

DECISION ON THE MERITS

18 February 2009

European Roma Rights Centre (ERRC) v. Bulgaria

Complaint No. 48/2008

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 234th session attended by:

Mrs Polonca KONČAR, President
Mr Jean-Michel BELORGEY
Mrs Csilla KOLLONAY LEHOCZKY
Mssrs Andrzej SWIATKOWSKI
Lauri LEPPIK
Colm O' CINNEIDE
Mrs Monika SCHLACHTER
Birgitta NYSTRÖM
Lyudmila HARUTYUNYAN
Mssrs Rüchan IŞIK
Petros STANGOS
Alexandru ATHANASIU
Luis JIMENA QUESADA
Ms Jarna PETMAN

Assisted by Mr Régis BRILLAT, Executive Secretary

Having deliberated on 18 February 2009

On the basis of the report presented by Mr Colm O' CINNEIDE

Delivers the following decision adopted on this date:

PROCEDURE

1. The complaint lodged by the European Roma Rights Centre (hereafter referred to as "ERRC") was registered on 28 March 2008. The European Committee of Social Rights ("the Committee") declared the complaint admissible on 2 June 2008.

2. Pursuant to Article 7§§1 and 2 of the Protocol providing for a system of collective complaints ("the Protocol") and the Committee's decision on the admissibility of the complaint, the Executive Secretary communicated the text of the admissibility decision on 9 June 2008 to the Bulgarian Government ("the Government"), the complainant organisation, the states party to the Protocol, the states that have ratified the Revised Charter and made a declaration under Article D§2 and to the international organisations of employers and trade unions referred to in paragraph 2 of Article 27 of the 1961 Charter, i.e. the European Trade Union Confederation (ETUC), Business Europe (formerly UNICE) and the International Organisation of Employers (IOE).

3. In accordance with Article 31§1 of the Committee's Rules, the Committee fixed a deadline of 21 July 2008 for the presentation of the Government's written submissions on the merits. Its submission was registered on 22 July 2008.

4. Pursuant to Rule 31§2, the President set 19 September 2008 as the deadline for the complainant to present its response to the Government's submissions. The response was registered on 19 September 2008 and forwarded to the Government on 6 October 2008. The complainant submitted additional information on 2 December 2008. The Government was invited to submit observations on the latter by 12 February 2009. No response was registered..

THE PARTIES' SUBMISSIONS

A – The complainant organisation

5. The complaint brought by the ERRC concerns the 2006¹ and 2008² amendments to the Social Assistance Act, which have lowered the maximum time periods for which most unemployed persons of working age can obtain monthly social assistance benefits to initially 18, then 12 and now 6 months.. Those who lose their entitlement to monthly social assistance can have this entitlement restored, but this is only possible when 12 months have passed since the expiration of the initial 18, 12 or 6 month period. Prior to these amendments, entitlement to social assistance benefits was unlimited in time and only made conditional on the needs of beneficiaries. The ERRC claims that the introduction of such maximum time limits deprives vulnerable

¹ Amendments to the Social Assistance Act were published in the Official Gazette on 28 February 2006.

² Additional amendments to the Social Assistance Act were voted by Parliament on 19 June 2008 and 5 November 2008.

individuals of access to important forms of social welfare support. The ERRC also claims that this reduction will have a disparate and unjustified effect on Roma, who are substantially overrepresented among the beneficiaries of social assistance. It also considers that it will have a negative effect on women, who the ERRC suggest will face pressure to leave their jobs and raise their children as a result of the imposition of these maximum time limits, since the impugned social assistance cuts do not apply to women who are raising a child up to 3 years of age. In addition, the ERRC states that no other existing forms of social welfare provision at present available in Bulgaria can compensate for or alleviate the impact of the social assistance cuts on affected individuals and groups. The ERRC considers that this situation constitutes a violation of Article 13§1 of the Revised Charter, taken alone or in conjunction with Article E.

