



November 2008

European Social Charter

European Committee of Social Rights

Conclusions XIX – 1 (SPAIN)

Articles 1, 9, 10, 15 and 18 of the Charter and Article 1 of the
1988 Additional Protocol

Introduction

The function of the European Committee of Social Rights is to assess the conformity of national law and practice with the European Social Charter and the Revised 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 figure in the General Introduction to the Conclusions¹.

The European Social Charter was ratified by Spain on 6 May 1980 and the 1988 Additional Protocol on 24 January 2000. The time limit for submitting the 20th report (4th report on the Additional Protocol) on the application of this treaty to the Council of Europe was 31 October 2007 and Spain submitted it on 30 October 2007. On 18 December 2007, a letter was addressed to the Government requesting supplementary information regarding Articles 1§2, 1§3, 10§1, 10§2, 10§3, 10§4, 15§1, 15§2, 18§2 and Article 1 of the Additional Protocol. The Government submitted its reply on 15 September 2008.

This report was the first under the new system for the submission of reports adopted by the Committee of Ministers.² It concerned 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 education, training and employment (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).

Spain has accepted all these articles.

The applicable reference periods were:

- 1 January 2003 – 31 December 2006 for Article 18 and Article 1 Protocol;
- 1 January 2005 – 31 December 2006 for Articles 1, 9, 10 and 15.

The present chapter on Spain concerns 16 situations and contains:

- 6 cases of conformity: Articles 1§1, 1§2, 10§2, 10§3, 18§4 and Article 1 of the Additional Protocol;
- 7 cases of non-conformity: Articles 1§4, 9, 10§4, 15§1, 15§2, 18§1 and 18§3.

In respect of the 3 other situations concerning Articles 1§3, 10§1 and 18§2, the Committee needs further information. The Government is therefore invited to provide this information in the next report on the provisions in question.

The next Spanish report deals with the accepted provisions of the following articles belonging to the second thematic group “Health, social security and social protection”:

- the right to safe and healthy working conditions (Article 3),
- the right to protection of health (Article 11),
- the right to social security (Article 12),
- the right to social and medical assistance (Article 13)
- the right to benefit from social welfare services (Article 14),
- the right of elderly persons to social protection (Article 4 of the Additional Protocol).

The deadline for the report was 31 October 2008.

¹ The conclusions as well as state reports can be consulted on the Council of Europe’s Internet site (www.coe.int/socialcharter).

² Decision adopted at the 963rd meeting of the Ministers’ Deputies on 3 May 2006.

Article 1 – Right to work

Paragraph 1 – Policy of full employment

The Committee takes note of the information provided in Spain's report.

Employment situation

The Committee notes from Eurostat that growth was steady during the reference period (3.9% in 2006, rising from 3.1% in 2004).

The employment rate increased slightly during the reference period, reaching 63.3% in 2005 and 64.8% in 2006 from 60.9% in 2004. Women continue to benefit in particular from this progress as the employment rate for women rose from 48.3% in 2004 to 51.2% in 2005 and 53.2% in 2006.

Unemployment decreased from 10.8% in 2004 to 8.5% in 2006, while unemployment among women fell from 14.3% in 2004 to 11.6% in 2006. Unemployment rate for young people (15-24 year-olds) fell from 22% in 2004 to 17.9% in 2006.

Similarly, the proportion of the long-term unemployed as a percentage of the total unemployed decreased significantly during the reference period (from 34.1% in 2003 to 24.5% in 2005).

The Committee requests information on the unemployment rate among foreign nationals and persons with disabilities.

Employment policy

The Committee notes, from the report, that there have been certain changes to the relevant legislation during the reference period. They include, in particular, measures to reduce employers' contributions (through rebates) for companies recruiting persons with disabilities (under Act no. 30/2005 of 29 December 2005) as well as workers over 60, and measures designed to encourage employers to offer permanent contracts (Royal Legislative Decree no. 5/2006 of 9 June 2006).

The Committee observes that during the reference period training measures for young people between 16 and 21 with training contracts was a priority. It asks for details of the number of persons benefiting from these measures and the total number of people taking part in vocational training measures and other measures linked to employment policy.

The Committee also notes that less than 0.6% of the GDP was spent on employment policy in 2006 (active and passive measures). It asks for the next report to explain the reasons for the significant decrease of expenditure (from 2.1% in 2002) as well as to specify in particular what portion is earmarked for various active and passive measures.

Conclusion

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

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

The Committee takes note of the information provided in Spain's report.

It notes that there have been no changes to the situation, which it has previously found to be in conformity.

It notes however that there are no answers in the report to any of the questions in its last conclusions, whether those directed specifically at Spain under Article 1§2 or the ones put to all the states party in the General Introduction to Conclusions XVIII-1.

It asks that the questions below be answered:

1. Elimination of all forms of discrimination in employment

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

In case of states party, such as Spain, that have accepted Article 15§2 of the Charter the Committee will examine legislation prohibiting discrimination on grounds of disability under this provision.

The Committee has examined the overall legal framework for the right to equal treatment between men and women in an earlier conclusion under Article 1§2 (Conclusions XVII-1) and Article 1 of the Additional Protocol (right to equal opportunities and treatment in employment and occupation without sex discrimination) (Conclusion XVII-2).

Issues relating to equal pay are examined under Article 4§3 of the Charter (right of women and men to equal wages).

Act 62/2003 transposed Council Directives 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹ and 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation². The legislation amends a number of existing statutes. It now explicitly prohibits discrimination on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, in all areas connected with employment including recruitment. It includes definitions of direct and indirect discrimination, which had hitherto been defined by case law. The Committee again asks how the notion of indirect discrimination is defined/interpreted by the courts. It also asks for information on how the provisions of the legislation relating to age discrimination are interpreted.

