article 16, states parties must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing is of an adequate standard and size considering the composition of the family in question, and includes essential services (such as heating and electricity). Furthermore, the obligation to promote and provide housing extends to security of tenure, which is necessary to ensure the meaningful enjoyment of family life in a stable environment. The Committee recalls that this obligation extends to ensuring protection against unlawful eviction (European Roma Rights Centre (ERRC) v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, § 24).

To be effective, the right to housing must be legally protected by adequate procedural safeguards. Occupiers and tenants must have access to affordable and impartial legal and non-legal remedies. Any appeal procedure must be effective (Conclusions 2003, France, Italy, Slovenia and Sweden; Conclusions 2005, Lithuania and Norway; European Federation of National Organisations working with the Homeless (FEANTSA) v. France, complaint No. 39/2006, decision on the merits of 5 December 2007, §§ 78-79). The public authorities must also ensure that essential services such as water, electricity and telephone are not cut off (Conclusions 2003, France).

As to protection against unlawful eviction, States must set up procedures to limit the risks of eviction (Conclusions 2005, Lithuania, Norway, Slovenia and Sweden). The Committee recalls that, in order to comply with the Charter, the legal protection of persons at risk of eviction must include:

- an obligation to consult the parties affected in order to find alternative solutions to eviction;
- an obligation to fix a reasonable notice period before eviction;
- accessibility to legal remedies;
- accessibility to legal aid;

- compensation in case of illegal eviction.

The report states in this respect that it is the court which delivers a decision on eviction, that this decision may provide for notice to leave the home, that it is possible to appeal against the decision and that the court may grant protection from eviction. In order to establish whether the situation is in conformity with Article 16 in this respect, the Committee asks for the next report to provide more details about the aforementioned questions.

Where the access to housing of vulnerable families, particularly Roma, is concerned, the Committee has taken the view that "(...) as a result of their history, the Roma have become a specific type of disadvantaged group and vulnerable minority (...). They therefore require special protection. (...) special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (...) not only for the purpose of safeguarding the interests of the minorities themselves but to preserve cultural diversity of value to the whole community" (COHRE v. Italy, complaint No. 58/2009, decision on the merits of 25 June 2010, § 39).

The Committee notes that, according to the report, foreign and Roma families may benefit from the housing allowance in the same conditions as German nationals if they have a right of permanent residence in Germany. Similarly, assistance with the purchase of social housing applies irrespective of nationality or ethnic origin, so also to Roma families. The Committee also notes that, in its comparative report on "Housing conditions of Roma and Travellers in the European Union" (October 2009), the European Union Agency for Fundamental Rights (FRA) says that conditions in accommodation provided to Roma asylum seekers from non-EU Member States is not always satisfactory, in Germany, particularly regarding children. It asks for the next report to provide information about the measures taken to improve this situation.

### ***Childcare facilities***

Childcare facilities are provided in pursuance of the Act of 8 December 2008 on childcare promotion. According to the report, approximately 417,000 children up to the age of three were attending family crèches or collective childcare centres in March 2009, with the number of childcare places having risen by 15% since the previous year. The largest rise was noted in the western part of Germany, where 105,000 new places have been created in collective childcare establishments, i.e. 75% more places since 2006. The report says that, in 2013, it will have to be possible for 35% of children up to the age of three to take up a care place. The Act of 8 December 2008 is also intended to improve the quality of childcare.

The Committee observes that States must ensure that affordable, good quality childcare services are available to its citizens (coverage with respect to the number of children up to the age of six, ratio of staff to children, staff qualifications, suitable premises and the size of the financial contribution parents are asked to make). It reiterates its request (see Conclusions 2006) for accurate information about these matters to appear in the next report.

### ***Family Counselling Services***

The report says that, in pursuance of the Act intended to facilitate family court intervention in the event of risks to the child's well-being, the court may require parents to submit to measures provided for in the context of the child and youth welfare service, inter alia in the form of child-rearing advice or violence prevention training. It may also require parents to avail themselves of their right to a childcare place or to ensure that the child attends school. Article 16 of the German Civil Code allows youth welfare offices to give advice or other kinds of assistance to families in conflict situations. In the event of a dispute between parents, the courts may require them to consult these same offices in order to reach a friendly settlement.

The Committee observes that families must be able to approach appropriate social services, particularly when they are in difficulty. States are required in particular to set up family counselling

services and services providing psychological support for children's education. It asks for the next report to contain more detailed information about the family advice services which families may use for matters connected with the raising of children.

### ***Participation of associations representing families***

To ensure that families' views are taken into account when family policies are formulated, the competent authorities must consult associations representing families. The Committee reiterates its request (see Conclusions 2006) for the next report to contain information on the participation of relevant associations representing families in the framing of family policies.

### ***Legal protection of families***

#### ***Rights and obligations of spouses***

The Committee notes that a wide-ranging reform of procedural law relating to family matters took place on 1 September 2009. This reform extended the powers of family courts, which acquired jurisdiction in all cases connected with marriage and the family. Those disputes concerning assets, which may have an effect on the calculation of maintenance or of a compensatory allowance (particularly in the context of liability for debts or the liquidation of a family company) are within the jurisdiction of the family court. The reform also emphasises the child's interest during the procedure and gives him or her a more active role. The child receives assistance from a person responsible for explaining to him or her the different stages of the procedure, including the scope for intervention, and for arguing in the child's interest. If necessary, the court may instruct this person to have a discussion with the parents or with other persons close to the child, and to intervene during a friendly settlement of the subject of the procedure. In the event of problems connected with the exercise of visiting and staying contact rights, the law provides for a person to be designated to ensure that the court's decision on the matter is applied. The person tasked with assisting the child during the proceedings has power to lodge an appeal in the child's interest.