B- The respondent Government

6. The Government states that the amendments to the Social Assistance Act, whereby it has progressively lowered the time during which social assistance can be received, only apply to unemployed persons who are fit to work. The aim of such amendments is to overcome the long-term dependency of unemployed persons on social assistance and to encourage their personal initiative and reintegration into the labour market. During the period that social assistance is interrupted, unemployed persons can make use of the opportunities provided by the Employment Bureau Directorates for education, training and employment. The Government also states that the impugned amendments are in no way discriminatory towards Roma, and, moreover, that it has taken a number of positive measures to improve the disadvantaged situation of Roma. It therefore considers that the statutory amendments which have introducing a temporal limitation on the receipt of social assistance payments do not violate Article 13§1 of the Revised Charter, whether alone or in conjunction with Article E.

RELEVANT DOMESTIC LAW

7. The right to social assistance is provided for in Article 51, paragraph 1 of the Bulgarian Constitution, which reads:

“Citizens shall have the right to social security and social assistance”.

8. The system of social assistance in Bulgaria is regulated by the Social Assistance Act of 1998. The aim of social assistance is to support persons who are not able to meet their basic needs in life by their own efforts, to encourage their employment and social reintegration and to promote social solidarity:

Article 1. (2) (Amended, SG No. 120/2002) This Act is intended:

1. to provide assistance to persons who are unable to secure by their own efforts adequate resources to meet their basic necessities of life;
2. to strengthen and develop social solidarity in hardship;
3. to assist the social re-integration of social assistance beneficiaries;

4. to assist in the gainful employment of unemployed persons eligible for receipt of social assistance benefits;
5. to encourage entrepreneurship in the social sphere by making it possible for natural and legal persons to provide social services.

9. The Act envisages three types of social assistance: monthly, targeted and one-off. All types of benefits are granted after an assessment by a social worker of the income of the person or family, property status, marital status, state of health, employment status, age and other circumstances:

Article 12. (1) Social assistance benefits shall be:

1. monthly;
2. target;
3. lump-sum.

(2) (New, SG No. 120/2002) Social assistance benefits shall be granted following an assessment of:

1. the income of the person or the family;
2. the property status of the applicant;
3. the marital status of the applicant;
4. the applicant's state of health;
5. the applicant's employment status;
6. the applicant's age;
7. other established circumstances.

(3) (New, SG No. 120/2002) The Council of Ministers shall determine the monthly amount of the guaranteed minimum income serving as a basis for determining the size of social assistance benefits under Paragraph (1).

(4) (Renumbered from Paragraph (2) and supplemented, SG No. 120/2002) The terms and procedure for the grant of social assistance benefits shall be established by the Regulations for Application of this Act with the exception of target benefits for heating which shall be regulated by an ordinance of the Minister of Labour and Social Policy.

10. The entitled persons/beneficiaries of social assistance are:

Article 2. (3) (Supplemented, SG No. 120/2002) Entitlement to social assistance shall accrue to Bulgarian citizens, families and cohabitants who, due to health, age, social and other reasons beyond their control, are unable to meet their basic necessities of life on their own through their work or on income accruing from property they own, or with the help of the persons whose dependants they are by law.

11. Targeted social assistance for purposes such as the payment of rent or heating is available for persons in need. Likewise, a lump sum may be granted once a year to cover accidental health, educational, domestic or other vital needs. Eligibility and the procedure for application of these benefits are regulated by the Rules and Regulations for the Implementation of the Social Assistance Act and other regulations of the Minister of Labor and Social Policy.

12. An unemployed person must have been registered in the Employment Office Directorates for at least 9 months before the submission of a claim for social assistance and not rejected any jobs offered or qualification courses organised by the Employment Offices:

Article 12b. (New, SG No. 120/2002) (1) Unemployed persons eligible for receipt of monthly benefits shall be enrolled in employment programmes approved by the Minister of Labour and Social Policy.

(2) Any persons referred to in Paragraph (1), who have refused to participate in employment programmes, shall be deprived of monthly benefits for a period of one year.

13. On 28 February 2006 an amendment to the Social Assistance Act limited the time for receiving social assistance benefits to 18 months. This time-limit was further reduced in 2008, first to 12 months (amendment of 19 June 2008) and then to 6 months (amendment of 5 November 2008). Prior to these amendments, benefits were unlimited in time and conditioned only on the needs of the beneficiaries. The contentious Article 12(c) reads as follows (does not take into account the latest amendment of 5 November 2008):

Article 12c. (New, SG No. 18/2006, effective 1.07.2006) (1) (Amended, SG No. 58/2008) Unemployed working-age individuals, except for the persons under Article 12b, Paragraph (2), shall be entitled to receiving monthly social benefits a continuous term of 12 months.