Act 62/2003 introduces protection against harassment on the aforementioned prohibited grounds and requires certain forms of positive action to promote the equality of certain social groups, which may be provided for, following collective bargaining, in collective agreements.

In proceedings where the non-discrimination principle is alleged to have been violated there is a shift in the burden of proof. The respondent must then show that the principle has not been breached. Agreements, rules and acts breaching the principle of non-discrimination in employment may be declared null and void, as may acts of employers taken as reprisals following complaints of discrimination. The Committee again asks for further information on the various possibilities for compensation which are available to victims of discrimination.

Article 1§2 of the Charter requires remedies in cases of discrimination to be effective, proportionate and dissuasive. It follows that the imposition of an upper limit may in certain cases prevent an award of damages commensurate with the loss and damage actually sustained and may not be sufficiently dissuasive for the employer. The Committee therefore again asks whether there are limits to the amount of compensation that may be awarded in discrimination cases.

Under Spanish law employers who are found under Act 62/2003 to have discriminated against employees are liable to a fine of between € 3,000 and 90,000, details of which may be published. The Committee again asks how many discrimination cases have been brought before the courts and how many have been upheld.

Act 62/2003 provides for a council for the promotion of equal treatment with no distinction on grounds of racial or ethnic origin. This body is to be attached to the Ministry of Labour and Social Affairs. Its composition and functions are to be defined by legislation. The Committee again asks for up-to-date information on this body, and in particular whether it is fully independent.

Act 62/2003 permits groups of persons to take or be party to legal proceedings alleging discrimination on grounds of racial or ethnic origin but not in the context of employment and not for other grounds of discrimination. However trade unions are permitted to take proceedings on behalf of their members. The Committee again asks whether any other legislation allows bodies other than trade unions to take proceedings alleging discrimination in employment, or whether there is any other legal basis for such action.

The Committee considers that anti-discrimination legislation can only be truly effective if it is part of a broader strategy on equality, and therefore asks for information on any other forms of positive action in this area.

The Committee recalls that under Article 1§2 of the Charter while it is possible for states to make foreign nationals' access to employment on their territory subject to possession of a work permit, they cannot impose a general ban on nationals of states party from occupying jobs for reasons other than those set out in Article 31. Restrictions on the rights guaranteed by the Charter are admitted only if they are prescribed by law, serve a legitimate purpose and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals. The only jobs from which foreigners may be banned are therefore those that are inherently connected with the protection of the

¹ Official Journal L 180 , 19.07.2000 pp. 0022-0026.

² Official Journal L 303 , 02/12/2000 pp. 0016 – 0022.

public interest or national security and involve the exercise of public authority. The Committee therefore again asks whether foreign nationals are excluded from certain jobs categories, particularly in the public service, and if so what these job categories are and the grounds for these restrictions.

2. Prohibition of forced or compulsory labour

Prison work

The Committee asks for answers to the following questions:

- Can a prisoner be required to work (irrespective of consent):
 - A. for a private undertaking/enterprise
 - i. within the prison?
 - ii. outside the prison?
 - B. for a public/state undertaking
 - i. within the prison?
 - ii. outside the prison?
- What types of work may a prisoner be obliged to perform?
- What are the conditions of employment and how are they determined?

3. Other aspects of a worker's right to earn his living in an occupation freely entered upon

Privacy at work

The Committee refers to the Government's reply to its letter for more information on the matter.

Article 4§2 e) of Royal Legislative Decree no. 1/1995 of 25 March 1995 implementing the revised version of the Law on the status of workers provides that "under the employment relationship, employees are entitled to respect for their privacy and their dignity, including protection against verbal or physical abuse of a sexual nature". Employers may, nevertheless "exercise any form of supervision or oversight they consider necessary to ensure that employees carry out their obligations and duties, on condition that, when adopting and implementing such measures, due consideration is given to respect for human dignity" (Article 20§3). The reply to the letter to the Government specifies that employees' privacy includes computer privacy.

The Constitutional Court has established a whole body of case-law aimed at striking a balance between employees' fundamental right to respect for their privacy and the right to exercise supervision and oversight granted to employers. In particular, measures taken by employers must comply with the principle of proportionality, which means that they should achieve their object, be necessary (in that there are no other less intrusive ways of achieving this object as effectively) and establish a balance (benefits or advantages to the general interest outweigh any detriment to other assets or values at issue; judgment on proportionality).

The Committee considers that these measures make it possible to protect employees' freedom and dignity against intrusions into personal or private life that may be associated with or result from the employment relationship (see observations on Article 1§2, General Introduction to Conclusions 2006, §§13-21). It asks that, in its next report, Spain continues to provide more detailed information so that it can make a more accurate assessment of the situation.

Restrictions linked to the fight against terrorism

The Committee again invites the Government to reply to its question in the General Introduction to Conclusions 2006 as to whether any legislation against terrorism precludes persons from taking up certain types of employment.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Spain is in conformity with Article 1§2 of the Charter.

Paragraph 3 – Free placement services

The Committee notes the information provided in Spain's report.

It notes the enactment, during the reference period, of Royal Legislative Decree 5/2006 on modernisation of public employment services, which provides for better co-ordination between the National Public Employment Service (SPEE) and the public employment services run by the autonomous regions. The Committee requests information on the main arrangements concerning them.

The enactment of the decree follows on from Law 56/2003, which the Committee noted in its previous conclusion (Conclusion XVIII-1) and which divided the National Employment System into the SPEE and the public employment services run by the autonomous regions.

According to the report, the total staff numbers amounted, during the reference period, to more than 7,000 employees. As to qualifications, the majority followed a secondary education and has an A-level.

The report submitted by Spain contains little information and does not answer the questions put in the previous conclusion concerning the number of placements made by all the employment services.

The Committee stated in its previous conclusion that that information was indispensable to it for assessing the real effectiveness of the employment services – in the present instance the SPEE and the public employment services run by the autonomous regions.