In pursuance of German legislation, the spouses have equal rights and duties vis-à-vis the children. Parental authority is exercised jointly over the child (the personal aspect) and his or her assets (the property aspect).

In the event that family relations deteriorate irretrievably, Article 16 of the Charter requires legal arrangements to be made to resolve disputes between spouses, and particularly disputes relating to children (care and maintenance, deprivation and restriction of parental rights, custody of the children and visiting contact rights in the event of family break-up). The Committee requests that the next report contain accurate information on the implementation of the reform in family matters.

#### ***Mediation services***

The Committee notes that one of the objectives of the Act on procedure in family matters, in force since 1 September 2009, is to promote consensual settlement of disputes between spouses. Thus the court may order divorcing spouses to obtain free of charge from an institution designated by the court information about mediation or about another measure promoting dispute settlement out of court. Refusal by the spouses is punishable by a fine.

During the reference period the federal government set up binational co-mediation. This method applies to cases which come under the Hague Convention on International Child Abduction, as well as to international disputes about visiting and staying contact rights. According to the report, experience of binational co-mediation has been positive, in that parents readily make use of it and accept the procedure, and the results endure.

The Committee asks for the next report to provide information on access to family mediation services, their availability free of charge, their distribution across the country and their effectiveness.

#### ***Domestic violence against women***

The Committee recalls that Article 16 requires that there exists protection for women, both in law (through appropriate measures and punishments for perpetrators of violent acts, including restraining orders, fair compensation for the pecuniary and non-pecuniary damage caused to the victims, the possibility for victims - and associations acting on their behalf - to take their cases to court and special arrangements for the examination of victims in court) and in practice (through the collection and analysis of reliable data, training for members of the police in particular, and services to reduce the risks of violence, support and rehabilitation services for victims of such conduct).

According to the report, implementation of the Act of 1 January 2002 on protection from acts of violence has been positively evaluated. Orders imposed on the perpetrators of acts of violence to stay away from their victims were deemed the most effective way of protecting victims. Since 1 September 2009, it has been the family courts which have had jurisdiction in cases of violence or harassment. At the same time, the courts are required to pass on any decisions delivered under the Act against violence to the police and any other authorities responsible for this subject, so that information is exchanged as necessary to provide victims with better protection and make an immediate reaction possible if further offences are committed.

The Committee asks for the next report to provide information on the results of the reform carried out in September 2009.

### ***Economic protection of families***

#### ***Family benefits***

The Committee considers that, in order to comply with Article 16, child allowances must constitute an adequate income supplement, which is the case when they represent a significant percentage of median equivalised income.

In its previous conclusion (see Conclusions 2006), the Committee considered that the amount of the child allowances in 2003, at 11% of the monthly median equivalised income, was adequate. According to MISSOC, the monthly amount of family allowances in 2009 was €184 for the first two children, €190 for a third child and €215 per child for any subsequent children. The Committee notes that these amounts per month correspond to 11.9%, 12.3% and 13.9% of monthly median equivalised income. The Committee also notes that the amount of the basic benefits is higher than in the previous reference period. It therefore considers that the amount of family benefits is adequate.

The Committee also notes the existence of additional economic measures, such as the parental income which on 1 January 2007 replaced parents' child-raising leave and parents' child-raising allowance. Parents who take a period off work or reduce their work to a maximum of 30 hours a week may receive 67% of their net income (up to a monthly maximum of €1800) as a parental allowance paid by the government for a maximum period of 14 months. There are in addition a higher rate for those on low incomes and a bonus for families with at least two children aged three or under, or at least three children aged under six.

#### ***Vulnerable families***

The Committee notes that the German Social Code (Book VIII) contains provisions intended to protect single-parent families: advice and assistance on the exercise of parental authority and of visiting and staying contact rights, and the accommodation of mothers/fathers with their children in residential establishments set up for this purpose. The Act on maintenance advances provides for a special social benefit for children living in single-parent families, in the form of payment of an allowance in the event that the parent ordered to pay maintenance fails to do so.

States' positive obligations under Article 16 include implementing means to ensure the economic protection of various categories of vulnerable families, including Roma families. The Committee therefore asks what means are used to provide economic protection to Roma families.

### ***Equality of treatment for foreigners and stateless persons in respect of family benefits***

The Committee has previously considered the situation in Germany not to be in conformity with Article 16 because of the discrimination to which non-nationals are subjected in Baden-Württemberg and Bavaria, with the exception of nationals of member states of the European Economic Area or European Union, who are treated in the same way as German citizens, and of Turkish nationals.

The report states that the situation was changed through adoption of the Act which came into force on 1 January 2006 on foreigners' rights to social benefits, including family benefits. This Act was introduced following decisions by the Federal Constitutional Court and judgments of the European Court of Human Rights (*Okpisz v. Germany* and *Niedzwiecki v. Germany* cases, 25 October 2005). The Federal Constitutional Court ruled that Article 1§3 of the Child Benefits Act in its version applicable from January 1994 to December 1995 was incompatible with the right to equal treatment enshrined in Article 3§1 of the Basic Law. It ordered amendment of the Child Benefits Act by 1 January 2006. It particularly considered that the distinction made on the basis of residence permits lacked sufficient justification, especially as, in respect of the protection of family life within the meaning of Article 6§1 of the Basic Law, very weighty reasons were needed to justify unequal treatment. The new Act takes account of the principles set out by the Federal Constitutional Court, to which the European Court of Human Rights referred in its judgments. Furthermore, the Act contains provisions for all cases relating to family benefits on which decisions which are not yet final were taken between 1 January 1994 and 18 December 2006. At their 997th meeting (DH), on 5-6 June 2007, the Council of Europe's Ministers' Deputies considered the new information available on the subject and agreed that the measures had been properly taken by the state.