(2) Rights to monthly social benefits shall be re-established upon expiry of 12 month of its termination under terms and procedure, prescribed by the Regulation on the Implementation of this Act.

(3) The provision of Paragraph (1) shall not apply in the cases under Article 12b, Paragraph (4).

14. Certain categories of persons are not affected by the 18 or 12 or 6 month limitation period, and may receive social assistance benefits for an unlimited duration:

Article 12b. Paragraph (4) 1. persons taking care of children aged under 3 years:

(a) mothers (female or male adopters);

(b) single parents;

(c) guardians;

2. pregnant women after the first trimester;

3. persons with permanent disabilities or with certified temporary incapacity to work;

4. persons taking care of a sick member of the family or antecessors or descendants up to the second degree of consanguinity;

5. persons taking care of a family member or antecessors or descendants up to second degree of consanguinity who are disabled and need constant attendance;

6. persons suffering from mental diseases diagnosed by the competent authorities.

THE LAW

15. Article 13§1 of the Revised Charter reads:

Article 13 – The right to social and medical assistance

Part I: "Anyone without adequate resources has the right to social and medical assistance."

Part II: "With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; (...)"

16. Article E of the Revised Charter reads:

Article E – Non-discrimination

"The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status."

A. Arguments of the parties

a. The complainant organisation

17. The ERRC considers that by placing maximum time limits on eligibility for social assistance benefits the 2006 and 2008 amendments to the Social Assistance Act violate Article 13§1 of the Revised Charter. It argues that such amendments disregard the fundamental basis for entitlement to social assistance, which is individual need.

18. The ERRC emphasises that persons affected by the impugned measures may be arbitrarily deprived of their means of subsistence, because the social assistance cuts are not based on an assessment of individual circumstances, or related to any particular conduct of the persons affected, such as refusal to take up a job offered or the like. In particular, the amendments will affect persons who have actively searched for a job but have not been able to secure one. According to official statistics from the National Employment Agency, in June 2008 there was an average of 8 unemployed persons competing for 1 job vacancy. Therefore, the available job vacancies were clearly insufficient to absorb all unemployed persons willing to work.

19. As to the number of persons affected by the impugned amendments to the Social Assistance Act, the ERRC states that according to official statistical data 23,602 persons were deprived of social assistance as of 31 May 2008. Moreover, many such persons were part of the most vulnerable strata of society, being often poor, destitute, uneducated and marginalised.

20. The ERRC maintains that persons in need whose social assistance benefits will be discontinued after 1 January 2008 will also lose some other entitlements which are linked to being a recipient of social assistance, namely the right to medical insurance, the right to legal aid, the right to obtain agricultural land for cultivation with priority, and the right to be exempted from kindergarten taxes.

21. The ERRC claims that the amendments to the Social Assistance Act also violate Article E of the Revised Charter because they will have a disparate and unjustified impact on Roma, which amounts to indirect discrimination. It maintains that a substantially higher proportion of members of this ethnic group will be affected by these measures when compared to members of other ethnic groups in Bulgaria, since the Roma are disproportionately represented among the persons without adequate resources and who therefore rely on social assistance.

22. In support of its allegation that Roma are heavily overrepresented among the beneficiaries of social assistance and thus likely to be comparatively more affected by the amendments to the Social Assistance Act, the complaint quotes a 2002 UNDP survey¹ in which 44.4% of the Roma in Bulgaria had indicated that social assistance was the usual source of income for their households during the last six months. A survey from 2006 on Roma Integration and economic reform by the Open Society Institute in Bulgaria also estimated that between 62% and 98% of Roma relied on social assistance (the percentages are based on a low and a high estimate of the number of Roma in Bulgaria).