It therefore asks that the next report specify the placement rate – i.e. the number of placements made by the public employment services as a percentage of total job offers. The Committee also wishes to know the total number of vacancies notified to the public employment services.

It also asks about the average length of time taken to fill vacancies.

The Committee lastly states that if the next report does not supply the necessary information, it will consider that Spain has not been able to show that the situation is in conformity with Article 1§3 of the Charter.

Conclusion

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

Paragraph 4 – Vocational guidance, training and rehabilitation

The Committee takes note of the information provided in Spain's report.

As Spain has accepted Article 9, 10§3 and 15§1 of the Charter, measures relating to vocational guidance, to vocational training and retraining of workers, and to guidance and vocational training for persons with disabilities are dealt with under these provisions.

The Committee has considered that, with regard to vocational training and retraining of adult workers, the situation is in conformity with Article 10§3 of the Charter.

However, concerning vocational guidance (Article 9), the Committee holds that the situation is not in conformity on the ground that it has not been established that the right to vocational guidance in the education system is guaranteed and that equal treatment is guaranteed to all nationals of States Parties to the Charter in this respect.

The Committee further finds that the situation with regard to the vocational guidance, education and training of persons with disabilities (Article 15§1) is not in conformity with the Charter on the ground that it has not been established that mainstreaming of persons with disabilities is effectively guaranteed in education and training.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 1§4 of the Charter.

Article 9 – Right to vocational guidance

The Committee takes note of the information provided in Spain's report.

The Committee notes from another source¹ that under Education Act No. 1/1990 of 3 October 1990 (LOGSE), the autonomous regions must set up specialised services for vocational guidance in the education system and in the labour market which are provided in training centres and organised by sector.

In its previous conclusion (Conclusions XVIII-2), the Committee noted that some of the responsibility for vocational guidance had been transferred to the autonomous communities. It asks how responsibilities are shared out between the autonomous communities and the autonomous regions in the vocational guidance system.

As Spain has accepted Article 15 of the Charter, measures relating to vocational guidance for persons with disabilities are dealt with under that provision.

Vocational guidance in the education system

a. Functions, organisation and operation

The Committee notes from another source² that the 2002 Quality of Education Act assigns special importance to school counselling and to vocational guidance. At primary school level, this is provided by teachers. At secondary school level, teachers are backed up by specialised counselling departments and qualified staff. Universities run guidance, information and employment centres under agreements with the National Employment Service (INEM). The Committee asks the next report to provide information in this respect and how is this vocational guidance implemented in practice.

b. Expenditure and numbers of staff and of persons assisted

In its previous two conclusions (Conclusions XVI-2 and Conclusions XVIII-2), the Committee asked for information about expenditure on the numbers of staff involved in and the number of persons assisted by the school vocational guidance system. In view of the repeated lack of information, the Committee concludes that it has not been demonstrated that the right to vocational guidance in the education system is effectively guaranteed, and hence that the situation is not in conformity in this respect.

Vocational guidance in the labour market

a. Functions, organisation and operation

The Committee notes from another source³ that vocational guidance services in the labour market are aimed in particular at the unemployed. Priority groups are people under the age of 25 who have been unemployed for more than six months, people over the age of 25 who have been unemployed for over twelve months and the long-term unemployed. These people receive individual counselling or may attend group lessons or workshops designed to help them re-enter the labour market.

According to the report, a comprehensive plan for active employment policies in the textile and clothing industries makes provision for vocational guidance measures to facilitate vocational retraining of these workers. These guidance measures take account of the workers' profile and the needs of the labour market. They are financed by the guidance budget of the national employment services while taking account of the powers and responsibilities of the autonomous communities. The Committee asks for the next report to give information about vocational guidance measures covering the entire labour market, not just the textile and clothing industries.

b. Expenditure and numbers of staff and of persons assisted

In the absence of any information on this subject, the Committee asks for the next report to provide up-to-date information about expenditure on, numbers of staff involved in and numbers of persons assisted by vocational guidance in the labour market.

¹ Cedefop, Overview of the Vocational Education and Training System, p. 69.

² *Idem*, pp. 69-70.

³ *Idem*, pp. 70-71.

Equal treatment of nationals of the other States Parties

Although the Committee put this question in its previous three conclusions (Conclusions XIV-2, XVI-2 and XVIII-2), the report fails to state whether equal treatment is guaranteed to nationals of other States Parties in law and, if so, on what legislation this equality is based. In view of the lack of information, the Committee concludes that it has not been established that all nationals of States Parties are guaranteed equal treatment and hence that the situation is not in conformity in this respect.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 9 of the Charter on the grounds that it has not been established that:

- the right to vocational guidance in the education system is guaranteed;
- equal treatment is guaranteed to all nationals of States Parties.

Article 10 – Right to vocational training

Paragraph 1 – Promotion of technical and vocational training and the granting of facilities for access to higher technical and university education

The Committee takes note of the information provided in Spain's report.

Secondary and higher education

The Committee notes that the report only gives account of the legislative changes that have taken place during the reference period, such as: Royal Decree 1416/2005, establishing the National Catalogue of Vocational Qualifications; Royal Decree 1228/2006 of 27 October which completes the Catalogue of National Vocational Qualifications, by establishing certain new qualifications as well as their corresponding training modules; Order TAS 3868/2006 of 20 December which establishes the Training and Employment Plan (FIP); Order TAS/2967/2006 of 26 September which establishes the regulatory framework for granting public financing for the training, retraining and employment programme for workers in the fields of information technologies and communication, as well as training in the use of new technologies and Royal Decree 1558/2005 of 23 December establishing the framework for the Integrated Centre of Vocational Training. The Committee notes from Eurydice¹ that the Organic Act on Education 2/2006 was adopted on 3 May 2006.

The Committee wishes to be informed about the results of the measures taken, in the framework of these legal acts, to provide and promote the vocational training.