The Committee takes note of the information provided by the *Länder* about the granting of the parental child-raising allowance supplementing the allowance granted by the state. In particular, it notes that, in Baden-Württemberg, the current procedure for granting the allowance might soon be amended, subject to the implementing decree due to be issued following European Union Regulations (EC) Nos. 883/2004 and 987/2009 on the co-ordination of European social security systems. The Committee asks for the next report to provide information about developments in this sphere.

Where Bavaria is concerned, the report states that there are no plans to date to expand the category of persons entitled to the supplementary allowances, the granting of which is regulated by the Act of 9 July 2007 as amended by the Act of 14 April 2009 on the granting of the Bavarian parental child-raising allowance. Entitlement to this allowance is enjoyed by EU/EEA nationals and by the persons treated as such in pursuance of international or Community texts, and by nationals of the following countries: Iceland, Norway, Liechtenstein, Switzerland, Algeria, Morocco, Tunisia and Turkey (the last four in pursuance of Decision No. 3/80 of the Association Council or the Euro-Mediterranean Agreement). If the child has German nationality, the allowance is granted without account being taken of the parents' nationality. The Committee asks for the next report to provide information about any measure taken to ensure in Bavaria the equality of treatment required by the 1961 Charter. Meanwhile, the Committee concludes that the situation is not in conformity with Article 16 in this regard.

### *Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 16 of the Charter because equal treatment is not guaranteed to nationals of other States Parties to the 1961 Charter and the Charter in respect of the granting of supplementary child-raising allowances in Bavaria.

## **Article 17 - Right of mothers and children to social and economic protection**

The Committee takes note of the information contained in the report submitted by Germany.

### ***Status of the child***

The Committee notes that there have been no changes to the situation which it has previously (Conclusions 2005) found to be in conformity with the Charter.

### ***Protection of children from ill treatment and abuse***

The Committee notes that there have been no changes to the situation which it has previously found to be in conformity with the Charter.

### ***Children in public care***

In reply to the Committee's question, the report states that placement in institutions does not involve any limitations of the right to personality of the child. The scope of the rights of the child at home is fundamentally not wider or narrower than in alternative care. Unless otherwise requested by the parents, educators working in institutions have the legal authority necessary to make decisions in matters relating to the daily life of the child (Article 1688, para. 1 of the Civil Code).

In its previous conclusion the Committee asked how many children could be accommodated in a single institution. It notes from the report that there were on average 9,7 places in 2006.

According to the report institutions have to have an authorisation from the state and are under surveillance from the state. This surveillance also covers the right of children, as customers, to complain about the quality of services provided. There is also a system of internal control to make sure that there is an efficient management of complaints.

In 2008 there were 14,019 children placed in foster care, 29,313 received educational assistance in institutions and 32,253 were under temporary protection measures.

The Committee recalls that any restriction or limitation of parents custodial rights should be based on criteria laid down in legislation, and should not go beyond what is necessary for the protection and best interest of the child and the rehabilitation of the family (Conclusions XV-2, Statement of Interpretation on Article 17§1, p.29). The Committee has held that it should only be possible to take a child into custody in order to be placed outside his/her home if such a measure is based on adequate and reasonable criteria laid down in legislation. The Committee asks what are the criteria for the restriction of custody or parental rights and what is the extent of such restrictions. It also asks what are the procedural safeguards to ensure that children are removed from their families only in exceptional circumstances. It further asks whether the national law provides for a possibility to lodge an appeal against a decision to restrict parental rights, to take a child into public care or to restrict the right of access of the child's closest family.

### ***Young offenders***

According to the report in 2008 19,255 young offenders (16,6%) received a prison sentence, 88,976 (76,5%) received correction measures and 8,047 (6,9%) educational measures.

According to the Law on the Juvenile Court (*JGG, Jugendgerichtsgesetz*) an arrest warrant cannot be issued if the purpose of custody can be achieved through interim education or other measures (Section 72, para. 1 of the JGG). Other alternative measures also include provision of emergency shelter in a youth home. The arrest warrant must state why the imposition of pre-trial detention is not disproportionate. Minors legal protection service must be immediately informed of the execution of a arrest warrant (Article 72a of the JGG). This service will accompany the children throughout the duration of the procedure and examine whether alternative measures can be applied (Article 52 al. 2 and 3 of Book VIII of the Social Code).

According to the report, as with adults, there is no absolute limit of the duration of custody. However, it must be ensured that its continuation is proportionate. Pre-trial detention cannot in principle last longer

than six months. It can only be extended by the High Regional Court order and must be justified. According to the data from the Federal Office of Statistics the number of minors in custody at March 2010 was 468. However, according to the report, there is no statistics of the average length of pre-trial detention. Due to the small number of young people in custody there is no pre-trial detention facilities specifically designed for young people. Often, young offenders are placed in the section of the prison for juvenile offenders dedicated to provisional detention or in a specific part of a general temporary detention centre. The Committee asks how many cases of extension of the pre-trial detention were ordered by the Court, on what grounds and how was the issue of proportionality addressed.