23. The ERRC alleges that the amendments to the Social Assistance Act, by excluding mothers caring for children under three years - who will not be affected by the social assistance cuts - are also likely to have a discriminatory and unjustified impact on women, with mothers in the poor families being potentially exposed to financial pressure to take child care leave and thus being deprived of the possibility to advance in working careers outside of their home.

24. Whilst the ERRC considers that the Government's aims for introducing the impugned amendments are legitimate, namely to stimulate the personal initiative of persons receiving social assistance so that they find jobs on the labour market, it nevertheless maintains that such aims cannot be pursued by leaving persons and their families without financial support as a form of pressure for them to find jobs. Moreover, the Government has failed to demonstrate that the prevailing economic and labour market conditions can absorb all those persons whose social assistance is to be cut, nor has it explained why job training and subsidised employment programmes could not have been implemented as alternative employment creation policies without cutting social assistance.

¹ UNDP, *Avoiding the Dependency Trap – a Human Development Report on the Roma Minority in Central and Eastern Europe* (UNDP, 2002)

25. In summary, the ERRC considers that the imposition of maximum time limits on the receipt of social assistance benefits has been introduced in an absolute and disproportionate manner, while Bulgarian social welfare legislation does not provide adequate alternative forms of social assistance to alleviate the negative effects of the cuts. There is no possibility for persons who have failed to find a suitable job to continue receiving some sort of support until a fresh assessment of their situation is conducted. In addition, the introduction of the time limits can be said to have a disparate and unjustified impact on the Roma and women.

b. The Government

26. The Government maintains that it has made efforts to prevent any potential unfavourable consequences resulting from the contested amendments made to the Social Assistance Act, and also has abided by the non-discrimination principle. It emphasises that the interruption of social assistance foreseen by Article 12(c) of the Social Assistance Act only applies to unemployed persons who are fit to work and of working age.

27. The main rationale given by the Government for making the contested legislative changes to the Social Assistance Act is that there is a pressing need to overcome the long-term dependency of unemployed persons on social allowances.

28. The Government states that the Bulgarian situation is not unique and that restrictions on the unlimited payment of social assistance benefits have also been introduced in other European countries.

29. It moreover emphasises that the amendments will not affect persons in the most seriously disadvantaged type of situations or who are in greatest need, who will continue to receive monthly social assistance on an unlimited basis (see § 15 above, which refers to Article 12(b) para. 4 of the Social Assistance Act which excludes certain categories of persons from the scope of the impugned new provision).

30. The Government indicates that the amounts of family allowances for children were increased in 2008, and also that new types of family allowances have been introduced in recent years, which taken together redress some of the negative impact of Article 12(c) of the Social Assistance Act.

31. The Government's central argument in justifying the measures taken is that persons who drop out of the system of social assistance can find jobs on the labour market in either subsidised employment programmes, or directly on the real labour market (the decreasing unemployment rate in the country is mentioned as a relevant factor in this context). The Government describes a number of operational programmes and policy measures which provide professional training, incentives for finding a job, encouragement for the start-up of small businesses and implement a large-scale national programme to provide subsidised employment. An individualised approach has been adopted by the Employment Bureau Directorates, who work individually with

each person actively searching for employment and assess the opportunities and particular obstacles that each person may face.

32. The Government states that it has also undertaken a number of organisational and administrative measures to minimise the negative impact of the changes to the Social Assistance Act. These include notifying all persons affected by the statutory changes of the need to search more actively for jobs, the submission of lists of persons excluded from entitlement to social assistance to the Employment Bureaus so that they can receive assistance and priority in finding jobs, and the inclusion of a large number of such persons in employment or training courses.

33. The Government considers that it is incorrect to assert, as the complainant does, that persons losing social assistance will be deprived of the right to legal aid, the right to health insurance, the right to receive farming land for cultivation or exemptions from kindergarten fees.

34. As regards the alleged disparate impact of the amendments to the Social Assistance Act on the Roma, the Government maintains that Bulgarian legislation does not permit the collection of personal data separated by ethnic groups. Therefore, there is no reliable data on the percentage of Roma receiving social assistance, or on the number of Roma that may be affected by the cuts. Moreover, the Government describes a number of measures/programmes that it is carrying out to improve the labour market integration, training, education and employment of Roma. It also notes that Roma are a target group under the National Action Plan on Employment for 2007.

