

Case summary

International Federation for Human Rights (FIDH) v. Belgium

Complaint No: 75/2011

1. Reference Details

Jurisdiction: European Committee of Social Rights (“the Committee”)

Date of decision: 18 March 2013 (published 29 July 2013)

Case Status: Final decision

Link to full Decision:

http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC75Merits_en.pdf

2. Facts of the Case

In accordance with Belgium’s constitution, the country is made up of a number of communities and regions. Under the Special Institutional Reform Act of 1980 disability policy, including policy on the care and support of persons with disabilities and provision of accommodation for this purpose where necessary (but excepting the rules governing the financing of disability allowances), was transferred from the national level of government to the communities. A further governmental agreement in 2011, designed to standardise policy on assistance to persons with disabilities, resulted in the transfer of responsibility for mobility aid to the federated entities and for Belgium’s elderly persons’ allowance to the communities. As a result, each community and region has responsibility for funding any expansion in care for persons with disabilities from its own resources.

This case concerns a collective complaint lodged by the FIDH (“the Complainant”) on 13 December 2011 on behalf of highly dependent adults with disabilities (“the persons concerned”) and their families against the Belgian state (“the Respondent”). In the five years before the complaint, the Respondent had increased the budget given to the communities for the purpose of making provision for persons with disabilities, and there was some accommodation and care provision for persons with disabilities in all communities. However, the Complainant provided evidence to show that many of the persons concerned were unable to access accommodation options – they were either refused or remained on waiting lists for roughly three years.

In its complaint, the Complainant argued that there was a severe shortage of accommodation for highly dependent adults and that there was a lack of effective access to social and medical assistance, social services and housing; a violation of the right to independence, social integration and participation in the life of the community; a lack of social, legal and economic protection against poverty and social exclusion; and discrimination. The Complainant described the persons concerned as falling into one of the following groups: persons with multiple disabilities; persons with autism; persons with an acquired brain injury; persons with severe cerebral palsy; persons with a severe to profound mental disability; persons with behavioural disorders on top of a pre-existing severe disability; and persons in a position of high dependency caused by a range of other factors.

Whilst there was some variation in the level of provision depending on the community or region, the Complainant felt that the provision was inadequate throughout the state.

3. Law

National Laws:

- Belgian Constitution 1994
- Special Institutional Reform Act 1980
- Disability Allowances Act 1987
- Co-ordinated Health Insurance and Allowances Act 1994
- Various regional and national agreements

International Laws:

- Vienna Convention on the Law of Treaties – Article 27
- Revised European Social Charter 1996 (“the Charter”) - Article 13 (right to social and medical assistance), 14 (right to benefit from social welfare services), 15 (the right of persons with disabilities to independence, social integration and participation in the life of the community), 16 (the right of the family to social, legal and economic protection) and Article 30 (the right to protection against poverty and social exclusion) (all of which claims taken alone or in conjunction with Article E (non-discrimination))
- UN convention on the Rights of Persons with Disabilities 2006 (“CRPD”) - Article 19 (living independently and being included in the community)

4. Legal Arguments

Complainant’s Arguments

In its Complaint, FIDH drew attention to the fact that responsibilities for the integration of persons with disabilities were fragmented between the numerous federal and federated entities. FIDH argued that this fragmentation of responsibilities and the limited budgets available were a serious obstacle to the effective implementation of legislation and policy. It highlighted the ECSR decision in *European Roma Rights Centre v Greece* (complaint n°15/2003) in which it held that even if under domestic law local or regional authorities are responsible for exercising a particular function, the ultimate responsibility for the implementation of the official policy lies with the state.

Fundamental issues raised by the complaint

FIDH argued that the Belgian authorities were failing to provide adequate facilities for the persons concerned and that this deprived them and their families of the rights guaranteed by Articles 13 to 16, and Article 30 of the Charter.