The Committee asks whether young offenders can be detained with adults and held in adult prisons. It also asks whether young offenders have a statutory right to education.

### *Conclusion*

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

## **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 contained in the report submitted by Germany.

#### ***Migrations trends***

In the 1960s and early 1970s, a shortage of labour caused by the recovery of the German economy prompted the German Government to invite workers from southern and south-eastern Europe to come and settle in Germany (*Gastarbeiter*). Repatriated ethnic Germans (*Spätaussiedler*) make up a second large group of immigrants. Most of these immigrants come from Poland, Romania or the former Soviet Union<sup>1</sup>. A third group is made up of refugees and asylum seekers. It is worth noting that asylum applications in reunified Germany reached their high point in 1992 at nearly 440 000. In the wake of the restrictions adopted by the German authorities in the late 1990s, the number of asylum applications decreased steadily every subsequent year, reaching 19 000 in 2007. At the end of 2009, foreigners accounted for nearly 9% of Germany's total population<sup>2</sup>.

#### ***Change in policy and the legal framework***

The first Immigration Act (*Zuwanderungsgesetz*) came into force on 1 January 2005. Its aim is to control the influx of immigrants into Germany and their integration. Following its implementation, the former Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) was renamed the Federal Office for Migration and Refugees (*Bundesamt für Migration und Flüchtlinge*). This body is responsible, in particular, for keeping the Central Aliens Register, devising and running integration courses and implementing measures to encourage voluntary return. In 2005 the new function of Federal Government Commissioner for Migration, Refugees and Integration was set up. In July 2006, a first summit on the question of integration was held by the Federal Chancellor. On this basis joint guidelines for a federal integration policy were drawn up. This work involved the Federation, *Länder* and municipalities as well as a number of associations and non-governmental organisations. Dialogue with migrants' organisations was one of the key parts of the process. A National Integration Plan was presented by the Federal Chancellor at the second Integration Summit in July 2007<sup>3</sup>. The plan proposes 400 optional measures to be taken by various authorities in a very broad range of fields. Among these are measures to improve immigrant children's school results and make it easier for young immigrants to gain access to the labour market, programmes to promote integration through sport and measures to encourage parents to get involved in their children's education, improve access to health care, foster a more diversified approach in the media and deal with the specific situation of women and girls. A reform of the Immigration Act came into force in August 2007. Among the main changes it introduced were the transposition of eleven EU directives into national law and measures to promote the integration of legal immigrants.

#### ***Free services and information for migrant workers***

The Federal Office for Migration and Refugees provides a broad range of information and free services for foreigners wishing to settle in Germany for their work. The information is available in several languages on the Office's website and in the form of specific publications. On the site, there is information on issues such as German language and culture, Germany's institutions and legal system, residence permits, access to housing and employment, vocational training, recognition of qualifications, naturalisation, educational options, social security, integration support, medical services, family benefits, pension systems and social assistance.

Foreigners can also obtain this information from the regional branches of the Federal Office and through the "initial advisory services". There is also a telephone helpline and an e-mail advice service in German and in English. Under the Immigration Act some foreigners wishing to settle in Germany have to attend integration courses. These courses comprise language classes and an orientation course covering the German legal system, history and culture. The purpose of these courses is to foster the integration of immigrants in terms of their participation in the community and equal



opportunities. All new arrivals in Germany who are regarded as having some chance of acquiring a permanent residence permit may take part in integration courses and are required to do so – save in some exceptional circumstances – if their German is lower than A1 level in the Common European Framework of Reference. Language courses currently last 600 hours. The Committee asks that the next report specify what are the criteria for admission to the German language courses. In particular, it wishes to know who assess the chance of acquiring a permanent residence permit and what are the criteria on which the assessment is based. Lessons are free for repatriated Germans (*Spätaussiedler*) and those receiving welfare benefits; persons not receiving welfare benefits but with low incomes of an equivalent level may also be exempted from enrolment fees. The Committee asks under what circumstances new arrivals whose level in German is lower than A1 in the Common European Framework of Reference are not required to attend integration courses.

### ***Measures against misleading propaganda relating to emigration and immigration***

The Committee notes the information relating to the Xenos Programmes on “Integration and diversity” (2007-2013), which were based on an assessment of the results of the initial Xenos Programme on “Living and working in diversity” (2000-2006). It notes that the budget for the programme is currently €219 million. The main focus of the programme is on preventive measures to combat exclusion and discrimination on the labour market and in the community; accordingly it aims to promote activities to combat xenophobia, racism, right-wing extremism, anti-Semitism and discrimination in the labour market, with particular emphasis on the workplace in sectors such as administration, training, schools and vocational training. The Committee takes note of the specific projects in Thuringia and Mecklenburg-West Pomerania. The Committee asks for up-to-date information in the next report on the implementation of the Xenos Programme. The Committee also notes the information provided in response to its request concerning in-service training on action against racism and xenophobia for public servants. It notes that this type of training is also provided for police officers and would therefore like to know whether it is available to all German police forces.

The report does not contain any specific information on measures taken at legislative level or in practice to counter misleading propaganda relating to emigration and immigration. In this connection, it notes that in its most recent report on Germany<sup>4</sup>, the European Commission against Racism and Intolerance (ECRI) recommended that the German authorities should encourage politicians to take the utmost care to avoid perpetuating hostility or negative stereotypes about non-nationals and members of minority groups; instead, politicians should take the lead in denouncing racism and discrimination and in ensuring that non-nationals and members of minority groups are perceived as equal and valuable members of society.