The Committee notes from Cedefop² that in the framework of the National Reform Programme 2005-2010, special measures will be taken to promote continuing training of both employed and unemployed and to increase youth employment rate by offering training to the unemployed youth. The National Catalogue for Vocational Qualifications has been created at the institutional level to match training and labour market needs and to promote lifelong learning and mobility of workers within a unified labour market. The Committee also notes that in the framework of the National Reform Programme among the measures for continuing education and training, special attention is devoted to enhancing social dialogue in the matters of vocational training. The Committee requests that the next report provide information on the implementation of the National Reform Programme.

Measures to facilitate access to education and effectiveness of these measures

The Committee notes from Eurydice that a total of 1,443,811 students were enrolled in universities in the academic year 2005/2006. It also notes that a total of 238,154 students were involved in non-university higher education. The number of university teaching staff amounted to 50,190. The Committee notes from Eurostat that the percentage of employees in all enterprises participating in vocational training courses amounted to 33 % in 2005.

In its previous conclusion the Committee asked a number of questions regarding the measures adopted with a view to promoting vocational training, including establishment of mechanisms for recognition of knowledge and experience and making the qualifications obtained through vocational training relevant from the perspective of professional integration into the job market. The Committee also asked for statistical information regarding completion rate of students enrolled in higher education as well as figures on the employment rate of people who hold higher education qualification. The Committee also wished to know the reasons for the marked difference in participation between general and vocational education.

Finally, the Committee asked whether nationals of other States Parties to the Charter lawfully resident or regularly working in Spain have equal access to all kinds of vocational training, including higher education courses where access is regulated. According to the supplementary information provided by the Spanish Government the Royal Decree 395/2007 stipulates that migrant workers who are legally resident or regularly working in Spain enjoy the equality of access to vocational training. The Committee asks whether these rules also apply to higher education courses where access is regulated.

Conclusion

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

¹http://www.eurydice.org/ressources/eurydice/eurybase/pdf/0_integral/ES_EN.pdf

² http://libserver.cedefop.europa.eu/vetelib/eu/pub/cedefop/eknowvet/2006_TO_ES.pdf

Paragraph 2 – Apprenticeship

The Committee takes note of the information provided in Spain's report.

In its previous conclusion the Committee found that the situation was in conformity with Article 10§2 of the Charter and reiterated its request about whether there was a sufficient number of training places to the different types of training course. It also asked for systematic information on the development of the system and the number of beneficiaries.

The Committee notes that the report only provides information about legal developments during the reference period. The report states that the Royal Decree 5/2006 modifies, by its Section 12, the age limit for training contracts and establishes that these contracts can be concluded with workers between 16 and 21 years old. This age limit is 24 years for an unemployed who can participate, on contractual basis, as an apprentice in the programmes of the vocational training schools and workshops.

From the supplementary information provided by the Government the Committee takes note of the developments which took place in 2007. This information will be taken into account during the next examination of the situation under this provision.

The Committee recalls that the main indicators of compliance for Article 10§2 are, among others, the availability of training places for those seeking them. Therefore it repeats its previous question. The Committee also requests that the next report provide information on the total spending on training contracts.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Spain is in conformity with Article 10§2 of the Charter.

Paragraph 3 – Vocational training and retraining of adult workers

The Committee takes note of the information provided in Spain's report.

Employed persons

The Committee recalls that the purpose of Article 10§3 of the Charter is, among others, to oblige states to provide facilities for training and retraining of adult workers, in particular the arrangements for retraining redundant workers and workers affected by economic and technological change. The aim is to prevent the deskilling of still active workers at risk of becoming unemployed as a consequence of technological and/or economic progress.

In the previous conclusion the Committee observed that additional training activities and support measures were introduced to take technical developments into account, which helped to determine what training was needed to assist the productive sectors of the economy. In this connection the Committee wished to know what was the impact of these measures on vocational training for adults and whether available places matched the demand.

From the supplementary information provided by the Spanish Government the Committee notes that the total number of employed persons who have followed a training course in 2006 was 1,956,723.

Unemployed persons

The Committee notes from Eurostat that the unemployment rate in Spain amounted to 9,2% in 2005 and 8,5% in 2006. Long-term unemployment represented 21,7% of total unemployment in 2006 (the EU-15 average being 42,1% in 2006) and the youth unemployment rate equalled 17,9%. In its previous conclusion the Committee wished to know how the cost of vocational and continuing training was shared between public bodies (state or other collective bodies), unemployment insurance systems, enterprises and households. The Committee reiterates its question.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Spain is in conformity with Article 10§3 of the Charter.

Paragraph 4 – Facilities

The Committee takes note of the information provided in Spain's report.

Fees and financial assistance (10§4 a and b)

The Committee notes from Eurydice¹ that in university education the corresponding academic years of each degree are organised in credits. Tuition fees include a specific payment for each credit the students enrol in, as well as for compulsory insurance for all students aged under 28. Enrolment fees students have to pay for the 2006/7 academic year may vary among the different Autonomous Communities as well as depending on the type of degree in question. As regards the tuition fees system which is not organised through credits, the fee ranges from € 500 to € 780 for the first enrolment and slightly higher for subsequent enrolments.

The Committee also notes from the same source that with the passing of the 2006 Organic Act on Education a new reform process of the education system is taking place. The education system provides different types of assistance to compensate for inequalities regarding access to education. This is mainly through grants and study aids, intended to guarantee the right to education for pupils in disadvantaged socio-economic situations, that is, to provide an opportunity to access and to continue education for those who lack the financial resources required to do so. The Ministry of Education and Science makes annual call for grants in order to help the families of pupils with special educational needs to offset these pupils' education costs. Special education assistance can be awarded for such services as tuition (up to € 752), school transport (up to € 539), school lunch (up to € 501), school residence (up to € 1,566) etc.