35. The Government considers that the complainant's allegation that the amendments may have a possible disparate impact on women is unfounded. It argues that both parents have equal rights under the legislation, which provides that persons taking care of children under 3 years can receive social assistance benefits without interruption.

36. In summary, the Government considers that the termination of monthly social assistance after the expiration of a determined period of time will stimulate unemployed people who are able to seek work to take more active steps to engage with the labour market, and therefore will also assist their social inclusion and help remedy the negative impact of long-term absence from the working environment.

B. Assessment of the Committee

i. The alleged violation of Article 13§1 of the Revised Charter

37. The Committee, by way of introduction, emphasises the fundamental right of individuals to be able to access sufficient resources and social assistance in order to live in a manner compatible with human dignity. The Committee also emphasises that recognition of this basic right is an essential ingredient of any strategy which is intended to combat social exclusion in a

substantive and meaningful manner. The inclusion of Article 13§1 in the European Social Charter, which requires States to guarantee minimum income and social assistance for persons without adequate resources, must be understood in this context.

38. The Committee recalls that under Article 13§1 adequate benefits must be payable to “any person” who is without adequate resources and in need. The text of Article 13§1 clearly establishes that this right to social assistance takes the form of an individual right of access to social assistance in circumstances where a basic condition of eligibility is satisfied, which occurs when no other means of reaching a minimum income level consistent with human dignity are available to that person.

39. States may establish a link between access to this right and a willingness to seek employment or to receive vocational training. The Committee recalls in this respect its statement of interpretation on Article 13§1 in Conclusions XIV-1 that linking social assistance with willingness to look for work or undergo vocational training is in conformity with the Charter, provided that these conditions are reasonable and in keeping with the aim pursued, namely to find a lasting solution to the person’s problems in accessing the labour market. However, access cannot be made subject to time-limits, if the persons affected continue to meet the basic condition for eligibility established by Article 13§1. Reducing or suspending social assistance benefits may only be in conformity with the Charter if they do not deprive persons in need of their means of subsistence.

40. The Committee considers that the contested amendments to the Social Assistance Act, which establish the interruption of social assistance for unemployed persons in active age after 18, 12 or 6 months, cannot be considered to be a permissible restriction on the right to receive social assistance under the provisions of Article 13§1.

41. The Committee considers that persons who will be denied continuing entitlement to monthly social assistance as a result of these legislative measures will face the risk of the loss of basic means of subsistence. The Committee notes that the Government has taken measures to improve the education and training of unemployed persons, as well as measures to encourage the reintegration into the labour market of persons that will be losing social assistance as a result of the contested legislative amendments. Nevertheless, despite these measures, it remains probable that only a limited number of persons affected by the social assistance cuts will actually obtain employment. The difficulty for persons in finding jobs is reflected in the official statistics from the National Employment Agency, referred to by both parties in their submissions, that an average of 8 unemployed persons were competing for 1 job vacancy in June 2008. As a result, it is likely that finding a job will be a serious problem for many people that will be affected by these measures, and therefore the loss of minimum income will leave them without sufficient means to meet the necessary costs of living in a manner consistent with human dignity.

42. The Committee also considers it has received insufficient evidence to indicate that alternative forms of social assistance provision exist in Bulgaria to ensure that persons denied monthly social assistance can obtain adequate resources to live in a manner compatible with their human dignity, or that the exemption of particular and specifically defined categories of persons from the impact of the legislative changes will be sufficient in the circumstances to ensure that those in need will receive a sufficient level of social assistance to satisfy the requirements of Article 13(1).

43. Taking into account the serious risk that persons affected by the denial of continued social assistance will be deprived of adequate resources, and that social assistance must be provided as long as need persists to enable the person concerned to continue to live in manner compatible with their human dignity, the Committee holds that the amendments to the Social Assistance Act suspending minimum income for persons in need after 18, 12 or 6 months are in breach of Article 13§1 of the Revised Charter.