In the light of the foregoing, the Committee asks for the next report to provide a full, up-to-date description of measures taken to counter misleading propaganda relating to immigration and the dissemination of negative stereotypes about foreign workers. The Committee reiterates that to be effective, action against misleading propaganda should include legal and practical measures to tackle racism and xenophobia and to prevent trafficking in women. Such measures, which should be aimed at the whole population, are necessary to counter the spread of stereotypes such as immigrants’ supposed predisposition to crime, violence or drug abuse and disease (Conclusions XV-1, Austria).

### ***Conclusion***

Pending receipt of the information requested, the Committee concludes that the situation in Germany is in conformity with Article 19§1 of the 1961 Charter.

<sup>1</sup> Source: Website of the International Organisation for Migration (IOM) – 2011

<sup>2</sup> Source: Statistical offices of the Federation and the Länder

<sup>3</sup> Source: Government website

<sup>4</sup> European Commission against Racism and Intolerance (ECRI), Fourth report on Germany, 19 December 2008 – CRI(2009)19

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 2 - Departure, journey and reception*

The Committee takes note of the information in the German report. It notes that the information relates solely and in general to the Act on the transposition of the EU directives on the residence and asylum of foreigners which came into force in August 2007. There is no specific information on measures adopted to facilitate the departure, journey and reception of migrant workers and their families, and to provide the necessary health and medical services and proper conditions of hygiene during the journey.

The Committee asks for the next report to provide specific, up-to-date information on the aforementioned measures. In this connection it points out that “reception’ must be provided at the time of arrival and the period immediately following, that is to say during the weeks in which immigrant workers and their families find themselves in a particularly difficult position” (Statement of interpretation – Conclusions IV, 1975) and that “reception must include not only assistance with regard to placement and integration in the workplace, but also assistance in overcoming problems, such as short-term accommodation, illness, shortage of money and adequate health measures” (cf. Conclusions IV, Germany).

### *Conclusion*

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

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 3 - Co-operation between social services of emigration and immigration States*

The Committee notes that the report submitted by Germany does not contain any information on the implementation of Article 19§3. It asks that the next report provide a full and up-to-date description of the situation.

### *Conclusion*

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

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 4 - Equality regarding employment, right to organise and accommodation*

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

The Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 2006, AGG) transposed EU Directives 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and 2000/78/EC establishing a general framework for equal treatment in employment and occupation into domestic law. The aim of the Act is to “prevent or stop discrimination based on grounds such as race, ethnic origin, sex, religious or other convictions, disability, age or sexual orientation”.

### ***Remuneration and other employment and working conditions***

In previous conclusions, the Committee concluded that the situation was not in conformity with the 1961 Charter as the provisions on military service of the Employment Protection Act (*Arbeitsplatzschutzgesetz*) applied only to German nationals and nationals of the EU member states or parties to the EEA agreement. This Act failed to secure for migrant workers of all other States Parties lawfully present on German territory no less favourable treatment than that afforded for German nationals with regard to employment conditions for those just finishing their military service. According to the report, section 9 of the Act amending military law of 31 July 2008 (BGBl. I, p.1629),

which came into force on 9 August 2008, added the following paragraph 6 to section 16 of the Employment Protection Act: “Sections 1, paragraphs 1, 3 and 4, and sections 2 to 8 of this Act shall also apply to foreigners employed in Germany if they are required to honour their military service obligations in their country of origin. This provision shall apply only to nationals of States Parties to the European Social Charter of 18 October 1961 (BGBl. II, 1964, p. 1262) who are lawfully resident in Germany”. On this basis, migrant workers from the States Parties to the 1961 Charter who are lawfully present on German territory are now treated no less favourably than German nationals and nationals of the EU member states or parties to the EEA agreement with regard to employment conditions for those just finishing military service. Given this, the Committee considers that the situation in Germany is now in conformity with Article 19§4 a) of the 1961 Charter on this point.

From another source<sup>1</sup>, the Committee notes that people from immigrant backgrounds still suffer major discrimination in access to employment in Germany, particularly skilled workers. Immigrants and their children with the same qualifications as other members of the population find it more difficult to find a job. The Committee asks for up-to-date information in the next report on cases of discrimination and the measures taken to counter them. In this connection, the Committee points out that “it is not enough for a government to prove that no discrimination exists in law alone but that it is obliged to prove, in addition, that no discrimination is practised in fact or to inform the supervisory organs of the practical measures taken to remedy it” (Statement of interpretation – Conclusions III, 1973) and that, pursuant to paragraph a) of Article 19§4, “States are obliged to eliminate all legal and de facto discrimination concerning remuneration and other employment and working conditions, including in-service training and promotion. The provision applies notably to vocational training” (cf. Conclusions VII, United Kingdom).

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

The report does not contain any specific information on the situation regarding the implementation of Article 19§4 b), which it previously found to be in conformity with the 1961 Charter. The Committee asks for specific, up-to-date information in the next report on measures taken to ensure that migrant workers are treated no less favourably than German nationals with regard to membership of trade unions and enjoyment of the benefits of collective bargaining and on any cases of discrimination recorded and any steps taken to deal with them. In this connection, the Committee points out that paragraph b) of Article 19§4 “requires States to eliminate all legal and de facto discrimination concerning trade union membership (Conclusions XIII-3, Turkey) and as regards the enjoyment of the benefits of collective bargaining, including access to administrative and managerial posts in trade unions”.