In its previous conclusions (XVI-2 and XVIII-2) the Committee asked whether equal treatment for nationals of other States Parties was guaranteed with respect to financial assistance. The Committee notes that the report does not again provide this information. Therefore, the Committee holds that it has not been established that the situation is in conformity with the Article 10§4 of the Charter on this point.

Training during working hours (Article 10§ 4 c and d)

The Committee notes that there have been no changes to the situation that it has previously (Conclusions XVIII-2) considered to be in conformity with the Charter.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 10§4 of the Charter as it has not been established that the right to equal treatment for nationals of other States Parties lawfully resident or regularly working in Spain is guaranteed with respect to financial assistance.

¹http://www.eurydice.org/ressources/eurydice/eurybase/pdf/0_integral/ES_EN.pdf

Article 15 – Right of physically or mentally disabled persons to vocational training, rehabilitation and social resettlement

Paragraph 1 – Education and training for persons with disabilities

The Committee takes note of the information provided in Spain's report.

The Committee observes that no up-dated figures are included in the report and highlights that in order to be able to assess the conformity of the situation with Article 15§1, it needs to be systematically informed of:

- the total number of persons with disabilities, including the total number of children with disabilities;
- the number of children with disabilities attending mainstream schools and training facilities;
- the number of those attending special education and training institutions.

In this context the Committee recalls that where it is known that a certain category of persons is, or might be, discriminated against, it is the national authorities' duty to collect data to assess the extent of the problem (European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy (European Roma Rights Centre v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §23).

Definition of Disability

The Committee notes that during the reference period, the Law on equal opportunity, non-discrimination and universal accessibility of persons with disability (Law 51/2003) was supplemented by Royal Decree 1414/2006, which defines persons with disability as persons who are recognised as having a degree of disability equal or above 33%.

In this context, the Committee requests the next report to specify:

- how many persons are recognised a degree of disability equal or above 33%;
- how many are recognised an incapacity below 33%.

The Committee also notes the adoption, during the reference period, of Law 39/2006 which establishes a National Dependent Care System ("*sistema nacional de dependencia*") to promote the autonomy of dependent persons. The law establishes that dependent persons must apply to the autonomous community in which they live for recognition of their dependent status. An evaluation body will determine the applicant's degree of dependency. Such degree will entitle the applicant to an individual care programme that will determine which services he/she requires.

The Committee requests the next report to clarify whether the degree of disability equal or above 33% set by Royal Decree 1414/2006 is also a requirement in the determination of the dependency status which would entitle disabled persons to benefit from the services of the National Dependant Care System. It also asks the next report for figures on actual granting of personalised assistance to the disabled persons with a view to facilitate their access to premises of schools and/or training centres and thus contribute in practice to the integration of persons with disabilities into mainstream education (covering both children and adults) and training (including higher education).

Anti-discrimination legislation

The Committee refers to its previous conclusion (Conclusions XVIII-2) for a description of the Law on equal opportunity, non-discrimination and universal accessibility of persons with disability (Law 51/2003).

The Committee notes the adoption of Royal Decree 1417/2006, which establishes an arbitration system to resolve complaints arising within the framework of Law 51/2003. The Committee requests the next report to inform it about any relevant complaint and/or case law with respect to discrimination on the ground of disability in relation to education and training.

Education and vocational training

The Committee notes that the report contains no information on the practical implementation of the II Action Plan for Persons with Disability (2003-2007) and the I National Accessibility Plan (2004-2012), to which reference was made in the previous conclusion (Conclusions XVIII-2). Such information, just as the figures mentioned above, is necessary for the Committee to establish whether the right to education and training is effectively guaranteed to persons with disabilities.

The Committee also reiterates the specific questions asked in its previous conclusions (Conclusions XVIII-2 and XVI-2), and particularly whether regular teacher training includes training on special needs education.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 15§1 of the Charter on the ground that it has not been established that mainstreaming of persons with disabilities is effectively guaranteed in education and training.

Paragraph 2 – Employment of persons with disabilities

The Committee takes note of the information provided in Spain's report and the additional information submitted by the Government on 15 September 2008 in reply to further questions addressed to it by the Committee.

The Committee requests the next report to provide up-dated figures concerning the total number of persons with disabilities of working age, those employed (on the open market and in sheltered employment), those benefiting from employment promotion measures and those seeking employment as well as of those who are unemployed. Given the repeated absence of these figures, it cannot be established whether the situation is in conformity with Article 15§2.

In this context the Committee recalls that where it is known that a certain category of persons is, or might be, discriminated against, it is the national authorities' duty to collect data to assess the extent of the problem (European Roma Rights Centre v. Greece, Complaint No. 15/2003, decision on the merits of 8 December 2004, §27). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy (European Roma Rights Centre v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §23).

Anti-discrimination legislation

In its previous conclusion (Conclusions XVIII-2), the Committee acknowledged the existence of non-discrimination legislation (Law No. 62/2003) explicitly prohibiting direct and indirect discrimination in employment and occupation, *inter alia*, on the ground of disability. It noted that the prohibition of discrimination applied to access to employment and vocational training, working conditions including dismissal and pay, promotion, and membership in an organization of workers or employers.

It also noted that the legislation provided for the adjustment of working conditions (reasonable accommodation) by obliging employers to take adequate measures to adapt the work place and accessibility of the enterprise on a case-by-case basis to permit disabled persons to access employment and training, to carry out their work and progress professionally. The Committee further observed that the obligation to adopt such measures was subject to certain conditions to avoid a disproportionate burden on the employer.

In this context, the Committee had asked how reasonable accommodation is implemented in practice, in particular with a view to increasing the employment of persons with disabilities in the open labour market. From the additional information received, the Committee notes that a global action strategy concerning employment of persons with disabilities should be approved by the Government. This should contain specific lines of action concerning reasonable accommodation. The Committee asks the next report to inform it about the possible adoption of this strategy as well as of its implementation in practice.