44. The ERRC also contends that persons in need whose social assistance benefits will be discontinued will also lose some other rights which are linked to entitlement to receive social assistance. Insofar as this is the case in respect of the right to health insurance, the Committee refers to its assessment of the same legal arguments in the complaint *European Roma Rights Centre v. Bulgaria*, No. 46/2007, decision on the merits of 10 December 2008, §§43 and 44. As regards the loss of other rights alleged by the complainant, the latter has not submitted sufficient evidence enabling the Committee to examine such questions separately from the basic issue of access to social assistance.

ii. The alleged violation of Article E of the Revised Charter read in conjunction with Article 13§1

45. The Committee considers that the legislative measures in question are likely to have a considerable impact upon some of the most disadvantaged groups in Bulgaria and, in particular, upon the Roma – in light of the special difficulties that Roma face in gaining access to the labour market and the statistical evidence that exists of the extent to which Roma families are dependant upon social assistance. It also considers that a denial of the right to social assistance set out in Article 13§1 will inevitably constitute a denial of the fundamental right of persons belonging to socially disadvantaged groups to equality of respect and esteem. As a result, the allegations of a breach of Article E of the Revised Charter read in conjunction with Article 13§1 can be regarded as subsumed in the circumstances of this complaint within the wider question of whether Article 13§1 has been breached by the impugned amendments to the Social Assistance Act.

46. Therefore, having regard to the finding of a violation of the right to social assistance of all those persons affected by the amendments to the Social Assistance Act (see paragraphs 37-44, above), the Committee does not consider it necessary to examine the allegations of a breach of Article E of the Revised Charter read in conjunction with Article 13§1.

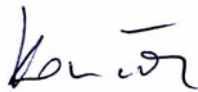
CONCLUSION

For these reasons the Committee concludes

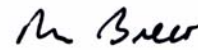
- unanimously that there is a violation of Article 13§1 of the Revised Charter; and
- by 8 votes against 6 that it is not necessary to examine whether there has been a violation of Article E of the Revised Charter read in conjunction with Article 13§1.



Colm O'CONNOR
Rapporteur



Polonca KONČAR
President



Régis BRILLAT
Executive Secretary

In accordance with Rule 30 of the Committee's Rules, dissenting opinions by Mr Petros STANGOS, joined by Mr Jean-Michel BELORGEY, and Ms Csilla KOLLONAY LEHOCZKY are appended to this decision.

**DISSENTING OPINION OF MR PETROS STANGOS,
JOINED BY MR JEAN-MICHEL BELORGEY**

Although I agree with the unanimous conclusion that there has been a violation of Article 13§1 of the revised Charter, I also think it was necessary to establish whether there had been a violation of Article E of the revised Charter, read in conjunction with Article 13§1. In substance, I believe that the Bulgarian legislation that was the subject of this collective complaint is in breach of Article E, in conjunction with Article 13§1, for reasons I shall now explain.

Article E of the revised Charter is directly based on Article 14 of the European Convention on Human Rights and the Committee pays particular "*attention*" to the Charter's role as a "*human rights instrument to complement the Convention*" (Complaint No. 14/2003, International Federation of Human Rights Leagues (FIDH) v. France, decision on the merits of 8 September 2004, § 27), so consideration needs to be given to the role of Article 14 in the Convention system, as shown by the case-law of the European Court of Human Rights. The starting point for this case-law was that "it is as though the latter formed an integral part of each of the articles laying down rights and freedoms" (ECHR, 23.7.1968, *Use of Languages in Education in Belgium*, § 9), in other words, the principle of non-discrimination enshrined in Article 14 applies to all the substantive provisions of the Convention (ECHR, 28.11.1978, *Luedicke*, § 53). The Court therefore considered for a long time that it was unnecessary to determine whether Article 14 had been breached, if it had already concluded that another specific provision had been violated. However, it relaxed this case-law in subsequent judgments, in which it stated that after finding that a specific provision had been violated, there would have to be an examination from the article 14 standpoint "if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case" (ECHR, 9.10.1979, *Airey*, § 30, a judgment further clarified, though sometimes qualified, by subsequent ones).