#### ***Accommodation***

According to the report, migrant workers have access to social housing provided that they satisfy the standard conditions for eligibility. It is also specified in the report that, since no distinction is made between applicants for housing on the basis of their origins, there are no data on the number of migrant workers who are accommodated in social housing. In its previous conclusion (2006), the Committee asked for up-to-date information on the situation with regard to housing access for migrants living in Germany temporarily. The report does not provide this information so the Committee repeats its request

From another source (see footnote 1), the Committee notes that discrimination by property owners and managers continues to be a problem in Germany. Discrimination includes the rejection of applications for housing from people with patronyms indicating that they are of foreign origin or from people who cannot speak German properly. Under paragraph c) of Article 19§4, states are required to “to eliminate all legal and de facto discrimination concerning access to public and private housing. There must be no legal or de facto restrictions on home-buying, access to subsidised housing or housing aids, such as loans or other allowances” (cf. Conclusions IV, Norway – Conclusions III, Italy). In view of the foregoing, the Committee asks for specific, up-to-date information in the next report on

measures taken to ensure that migrant workers are treated no less favourably than German nationals and on any cases of discrimination recorded and any steps taken to deal with them.

### *Conclusion*

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

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<sup>1</sup> *European Commission against Racism and Intolerance (ECRI), Fourth report on Germany, 19 December 2008 – CRI(2009)19*

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 5 - Equality regarding taxes and contributions*

The Committee notes from the report submitted by Germany that there have been no changes to the situation, which it has previously considered to be in conformity with Article 19§5 of the 1961 Charter. It asks that the next report provide a full and up-to-date description of the situation.

### *Conclusion*

The Committee concludes that the situation in Germany is in conformity with Article 19§5 of the 1961 Charter.

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 6 - Family reunion*

The Committee takes note of the information contained in the report submitted by Germany.

### **Scope**

Some of the principles set out in European Union Directive 2003/86/EC on the right to family reunification were incorporated into: a) the Act on the residence, employment and integration of foreign nationals on federal territory (*AufenthG, Aufenthaltsgesetz*) of 30 July 2004; b) the Act on the General Freedom of Movement for EU citizens of 30 July 2004. These acts entered into force in 2005. The Act incorporating the EU directives on residence and asylum rights into domestic law of 2007 made significant amendments to the aforementioned acts, which also related to family reunion. The report points out that these amendments are compatible with EU Directive 2003/86/EC. In this respect, the Committee points out that Article 3§4b of Directive 2003/86/EC on the right to family reunification states that the directive is without prejudice to more favourable provisions of instruments including the 1961 Charter and that this principle was recently upheld by the European Court of Justice<sup>1</sup>.

In principle, under the Act on the residence, employment and integration of foreign nationals on federal territory, only spouses and minor children are entitled to family reunion. Both spouses must be over eighteen years of age. Family reunion is granted as of right to single minor children under the age of 16 both of whose parents (or one, if the child is raised by only one parent) have a German residence permit. The Committee notes that the rule whereby children with only one parent residing in Germany were not entitled to family reunion, which had previously prompted a finding of non-conformity, no longer applies. The Committee asks confirmation of this point. The age limit for the reunion of children has been raised to eighteen where the family home has been transferred to Germany or it seems certain that the young person will integrate into German society in view of his or her education or command of the German language. In other cases, minor children are only entitled to family reunion if the authorities consider that a rejection of their application would place them in too difficult a situation. The same rule would seem to apply to major children. The Committee asks for confirmation of this point. It considers that in principle, if there has been a break with the past and this rule is now applied to major children under the age of 21, that would mean that the situation is now in

conformity with the 1961 Charter because it would mean that major children are no longer excluded from the scope of family reunion procedures. However, with a view to a detailed appraisal based on items of law and fact, the Committee asks for the next report to provide detailed information and figures on any rejections of family reunion applications during the reference period of minor children aged over 16 and major children under 21. Pending receipt of the information requested, the Committee reserves its position on this point.

In its previous conclusion, the Committee considered that the situation in Germany was not in conformity with Article 19§6 because the spouses of second generation foreign nationals were not entitled to family reunion. The Committee cannot find any up-to-date information on the subject in the report. Given this and the fact that the legislation on family reunion may have changed during the reference period, the Committee asks for up-to-date information on this issue in the next report. Pending receipt of this information, it reserves its position on this matter.

The Committee notes that children's residence permits obtained following a family reunion application must be renewed for as long as the parents hold a German residence permit and the children live in the family household. When they reach their majority, children obtain their own residence permit, which is only valid for a limited time and may be renewed until they satisfy the conditions to be eligible for a permanent residence permit. From the age of sixteen, they may already be eligible for such a permit if they have had a residence permit for five years or more. The same applies at their majority if they satisfy each of the following conditions: they have had a residence permit for at least five years; they have sufficient knowledge of German; their basic needs are being met or they are attending a state school or recognised education establishment.

### ***Conditions governing family reunion***

Family reunion of spouses is granted as of right when a foreign national living in Germany satisfies the requisite conditions and finds him or herself in the following circumstances: has a permanent residence permit (according to the law, a foreigner shall be granted a permanent residence permit provided that, inter alia, he or she has held a temporary residence permit for five years); has had a temporary residence permit for at least two years; has had a temporary residence permit for less than two years but was married before settling in Germany and is due to stay for at least one more year. In other circumstances spouses may be eligible for family reunion but not for a residence permit. In such cases, the authorities take the decision according to how they view the family's situation. The Committee asks that the next report provide detailed information on the implementation of these rules during the reference period and, in particular, in the case of discretionary assessments, on the decisions taken by the administrations concerned.