Furthermore, the Committee reiterates that it wishes to be informed about any relevant case-law related to the subject of reasonable accommodation.

Measures to promote employment

The Committee recalls that there must be obligations on the employer to take steps in accordance with the requirement of reasonable accommodation to ensure effective access to employment and to keep in employment persons with disabilities, in particular persons who have become disabled while in their employment as a result of an industrial accident or occupational disease (Conclusions XVIII-2, General Introduction, Statement of Interpretation on Article 15§2). The Committee requests the next report to indicate what steps employers may take in practice in this regard.

The Committee observes that the report lists several legislative measures adopted during the reference period which are aimed at promoting the employment of the disabled such as:

- Royal Decree 364/2005, which regulates alternative measures to the quota system for employment of disabled persons by companies.

- Law 43/2006 on the increase in growth and employment, which *inter alia*, regulates the granting of specific financial assistance for employers hiring people with disabilities not only for an indefinite period of time but also on short term contracts.
- Royal Decree 469/2006 regarding the Support Units for the Professional Activity of the Personal and Social Adjustment Services of the Special Employment Centres, which aims at modernising these services for the purpose of supporting the full integration of the disabled.
- Royal Decree 870/2007 (adopted outside the reference period), which regulates a programme of supported employment as a measure to promote employment of persons with disability on the ordinary labour market.

The Committee asks the next report to provide further information on these measures as well as on their impact in practice with a view to encouraging access to and maintaining in employment the persons with disabilities.

As regards specific questions raised in its previous conclusions (Conclusions XVIII-2 and XVI-2), from the additional information received, the Committee notes that:

- When the quota for employment of persons with disabilities is not filled and the alternative ways for employers to comply with their obligation are not used, employers must pay a penalty ranging between €626 and €6,250 in accordance with Royal Decree 306/2007 and whether there are alternative ways in which employers may comply with the obligation set by national law.
- As regards sheltered employment, the Committee takes note of the clarifications provided and notes that the workers with disabilities of the Special Employment Centres have the same basic rights and obligations as all workers (Royal Decree 1368/1985), including collective bargaining.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 15§2 of the Charter on the ground that it has not been established that persons with disabilities are guaranteed effective equal access to employment.

Article 18 – Right to engage in a gainful occupation in the territory of other Contracting Parties

Paragraph 1 – Applying existing regulations in a spirit of liberality

The Committee takes note of the information provided in Spain's report.

Foreign population and migration

The Committee notes from another source¹ that on 31 December 2004, there were 1,977,300 foreign nationals in Spain, amounting to 4.6 % of the population, compared with 1,324,001, or 3.1 %, in 2002. This increase of 1.5% is higher than other European countries, which over the same period averaged a 0.3% increase in their foreign population. In 2004, the foreign population was comprised of European Union nationals and persons from outside Europe, in particular Moroccans, Ecuadorians and Columbians. The only significant group of nationals from non-European Union States Parties comprised approximately 83,400 Romanians.

Work permits

Apart from nationals of States Parties to the Agreement on the European Economic Area, foreign nationals wishing to undertake paid employment in Spain require a work permit. Work permits are issued under a general scheme plus a system of quotas that are fixed annually and on a discretionary basis, having regard to the national employment situation and overall economic performance. There are preferential quotas for nationals of states with which Spain has agreements to that effect. The Committee refers to its conclusion under Article 18§3 of the Charter.

The Committee notes that, with the exception of Cypriots and Maltese, nationals of states that joined the European Union in 2004 were subject to the above regulations until 1 May 2006. It also notes that nationals of Bulgaria and Romania, which joined the European Union on 1 January 2007, that is outside the reference period, will continue to require a work permit until 1 January 2009

Finally, persons with a permanent residence permit are exempt from the requirement to obtain a work permit.

Relevant statistics

The Committee's assessment of the degree of flexibility in the application of existing regulations is based on statistics showing the refusal rates for both first-time and renewal applications for work permits from nationals of States Parties (Conclusions XVII-2).

There are no statistics in the report on work permits granted or refused, under either the general scheme or quotas. The Committee has already deferred two conclusions because of incomplete statistics that failed to meet one or more of the above requirements. It considers that, although the ground for these two deferrals differs in form, it is the same in substance, namely the absence of one or other item of statistics. Bearing in mind the repeated absence of statistics to enable it to assess the situation, the Committee finds that it has not been established that the current rules governing the right to engage in a gainful occupation in Spain are applied in a spirit of liberality.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 18§1 of the Charter on the grounds that it has not been established that the rules governing the right to engage in a gainful occupation are applied in a spirit of liberality.

Paragraph 2 – Simplifying existing formalities and reducing dues and taxes

The Committee takes note of the information provided in Spain's report.

The legislation on the rights and freedoms of foreign nationals and their social integration (Institutional Act 4/2000) was amended during the reference period by Institutional Act 14/2003 of 20 November 2003. A new regulation on the application of Act 4/2000 was also approved.

¹ Trends in International Migration, OECD, 2006 edition.

Administrative formalities

Issue of work permits

General scheme

The Committee notes from another source¹ that first-time applications for work permits must always be made in workers' country of origin, whether they are employed or self-employed. The so-called "residence and work visa", which enables those concerned to enter Spain for work purposes, is only issued after they have obtained their work permit. The Committee asks for confirmation that foreign nationals lawfully resident in Spain can make a first-time application for a work permit without having to leave the country.

In the case of employees, it is the employer who must apply for the work permit, either to labour organisations or to the aliens' office. In support of such applications, employers must present their business's social security registration document and a detailed report on its activities, the nature of the post and the corresponding supply of labour. Other than in the case of sectors which are difficult to fill, a list of which is published quarterly by the public employment service, employers must also present a document certifying that they have been unable to fill the post from the existing labour supply. The Committee asks for confirmation that this document states that the employer concerned has been unable to find Spanish or other Community applicants to fill the position in question.