The position taken by the majority of the Committee appears in §45 of the decision, which states that "the allegations of a breach of Article E of the Revised Charter read in conjunction with Article 13§1 can be regarded as subsumed ... within the wider question" of whether the Bulgarian measures in question are in breach of Article 13§1. In my opinion, this reflects the earlier case-law of the Court whereby a violation of the non-discrimination rule was diluted into a constituent part of one or more violations of other substantive rules of the Convention (just as here, by analogy, a violation of Article E becomes a constituent part of an Article 13§1 violation). Moreover, the statement in the same paragraph that the national legislation's denial of the right set out in Article 13§1 constitutes "a denial of the fundamental right of socially disadvantaged groups to equality of respect and esteem", suffers from excessive formalism, if it is not meaningless. Who, for example, are the "advantaged" social group against whom we can measure the unequal treatment of the disadvantaged? The majority make no attempt in this part of

the decision to undertake such a comparison, even though such an (intellectual) exercise is called for in any legal investigation worthy of the name into allegations of discrimination.

I believe that the Bulgarian legislation considered in this complaint is precisely the sort of case envisaged in the Court's *Airey* judgment, since its discriminatory element is a fundamental aspect of the legislation itself. Through its very purpose – reducing the time limit for entitlement to social assistance benefits – the legislation targets persons in socially disadvantaged groups, among whom, sadly, are included the majority of the Roma population. The effect of the legislation, which is to interrupt their benefits, is to place them at a disadvantage compared with other socially disadvantaged groups and deprive them of a minimum income that could have enabled them to live in dignity. I therefore consider that the "primary" violation of Article E of the revised Charter encompasses and entails a "secondary" violation of Article 13§1.

I would say in support of my argument that consideration must be given to the normative dimension of non-discrimination, which consists in the prohibition of *material discrimination*, whether this be different treatment of similar situations or treating different situations the same. It must then be established whether this applies to the relevant Bulgarian legislation. As a first step, though, the different groups of the population affected need to be identified.

It is clear that the complainants are challenging the compatibility with the revised Charter of domestic legislation of general application and that, as I will show, those affected are defined by their socio-economic status. The complainants only refer to the ethnic status of these persons – Roma – in connection with the disproportionate effect that this legislation of general, and superficially neutral, application has on them (see Complaint, case document No. 1, 28.3.2008, pp. 14-17). However, from the standpoint of establishing discrimination, this quantitative criterion cannot be considered satisfactory. In the case of legislation such as this the discriminatory purpose is a key element. Moreover, such discrimination may be intrinsic because by its nature the legislation is likely to have a disadvantageous effect on certain persons because of their difficult socio-economic circumstances.

The legal basis for my proposed approach derives from a path-breaking judgment of the Court of Justice of the European Communities (CJCE) in *John O'Flynn v. Adjudication Officer* of 23.5.1996 (case C-237/94). This has had a positive impact on the wording of Community directives on equality based on Article 13 of the EC Treaty and has been confirmed by subsequent judgments of the Court. It concerns the free movement of workers. According to the CJCE, "unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage" (§20). The approach adopted in this judgment, in which indirect discrimination is established on the basis of disproportionate impact, represents considerable progress. Emphasising the discriminatory potential of

such an apparently neutral measure because of its very nature dispenses with the need to establish proof of a disproportionate effect. Instead of having to establish quantitatively the impact of a particular measure, those alleging discrimination merely have to focus more generally on the measure's likely effect, having regard to the conditions to which it applies. For example, in the case of freedom of movement, a condition that is presented as being geographical appears, by its nature, to be suspect, because, as seems obvious, it will have a disproportionate effect on persons who have exercised their freedom of movement.

In the present case, what creates the suspicion of discrimination in the relevant legislation, both in its nature and from the outset, is the fact that the monthly social assistance is allocated specifically to unemployed persons (Article 12B of the legislation introduced in 2008, see Complaint, case document No. 1, 28.3.2008, p. 11). After the expiry period of 18 months (or 12 or 6 months following the 2008 amendments to the legislation), a number of persons who had been receiving social assistance will, at some time in the future, find work while others will not. This is acknowledged explicitly in §41 of our decision on the merits. Thus, once the aforementioned period expires two distinct groups will emerge within the Bulgarian socially disadvantaged population, with quite differing situations: those who will find work and those who will not. Yet both groups are treated the same in law, namely withdrawal of their social assistance. The long-term effect of withdrawing assistance from this second socially disadvantaged group is to deprive them of the resources that would have enabled them to live in dignity. As such they are the victims of a violation of the right to social assistance under Article 13§1 of the revised Charter, particularly as the other group of non-beneficiaries of social assistance, who at a certain point do find work, will have the opportunity to live in decent conditions. In the situation that I have just described, it is irrelevant that the second group is made up of persons from the Roma community. It is the socio-economic status – being unemployed – which determines over time (from the award of social assistance to its withdrawal) that they come within the scope of the legislation.