Minor, unmarried children shall be granted a residence permit if both parents or the parent possessing the sole right of care and custody hold a residence permit (permanent or temporary) and the child relocates the central focus of its life together with its parents or the parent possessing the sole right of care and custody in the Federal territory.

The Committee recalls that "States may require a certain length of residence of migrant workers before their family can join them. A period of a year is acceptable under the Charter." (Conclusions I, II, Germany). In this respect, the Committee considers that the residence requirements relating to the spouses are excessive and therefore they are not in conformity with the Charter.

Foreigners planning to apply for family reunion must be capable of accommodating their family members (minimum accommodation requirements vary from one *Land* to the next) and be able to support them without claiming welfare benefits.

To be entitled to family reunion, spouses and children (over sixteen) must also prove that they have a basic knowledge of German (level A1 of the Common European Framework of Reference for Languages). Documentary evidence of this knowledge must be provided with the visa application in the form of a certificate from the *Goethe Institut (Deutsch Start A1)*; otherwise, the Germany embassy in the applicants' country of origin will assess their knowledge. Reunion with nationals of the EU,

Australia, Japan, Canada, South Korea, New Zealand, Switzerland and the United States of America is not subject to this condition. Skilled or highly skilled workers are also given preferential treatment along with those who clearly do not need to be integrated. Having received a visa permitting reunion with their spouse, applicants also receive a residence permit, which is issued on condition that they take part in an integration course. On their integration course, foreign nationals learn German language (up to B1 level) and learn about German society, politics, culture and history. The Committee considers that the language knowledge requirement before the reunion is not in conformity with the 1961 Charter because it is likely to hinder family reunion rather than facilitate it. In this connection, it also considers that migrant workers from the States Parties to the 1961 Charter must all be eligible for family reunion to the same extent.

With regard to the conditions to which family reunion may be subject, the Committee reiterates that: (a) “the level of means required by States to bring in the family or certain family members should not be so restrictive as to prevent any family reunion” (cf. Conclusions XIII-1, Netherlands) ; (b) “the requirement of having sufficient or suitable accommodation to house the family or certain family members should not be so restrictive as to prevent any family reunion” (cf. Conclusions IV, Norway). The Committee considers that even if the requirements of the law prevent family reunion in only a limited number of cases, it is important that in practice the authorities in charge of issuing residence permits following applications for family reunion take account of the fact that “the principle of family reunion is but an aspect of the recognition in the Charter (Article 16) of the obligation of states to ensure social, legal and economic protection of the family. Consequently, the application of Article 19, paragraph 6, should in any case take account of the need to fulfil this obligation” (Statement of interpretation – Conclusions VIII, 1984). Bearing in mind the foregoing, the Committee asks for the next report to provide specific information, including figures, on any rejections of applications for family reunion based on the criteria relating to available resources and housing.

Furthermore, the Committee considers that migrant workers who have sufficient income to provide for the members of their families should not be denied the right to family reunion because of the origin of such income, where they have a right to the granted benefit. On this basis, it considers that the situation in Germany is incompatible with Article 19§6 of the 1961 Charter because the exclusion of social welfare benefits from the calculation of the worker’s income is likely to hinder family reunion rather than facilitate it.

### *Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 19§6 of the 1961 Charter on the grounds that:

- the requirement for foreign nationals wishing to be joined by their spouses to have a permanent residence permit - which is granted provided that the foreigner concerned has held a temporary residence permit for five years - or to have had a temporary residence permit for at least two years, is excessive;
- requiring applicants for family reunion to produce documentary evidence of their knowledge of German is likely to hinder family reunion rather than facilitate it;
- excluding social welfare benefits from the calculation of migrant worker's income is likely to hinder family reunion rather than facilitate it.

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<sup>1</sup> See *judgment of the Court of 27 June 2006, Case C-540/03, Parliament v. Council (2006) ECR, I-576.*

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 7 - Equality regarding legal proceedings*

The Committee notes from the report submitted by Germany and all the information at its disposal that there have been no changes to the situation, which it has previously considered to be in conformity with Article 19§7 of the 1961 Charter. It refers to its interpretive statement in the General introduction and asks that the next report provide a full and up-to-date description of the situation. In particular whether domestic legislation makes provision for migrant workers who are involved in legal or administrative proceedings and who do not have counsel of their own choosing to be advised to appoint counsel and, whenever the interests of justice so require, be provided with counsel, free of charge if they do not have sufficient means to pay the latter, and whether migrant workers may have the free assistance of an interpreter if they cannot properly understand or speak the national language used in the proceedings and have any necessary documents translated. Such legal assistance should be extended to obligatory pre-trial hearings.

### *Conclusion*

Pending receipt of the information requested the Committee concludes that the situation in Germany is in conformity with Article 19§7 of the 1961 Charter.

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 8 - Guarantees concerning deportation*

The Committee takes note of the information contained in the report submitted by Germany.