Applications for work permits for the self-employed are lodged by the individuals concerned with the consular services. The Committee notes that the relevant formalities are the same as those applicable to nationals but asks for more details as to what the formalities are.

Applications for residence and work visas are lodged with the Spanish consulate of the country of origin or of the worker's residence. Those concerned must present, not only their work permit but also a medical certificate and be able to demonstrate that they have no criminal record, as well as evidence of their means of subsistence.

Quota scheme

The Committee previously (Conclusions XVII-2) considered the formalities for this scheme. However, these only concerned nationals of States with which Spain had bilateral preferential quota agreements. The Committee notes that none of the States Parties are concerned by such agreements. It refers to its conclusion under Article 18§3 of the Charter. The Committee asks for information on the formalities to be completed by nationals of States covered by the quota scheme that do not benefit from a special agreement.

Work and residence permit

The report states that Act 4/2000, as amended by Act 14/2003, incorporates the work permit in the residence and work visa, and that there are two distinct procedures for obtaining a work permit, depending on whether it concerns paid or self-employment. The Committee notes that this information confirms what it has established from other sources and described above. However several questions, mainly asked in the previous conclusions, remain unanswered. Thus, although it is clear that an initial work permit accompanied by a residence and work visa entitles the holder to work and reside in Spain, the situation of persons wishing to renew their work permit remains unclear. The Committee asks for confirmation that the latter need a separate residence permit to reside lawfully in Spain. If so, it asks whether the periods of validity of the two permits are related.

The Committee also notes that, unlike a permanent residence permit, a temporary residence permit does not entitle its holder to work but that the procedures for obtaining work and residence permits are closely linked. It therefore repeats its questions in the last conclusion, namely whether this link facilitates the granting of the permits or whether parallel procedures have to be followed in the course of which the same documents and formalities have to be provided separately. It also notes that Article 18§2 implies, as a matter of principle, that it should be possible to obtain residence and work permits using one and the same procedure (Conclusion XVII-2, Germany, Article 18§2).

Renewal conditions

Neither the report nor the reply to the letter to the Government answers the questions the Committee raised previously (Conclusions XVII-2) on this issue. Therefore it repeats its questions, namely whether renewal is still granted automatically upon expiry of the existing work permit when the person concerned is in receipt of

¹ Immigrantesweb.org

unemployment benefit or social assistance, or whether it is based on a discretionary decision of the responsible authority. The Committee would also like to know what are the conditions for renewal of a work permit for self-employed workers.

Waiting times

The maximum time for issuing and renewing work permits is three months from the date the application was lodged with the relevant authorities. If no decision has been taken beyond this time, first-time applications are deemed to have been refused.

In the case of renewals of both work permits and residence permits, if no decision has been taken beyond the three months-delay, applications are on the contrary deemed to have been accepted.

According to the report, applicants receive a written decision and according to the Royal Regulation no 2393/2004, they can lodge an appeal against a decision of refusal. Two types of appeals are then possible : cases may be brought either before the authority which has refused the application (labour organisations, aliens' office, consular services) or the administrative courts.

Chancery dues and other charges

According to the report, under Act 4/2000, as amended by Act 14/2003, there will no longer be charges for work permits of less than six months.

The Committee asks for confirmation that any charges imposed on work permits of over six months should always be met by the employer.

It repeats its question about the level of charges for self-employed workers.

Conclusion

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

Paragraph 3 – Liberalising regulations

The Committee takes note of the information provided in Spain's report.

The legislation on the rights and freedoms of foreign nationals and their social integration (Institutional Act 4/2000) was amended during the reference period by Institutional Act 14/2003 of 20 November 2003. A new regulation on the application of Act 4/2000 was also approved.

Access to the national labour market

Employees

Work permits are issued under a general scheme plus a system of quotas that are fixed annually and on a discretionary basis, having regard to the national employment situation and overall economic performance. On this point the Committee refers to its conclusion under Article 18§1 of the Charter. In the absence of any reply in the report, the Committee again asks the next report to explain the quota system (rate established, the criteria applied, possible exceptions) and to indicate any links between the quota and the general system.

Preferential quotas may be established under bilateral agreements, offering easier access to the national employment market. During the reference period, Bulgaria and Romania were the only States Parties to be concerned by such agreements. However, the Committee notes that since their accession to the European Union on 1 January 2007 these two States are no longer subject to the quota system and will not be subject to any system of permits by 1 January 2009 at the latest. It asks whether new agreements of this sort are planned, particularly with States Parties that are not members of the European Union and that are concerned by the quota system.

Self-employed workers

The Committee notes from another source¹ that self-employed persons must submit a business plan in support of their first application for a work permit, including evidence of sufficient financial resources.

¹ www.lmmigrantesweb.org

Exercise of the right to employment

Spain has established a system whereby work permits' period of validity will gradually increase to five years, after which the individual concerned will be eligible for a permanent residence permit and will no longer need a work permit.

According to the report, work permits initially issued to foreign nationals, whether employed or self-employed, are only valid for one job and in a specified geographical area. However the implementing regulation for Act 4/2000 authorises foreign workers to apply for a modification to their work permit, in terms of both employment sector and geographical area. The Committee asks for more detail on the practical application of this procedure.

Consequences of loss of job

In the absence of information to the contrary, the Committee assumes that the rules on loss of employment remain unchanged. It notes that a foreign employee's residence permit is renewed upon its expiration, *inter alia*, in the event that the person concerned is in receipt of unemployment benefit. However, to qualify for unemployment benefit, the worker must have paid at least one year's contribution to the unemployment scheme. The legislation makes no provision for an extension to the residence permit of foreign workers whose employment contract is terminated through no fault of their own before they are able to qualify for unemployment benefit and who are therefore not entitled to automatic renewal of their residence permit to look for another job. The Committee previously (Conclusions XVII-2) concluded that this situation was not in conformity with Article 18§3 of the Charter. In the light of the foregoing, it must confirm its finding of non-conformity.