In particular it alleged that:

- a) There was a serious shortage of accommodation for the persons concerned in Belgium and this violated Articles 15(3) and 16 of the Charter taken alone or in conjunction with Article E;
- b) the persons concerned were deprived of effective access to social and medical assistance, social services and housing and of their autonomy, social integration and opportunities to take part in community life, in violation of Articles 13(3), 14 and 16 of the Charter taken alone or in conjunction with Article E; and
- c) the policies to combat the poverty and social exclusion that affect the persons concerned were inadequate and amounted to a violation of Article 30 of the Charter taken alone and in conjunction with Article E.

Respondent's Arguments

The Respondent pointed out that its federal structure meant policies often originate at a Regional or Community level.

It went on to argue that:

- a) it had sought to establish co-operation at the federal level in order to overcome institutional barriers and simplify procedures for people with disabilities seeking care and accommodation solutions, particularly where this is called for by the severity of the disability and the urgency of the situation.
- b) during the current period of economic crisis and financial constraint, the Respondent does ensure that it responds to the demands made of it, including all the possible care and accommodation facilities required and that this response reflects the needs of the families concerned;
- c) the persons with the severest disabilities are significantly better subsidised than others. The cost of their care is not therefore one of the reasons why they may be excluded or refused admittance to care/accommodation centres. The difficulty or complexity of providing them with the right care is much more of a reason for their refusal or rejection.
- d) because of the extremely varied range of solutions on offer, including accommodation and more, and the increase in the budget allocated for persons with disabilities, Belgium is in conformity with its obligations under the Charter.

Accordingly, the Respondent argued that it had not violated Articles 13(3), 14, 15(3), 16 and 30, alone or read in conjunction with Article E of the Charter.

5. Decision

Responsibility of the Federal State for its Federated Entities

The Committee noted Article 27 of the Vienna Convention on the Law of Treaties and held that the primary responsibility for implementing the European Social Charter rests with national authorities. It acknowledged that these authorities can in turn delegate certain powers to local authorities, having regard to their constitutional arrangements, as Belgium has done. The Committee, however, held that if these delegations are not accompanied with appropriate safeguards, such implementation arrangements would not be in compliance with the Charter.

Therefore the Committee held that, as Belgium is a state party to the Charter, it has the responsibility of ensuring the obligations under the Charter are respected by the regions and communities.

a) Article 14

The Committee considered that Article 14, which protects the right to benefit from social welfare services, was the main provision applicable to the complaint.

Equal and effective access to social welfare services for the persons concerned

The Committee held that all of FIDH's complaints with regard to the right to benefit from social welfare services fall within Article 14(1), and not under the Article 14(2). It pointed out that Article 14(1) establishes an individual right for all persons who find themselves in a dependent situation to benefit from services using methods of social work.

It explained that "equal and effective access to social welfare services" under Article 14(1) means an access that is guaranteed in law and in practice and is capable of keeping pace with the user's needs.

The Committee stated that access of persons with disabilities to social welfare services can be regarded as equal and effective if the state offers:

"varied and multiple methods of care for these people by the community and if the number and quality of the social welfare services actually provided correspond as closely as possible to the specific, practical, individual needs of the persons concerned so that a free choice can be made by the users concerned and, above all, by their families, provided that they act on behalf of these persons and not instead of them."

The Committee recalled that the UN Convention on the Rights of Persons with Disabilities (CRDP) "reflects existing trends in comparative European law in the sphere of disability policies" and that under Article 19 states undertake to recognise the right of all persons with disabilities to live in the community "with choices equal to others"; to "take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right"; to ensure that persons with disabilities "have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement"; and that social services are available to them "on an equal basis and are responsive to their needs".