The Committee recalls that the conclusion has been one of non conformity for several cycles on the grounds that legislation permitted expulsion on grounds unrelated to national security or the public interest, namely lack of resources to ensure subsistence, repeated convictions for drug abuse and being homeless for long periods. However the Committee noted last time that there had been amendments to the relevant legislation; the Residence Act (*Aufenthaltsgesetz* of 31 January 1980 BGBl.I S. 116 amended and the Free Movement Act EU (*Freizügigkeitsgesetz/EU* of 30 July 2004 as amended).

The Committee notes that the Residence Act which only applies to non EU nationals provides for mandatory expulsion, regular expulsion, and discretionary expulsion. Mandatory expulsion is ordered where inter alia, an individual has been definitively convicted of a crime where the sentence is at least three years, (Section 53) A foreigner will generally be expelled under the provisions relating to regular expulsion where he /she has committed a criminal offence punishable by imprisonment of at least two years or is convicted of serious drug related offences, trafficking of persons, is involved in incitement of hatred activities, in banned organizations or organizations which support terrorism (Section 54).

Expulsion of a foreigner may be ordered under Section 55 (discretionary expulsion) inter alia if his or her stay is detrimental to public safety and law and order or other substantial interests of the Federal Republic of Germany, uses heroin, cocaine or a comparably dangerous narcotic and is not prepared to undergo a course of rehabilitation treatment or evades such treatment, endangers public health through his or her behaviour or is homeless for a prolonged period, claims social welfare for himself/herself, his or her dependents or other persons belonging to his or her household. In reaching the decision on expulsion, under this section due consideration shall be accorded to:

- the duration of lawful residence and the foreigner's legitimate personal, economic and other ties in the Federal territory,
- the consequences of the expulsion for the foreigner's dependents or partner who is/are lawfully resident in the Federal territory and who lives/live with the foreigner as part of a family unit or cohabits with the foreigner as his or her partner in life,

The Committee finds, notwithstanding that the individual's circumstances are taken into account that these grounds are overly broad. It recalls that it has held that consistently held that recourse to social welfare, homelessness, and substance abuse, grounds for expulsion under the previous legislation as well, cannot be considered as grounds for expulsion permitted by Article 19§8.

The Committee notes that certain foreigners enjoy special protection against expulsion by virtue of section 56, in particular a foreigner who

- possesses a settlement permit and has lawfully resided in the Federal territory for at least five years,
  - possesses an EC long-term residence permit,
  - possesses a residence permit, was born in the Federal territory or entered the Federal territory as a minor and has been lawfully resident in the Federal territory for at least five years.
  - possesses a residence permit, has lawfully resided in the Federal territory for at least five years and cohabits with a foreigner as specified in numbers 1 to 2 as a spouse or in a registered partnership,
  - cohabits with a German dependent or partner in life in a family unit or a registered partnership.
- The Committee asks what in concrete terms this special protection means, does it mean that individuals falling into one of the above mentioned categories may never be expelled?

The expulsion of EU nationals and their family members is governed by Section 6 of the Free Movement Act/EU of 30 July 2004. Expulsion may only be ordered on grounds of public order, safety or health (and only if the illness occurred within three months of arrival). According to the legislation decisions or measures concerning the loss of the right of residence or of the right of permanent residence must not be undertaken for economic purposes.

A criminal conviction alone shall not constitute sufficient grounds for expulsion on grounds of public order or safety, only where circumstances pertaining to the a conviction indicates personal behaviour which constitutes a current threat to public order. A real and sufficiently serious danger must apply which affects a fundamental interest of society. Special consideration shall be accorded to the duration of the foreigner's residence in Germany, his or her age, state of health, family and economic situation, social and cultural integration in Germany and the extent of the foreigner's ties to his or her country of origin.

In the case of EU citizens and their dependents who have been resident in the Federal territory in the past ten years and in the case of minors, expulsion may only be ordered on compelling grounds of public safety only. Compelling grounds of public safety can only apply if the person concerned has been sentenced to a prison term or a term of youth custody of at least five years, the security of the Federal Republic of Germany is affected or the person concerned poses a terrorist threat.

The Committee requests information on the rights of the dependents of the migrant worker to be expelled, both in respect of EU nationals and non EU nationals

### *Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 19§8 of the 1961 Charter on the grounds that migrant workers and their families (not EU citizens) may be expelled for having recourse to social welfare or for being homeless or for substance abuse.

## **Article 19 - Right of migrant workers and their families to protection and assistance**

### *Paragraph 9 - Transfer of earnings and savings*

The Committee notes from the report submitted by Germany and all the information at its disposal that there have been no changes to the situation, which it has previously considered to be in conformity



with Article 19§9 of the Charter. It asks that the next report provide a full and up-to-date description of the situation.

*Conclusion*

Pending receipt of the information requested the Committee concludes that the situation in Germany is in conformity with Article 19§9 of the 1961 Charter.

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

*Paragraph 10 - Equal treatment for the self-employed*

The Committee takes note of the information contained in the report submitted by Germany.

On the basis of the information contained in the report 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 paragraphs 1 to 9 of Article 19 leads to a finding of non-conformity under paragraph 10 since the same grounds for non-conformity as described under the aforementioned paragraphs applies to self-employed workers.

In its conclusions under Article 19§6 and 8 the Committee has considered the situation in Germany not to be in conformity with the 1961 Charter. Accordingly, the Committee concludes that the situation in Germany is not in conformity with Article 19§10 of the 1961 Charter

*Conclusion*

The Committee concludes that the situation in Germany is not in conformity with Article 19§10 of the 1961 Charter on the same grounds for which it is not in conformity with paragraphs 6 and 8 of the same Article.