In conclusion, and for all the theoretical and practical reasons that I have described, I consider that the domestic legislation concerned constitutes discrimination, as prohibited in Article E of the revised Charter, against members of a precise category of the socially disadvantaged population of Bulgaria, namely persons who are "permanently unemployed, that is both when they were receiving the social benefit and after the expiry of this period. This is in breach of the right to social assistance under Article 13§1 of the revised Charter, which in these social and economic circumstances constitutes those persons' means of subsistence.

DISSENTING OPINION OF MRS CSILLA KOLLONAY LEHOCZKY

I agree with the decision of the Committee that there was a violation of article 13§1. On the other hand I disagree with its conclusion of not considering necessary to examine the breach of this article in conjunction with Article E of the Revised Charter. The view of the majority asserting that "the allegations of a breach of Article E of the Revised Charter read in conjunction with Article 13§1 can be regarded as subsumed in the circumstances...within the wider question" of the violation of Article 13§1 considers the implied fundamental discrimination as secondary issue and thereby loses from sight the very core of the collective complaint.

Besides the arguments presented below, we can find support in the case-law of the European Court of Human Rights for not rejecting the consideration of Article E in this case. While it mostly refrains from addressing discrimination in cases when it has already found a violation of a substantive Article considered alone, still its "position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case" (§89 *Chassagnou and Others v. France*, 29 April 1999). Further notable for us here in this case is that the Court found double violation to the Convention by the same factual situation, i.e. unreasonable differentiation between landowners. First, this differentiation undermined the defense of the state (necessity and proportionality) referring to its legitimate aim in limiting fundamental rights and thereby establishing the violation of the substantive article separately. Second, the very same fact served as ground for establishing a violation of the same substantive article considered also in conjunction with article 14.

Article E of the Charter (even more than Art. 14 of the Convention) cannot be considered a pure "subsidiary" rule designed to help with finding violations when the substantive provision taken alone cannot be established without reference to the element of discrimination. Its principal significance for the Charter grows beyond this role.

It is true that the contested amendments of the Bulgarian Social Assistance Act denying monthly social assistance to unemployed persons after a certain period of payment and exposing those affected to the loss of basic means of assistance have created a violation of Article 13.1 taken alone. The amendment implies a presumption that unemployed persons have an option to undertake or not employment, therefore being unemployed beyond a certain period is a sign of the lack of true will on the side of the beneficiary and this can be influenced by the coercion of interrupting assistance. This presumption behind the legislative amendment turns into pure punishment for situation in the case of those whose situation makes most unlikely to get a job at the same time being the group most surrounded by negative stereotypes on working habits.

I agree with the finding of the conclusion that the violation of Article 13§1 by the legislative amendment constitutes a denial of the fundamental right of socially disadvantaged groups to equality of respect and esteem. However, in itself this is not discrimination in legal terms, it is absorbed by the violation of

13§1 and cannot absorb the existing discrimination against one sub-group permeating the rules and determining the main thrust of the contested provisions.

§45 of the conclusion blurs the borderline between the overall target group of article 13.1 - labelled rightly as the socially most disadvantaged groups – and between particular groups within that larger group unevenly affected by the provisions in matter. Namely, the Roma, exposed to historic and pervasive discrimination in the past and facing unmountable difficulties now in a competition where there are 8 applicants for one job. The denial by the majority to distinguish between the effect of the legislative amendment to the Roma and non-Roma part of the relevant population and looking it indistinctly as “socially disadvantaged group” (§45) denies the concept of indirect discrimination lying, at the minimum, behind the amendment of the Bulgarian Social Assistance Act.

For these reasons I dissent.