The Committee noted that, of all the social services options available for persons with disabilities in Belgium, in reality the care or accommodation solutions were the only viable option for the persons concerned. Whilst it noted that there were no clear figures available to identify the number of persons concerned, it also found that there was evidence that there was a shortage of places in existing care and accommodation centres for the persons concerned. The Committee noted that the government had acknowledged this and that the situation was further evidenced by the fact that in some regions, waiting lists for highly dependent people were as long as three years. It also noted that across Belgium residential-type services, which help

people in particular to find appropriate housing, are not usually adapted to high-dependency disability, as is also the case with personal assistance budgets.

The Committee considered that excluding the persons concerned from any care or accommodation solution forces them either to obtain forms of social service unsuited to their practical needs or protections which are outside the scope of a social service based approach.

The Committee stated that:

“Due to the fact that highly dependent persons with disabilities remain for long periods on waiting lists for a place and because of the administrative practices with regard to the priority treatment of their applications, the Committee concludes that the Government has failed to fulfil its positive obligation under Article 14(1) to provide a number of places on offer in such institutions consistent with the demand.”

On the Government’s justifications for the limited number of care and accommodation places for the persons concerned

The Respondent argued that it had increased the budgets available to the regions for care in the community of people with disabilities over a five year period. It said it was justified in not making a bigger increase due to the economic climate. It also put forward practical justifications for the fact that the care and accommodation places on offer for persons with severe disabilities do not satisfy the demand. These included the argument that increasing life expectancies mean that people with disabilities remain in care and accommodation centres for a longer time and therefore places are unavailable despite the fact that they have been approved. The Respondent also argued that it was only required to progressively realise its obligations under the Charter and that it was doing so.

The Committee held that the practical justifications given by the Government result in a denial of the social service needs of the persons concerned and cannot therefore be accepted.

The Committee held that the fact that Article 14(1) does not require states to guarantee immediate results does not mean that conduct which fails to comply with the obligation to offer a particular social service because it denies that service to the persons concerned can be deemed to comply with the Charter. It acknowledged the high cost of providing the care required and stated:

“When the implementation of one of the rights guaranteed by the Charter is exceptionally complex and expensive, the measures taken by the state to achieve the Charter’s aims must fulfil the following three criteria: (i) a reasonable timeframe, (ii) measurable progress and (iii) financing consistent with the maximum use of available resources.”

In this case, the Committee held that the financing, given the larger context, could not be said to be inappropriate. However, it found that the local authorities had had enough time (it found that they had had since the 1990s or 2000s at the latest), yet failed to organise available financial resources in order to prevent the persons concerned being denied access to any care or accommodation solution. The Committee held none of the Government’s justifications for failing

to provide enough places in care and accommodation centres so as to ensure that the persons concerned are not denied access, could be legitimately accepted.

It held that there was a violation of Article 14(1) of the Charter in this regard.

Organisation of social services-information and advice

The Committee explained that the Charter requires the effective application of this principle throughout the metropolitan territory of each state party. The Committee noted that there are no institutions in Brussels giving individual advice and assistance to people with disabilities, from which the persons concerned could also benefit.

Consequently, the Committee held that there is also a violation of Article 14(1) of the Charter in this respect, as Belgium failed to comply with this principle.

b) Article 13(3)

The Committee held that Article 13(3) – which relates to the provision of appropriate public or private services - and Article 14 overlap as they both refer to social services, and since Article 13(3) is more general in nature, the complaint was examined within the context of Article 14. No separate question was raised under Article 13(3).

c) Article 15(3)

The Committee considers that Article 15(3) – which requires the state to promote the full social integration of persons with disabilities – is applicable to the persons concerned as it requires the state to ensure that the social services take action to implement the home adaptations necessary to permit these persons' integration and dignified existence within the family and social environment. However, the Committee held that FIDH had not submitted arguments with sufficient precision to show that Belgium had violated its obligations under Article 15(3).

Therefore the Committee held that there was no violation of Article 15(3).

d) Article 16

The Committee held that the shortage of care solutions and of social services adapted to the needs of persons with severe disabilities causes many families to live in insecure circumstances. It was considered that this also often causes families to make a greater financial outlay, in that they utilise their own funds to build and set up appropriate care and accommodation facilities without receiving any public subsidies. This was held to amount, on the part of the state, to a lack of protection of the family as a unit of society.