Conclusion

The Committee concludes that the situation in Spain is not in conformity with Article 18§3 of the Charter on the grounds that foreign workers who have lost their job are not entitled to an extension of their work permit to give them sufficient time to seek new employment.

Paragraph 4 – Right of nationals to leave the country

The Committee takes note of the information provided in Spain's report.

Article 19 of the Constitution grants Spaniards freedom to enter and leave the country and Article 55 permits restrictions in the event of a state of siege or emergency, which the Committee has previously (Conclusions XI-2) found to be in conformity with Article 31 of the Charter.

The report states that the right to leave the country may also be restricted by a "judicial resolution, giving grounds for the decision". The Committee asks for confirmation that this term refers to cases provided for in section 5 of the Emigration Act No. 33, which the Committee has previously (Conclusions XIII-2) found to be in conformity with the Charter. If not, it asks for the legal grounds and the content of that restriction.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Spain is in conformity with Article 18§4 of the Charter.

Article 1 of the 1988 Additional Protocol – Right to equal opportunities and treatment in employment and occupation without sex discrimination

The Committee takes note of the information provided in Spain's report.

Equal rights

The Committee examined the general legal framework for the right to equal treatment in Conclusions XVI-2 and considered that the main requirements under Article 1 of the Protocol were sufficiently covered by legislation (right of appeal for victims of discrimination, protection against retaliatory measures, shift of the burden of proof and adequate sanctions).

The Committee notes from the additional information sent by the Government in September 2008, that Organic Law 3/2007 on equality between women and men was adopted on 22 March 2007 (outside the reference period). Chapter IV of this law contains measures to guarantee equal treatment for men and women in respect of access to employment, vocational training and career advancement, and working conditions. The Committee asks to be kept informed on the implementation of this new law. It also asks that future reports indicate any relevant decisions handed down by the Supreme Court or the Constitutional Court in the area of gender discrimination.

The Committee notes from the report submitted by Spain for supervision cycle XVIII-2 for Article 4§3 that legislation on the "principle of equal pay" was enhanced in 2003 by the amendment of Article 28 of the Workers' Statute, when the notion of remuneration was extended to cover all its aspects (see also Conclusions XVII-2). The additional information sent by the Government at the request of the Committee indicates that under Royal Decree 5/2000 concerning breaches of social legislation and corresponding sanctions, cases of wage discrimination are considered serious violations, and may be punished with a minimum fine ranging from 3,005.07 € up to a maximum one of 90,151.82 €. The Committee asks if in equal pay litigation cases it is possible to make comparisons of pay and jobs outside the company directly concerned.

Position of women in employment and training

According to the report, the female employment rate increased comparatively faster than that of men during the reference period (7% for women as compared to 3% for men). Nevertheless, the female employment rate is still below the EU 15 average, and the gap between men and women remains over 20% (female employment rate was 48.56% in 2006, while that of men that same year was 69%).

Women still work more on part-time contracts (81% of all employees), and they are also more affected by the high incidence of non-permanent employment in Spain.

The report also indicates that the pay gap between men and women remains very high, at approximately 29%. The Committee wishes to know whether the rate is decreasing, and whether the Labour Inspectorate, which is responsible for overseeing compliance with legislation on equal pay, imposed any sanctions on companies during the reference period for cases of wage discrimination.

The report reiterates that women predominantly continue to work in the services sector and certain economic activities (Administration, Education, Health, Social Services, Hotel Trade and Personal Assistance). There has been a positive increase of women in professional and technical jobs, even in executive positions, but it is difficult to change their very small presence in agriculture, mining, fishing, industry, construction and in the armed forces, traditionally male jobs.

Measures to promote equal opportunities

A number of measures and policies to promote equal opportunities are mentioned in the report. Some of these are contained in legislation and others developed by bodies such as the Institute for Women. Employment Act No. 56/2003 pays particular attention to those groups which have bigger difficulties for professional reintegration, such as women, young people, persons over 45, persons with disabilities and immigrants. A similar objective for improving the employment rate of women appears in Royal Law Decree 5/2006 on the Improvement and Growth of Employment. This text contains 54 measures, most of them related to employment, enterprises and the conciliation of work and family life.

With a view to increasing the employment of women in the public sector, there are measures on parity in the composition of selection bodies and tribunals. Likewise, a 5% quota is reserved for women for positions in the armed forces.

The Committee also takes note that a number of measures have been adopted for the professional reintegration of women who have been victims of domestic violence (including financial aid for companies which recruit victims of domestic violence).

Lastly, the Committee recalls that promoting equal treatment of the sexes and equal opportunities for women and men by means of collective agreements is a prerequisite for effectiveness of the right in Article 1 of the Additional Protocol. It also recalls its case-law according to which “when, in order to implement undertakings accepted..., use is made of agreements concluded between employers’ organisations and workers’ organisations, in accordance with Article I.b of the Revised Charter [Article 7.b of the Protocol], States should ensure that these agreements do not run counter to obligations entered into, either through the rules that such agreements contain or through the procedures for their implementation” (Confederation of Swedish Enterprise v. Sweden, Complaint No.12/2002, decision on the merits of 15 May 2003, §27).

In this respect, the Committee requested in its previous conclusion the next report to provide information on the use of anti-discriminatory clauses in collective agreements, as well as the removal of discriminatory clauses from such agreements (Conclusions XVII-2). The Committee notes that Organic Law 3/2007 on equality between women and men contains provisions which aim at making progress in the area of equality through collective bargaining. The Committee asks to be kept informed on the implementation of the new law in this field.

Conclusion

Pending receipt of the information requested, the Committee concludes that the situation in Spain is in conformity with Article 1 of the Additional Protocol.