Therefore, the Committee held that the respondent Government was in breach of Article 16.

e) Article 30

The Committee pointed out that Article 30 requires the State to adopt positive measures for groups generally acknowledged to be socially excluded or disadvantaged, and deprived of

access to care and accommodation centres. The Committee did acknowledge the measures already in place in favour of persons with disabilities in Belgium, in particular income replacement and integration allowances and other financial assistance available. However, the Committee held that the state's failure to collect reliable data and statistics throughout Belgium in respect of the persons concerned prevents an "overall and co-ordinated approach" to the social protection of these persons.

Consequently, the Committee held that there has been a violation of Article 30.

f) Article E in conjunction with Article 14(1)

Article E requires that the Charter rights be secured without discrimination. FIDH had alleged that, in general, the Belgian authorities' attitude towards the persons concerned is indicative of institutional discrimination towards them, in breach of Article E of the Charter.

The Committee stated that Article E prohibits discrimination on the basis of disability, as disability is adequately covered by the reference to "other status". It stated that Article E included an obligation on states to take account of relevant differences of particular groups in order to safeguard their rights.

The Committee noted that, in this case relating to the persons concerned, the comparison to be made for the purposes of discrimination was in respect of all other persons, "whether persons without disabilities, whose interest is nonetheless to make use of the social services, or those with minor or moderate disabilities."

It went on:

"The Committee deduces from Article E of the Charter that the States Parties are obliged, when taking measures in the social services field, to take account of the situation of highly dependent adults with disabilities so as to guarantee their effective access to the benefits of public policy on an equal footing with all other persons, even if that entails that persons with severe disabilities, on account of their own specific vulnerability, will be treated more favourably than others."

In relation to the various aspects of Article E violations, the Committee held as follows:

g) Article E in conjunction with Article 14(1)

As Belgium was not creating sufficient day and night care facilities to prevent the exclusion of many highly dependent persons with severe disabilities from this form of social welfare service appropriate to their specific, tangible needs, Belgium had violated Article E taken in conjunction with Article 14(1). The Committee noted that refusals of access to the existing care and accommodation facilities experienced by the persons concerned qualified as exclusion for which the responsibility could be attributed to the Respondent, these refusals were in themselves a question of private law relations between the persons concerned and those legally responsible for the care facilities. Accordingly, the Committee noted that Belgian anti-discrimination law allows the persons concerned to assert their right to non-discriminatory treatment and hold private actors to account.

h) Article E in conjunction with Article 13(3)

As the Committee had not raised a separate question under Article 13(3), there was no violation of Article E in conjunction with Article 13(3).

i) Article E in conjunction with Article 15(3)

The Committee held that Belgium was not in breach of Article E taken in conjunction with Article 15(3) as FIDH has not produced information and arguments showing with sufficient clarity that Belgium had violated its obligations under Article E taken in conjunction with Article 15(3).

j) Article E in conjunction with Article 16

The Committee had held that there was a breach of Article 16. It considered that this breach resulted in the persons concerned having to seek care from their families, leaving the families in a vulnerable and insecure state. This was held to stigmatise these families as a particularly vulnerable group. The Committee held that the Respondent was completely in violation of its Article E obligation to outlaw unequal access of the persons concerned to collective advantages.

k) Article E in conjunction with Article 30

The Committee held that the breach of Article 30 was a general and structural policy weakness affecting all persons with disabilities and does not specifically disadvantage the persons concerned as a particular group. Therefore, the Committee held that there was no breach of Article E in conjunction with Article 30.

Remedy

The Committee of Ministers is invited to recommend that Belgium pay the sum of € 2 000 to FIDH as lump sum compensation for expenses incurred for the proceedings.