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Contribution of the Council of Europe

Migrant workers' rights as guaranteed by the European Social Charter

Migrant workers' rights are guaranteed in the European Social Charter¹ and the revised European Social Charter, in Articles 18 and 19.

Article 18 reads as follows:

- “1. With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake to apply existing regulations in a spirit of liberality;
2. With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;
3. With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake to liberalise, individually or collectively, regulations governing the employment of foreign workers;
4. With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties recognise the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.”

¹ The European Social Charter (hereinafter referred to as "the Charter") sets out rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by States Parties. The 1996 Revised European Social Charter, which came into force in 1999, is replacing the initial 1961 treaty. 43 States have ratified either the Charter or the Revised Charter. Three Protocols have been added to the initial 1961 treaty: Protocol No. 1 (1998) which adds new rights – Protocol No. 2 (1991) which reforms the procedure of control regarding reports – Protocol No. 3 (1995) which provides for a procedure of collective complaints.

Article 19 of the Revised Charter reads as follows:

"1. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;

2. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;

3. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;

4. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

- a. remuneration and other employment and working conditions;
- b. membership of trade unions and enjoyment of the benefits of collective bargaining;
- c. accommodation;

5. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;

6. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

Appendix : For the purpose of applying this provision, the term "family of a foreign worker" is understood to mean at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker.

7. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;

8. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;

9. With a view to ensuring the effective exercise of the right of migrant workers and

their families to protection and assistance in the territory of any other Party, the Parties undertake to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;

10. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply;

11. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;

12. With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker".

Articles 18 and 19 have given rise to a significant body of case law established during their supervision by the European Committee of Social Rights, ("the Committee").² This provides a valuable insight into the nature and scope of the Articles.

Article 18

Article 18 applies to employees and the self-employed who are nationals of States party to the Charter. It also covers members of their family allowed into the country for the purposes of family reunion³. Article 18 relates not only to workers already on the territory of the State concerned, but also to workers outside the country applying for a permit to work on the territory.⁴ This article also covers foreign workers who have obtained employment in a foreign country but subsequently lose it.⁵

In material terms, the right of migrant workers to engage in gainful employment entails:

² The European Committee of Social Rights (referred to below as "the Committee") ascertains whether countries have honoured the undertakings set out in the Charter. Its fifteen independent, impartial members are elected by the Council of Europe's Committee of Ministers for a period of six years, renewable once. The Committee determines whether or not national law and practice in the States Parties are in conformity with the Charter.

► A monitoring procedure based on national reports: Every year the states parties submit a report indicating how they implement the Charter in law and in practice. Each report concerns some of the accepted provisions of the Charter. The Committee examines the reports and decides whether or not the situations in the countries concerned are in conformity with the Charter. Its decisions, known as "conclusions", are published every year.

► A collective complaints procedure: Under a protocol opened for signature in 1995, which came into force in 1998, complaints of violations of the Charter may be lodged with the European Committee of Social Rights.

³ Conclusions X-2, Austria, p. 137

⁴ Conclusions XIII-1, Sweden, p. 204

⁵ Conclusions II, Denmark, Germany, Ireland, Italy, United Kingdom, p. 61

1. The application of regulations in a spirit of liberality

The Committee's assessment of the degree of liberality used in applying existing regulations is based on figures showing the refusal rates for work permits. To this end, the figures supplied must be broken down by country and must also distinguish between first-time applications and renewal applications.⁶

2. Simplification of existing formalities

With regard to the formalities to be completed, conformity with Article 18§2 presupposes the possibility of completing such formalities in the country of destination as well as in the country of origin and obtaining the residence and work permits at the same time and through a single application.⁷ It also implies that the documents required (residence/work permits) will be delivered within a reasonable time.⁸ Chancery dues and other charges for the permits in question must not be excessive and, in any event, must not exceed the administrative cost incurred in issuing them.⁹

3. Liberalisation of regulations governing employment

Under Article 18§3, States are required to liberalise periodically the regulations governing the employment of foreign workers regarding access to the national labour market. The conditions laid down for access by foreign workers to the national labour market must not be excessively restrictive, in particular with regard to the geographical area in which the occupation can be carried out and the requirements to be met.¹⁰

States parties may make foreign nationals' access to employment on their territory subject to possession of a work permit but they cannot ban nationals of States Parties, in general, from occupying jobs for reasons other than those set out in Article G of the Revised Charter. The only jobs from which foreigners may be banned therefore are those that are inherently connected with the protection of the public interest or national security and involve the exercise of public authority.

States are required to liberalise periodically also regulations governing the employment of foreign workers regarding the right to engage in an occupation. A person who has been legally resident for a given length of time on the territory of another Party should be able to enjoy the same rights as nationals of that country. The restrictions initially imposed with regard to access to employment (which can be accepted only if they are not excessive) must therefore be gradually lifted.¹¹

⁶ Conclusions XVII-2, Spain, p. 747

⁷ Conclusions XVII-2, Finland, p. 243

⁷ Conclusions XVII-2, Finland, p. 243

⁸ Conclusions XVII-2, Portugal, pp. 702 - 703

⁹ Conclusions XVII-2, Portugal, p. 703

¹⁰ Conclusions V, p. 119.

¹¹ Conclusions II, p. 60.

Lastly, loss of employment must not lead to the cancellation of the residence permit, thereby obliging the worker to leave the country as soon as possible. In such cases, Article 18 requires extension of the validity of the residence permit to provide sufficient time for a new job to be found.¹²

4. The right to engage in a gainful occupation

According to Article 18§4, States undertake not to restrict the right of their nationals to leave the country to engage in gainful employment in other Parties to the Charter. The only permitted restrictions are those provided for in Article G of the Revised Charter, i.e. those which are “prescribed by law 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.”¹³

Article 19

The right of migrant workers and their families to protection and assistance entails:

1. Adequate and free services - protection against misleading propaganda

Article 19§1 obliges States to provide free information and assistance to nationals wishing to emigrate and to nationals of other Parties who wish to immigrate¹⁴. Information should be reliable and objective and cover issues such as formalities to be completed and the living and working conditions they may expect in the country of destination (such as vocational guidance and training, social security, trade union membership, housing, social services, education and health)¹⁵.

Another obligation under this paragraph is that States must take measures to prevent misleading propaganda relating to immigration and emigration. Such measures should prevent the communication of misleading information to nationals leaving the country and act against false information targeted at migrants seeking to enter¹⁶.

To be effective, action against misleading propaganda should include legal and practical measures to tackle racism and xenophobia as well as women trafficking. Such measures, which should be aimed at the whole population, are necessary inter alia to counter the spread of stereotyped assumptions that migrants are inclined to crime, violence, drug abuse or disease¹⁷.

¹² Conclusions XVII-2, p. 247.

¹³ For examples of permitted restrictions, see inter alia Conclusions XI-1, p. 155, and Conclusions 2005, p. 105.

¹⁴ Conclusions I, p. 82

¹⁵ Conclusion III, p. 87, Cyprus

¹⁶ Conclusions XIV-1, p. 366, Greece

¹⁷ Conclusion XV-1, p. 59, Austria

States must also take measures to raise awareness amongst law enforcement officials, such as awareness training of officials who are in first contact with migrants.

2. Facilitating departure, journey and reception

This paragraph obliges States to adopt special measures for the benefit of migrant workers, beyond those which are provided for nationals to facilitate their departure, journey and reception¹⁸.

Reception must include not only assistance with regard to placement and integration in the workplace, but also assistance in overcoming problems, such as short-term accommodation, illness, shortage of money and adequate health measures¹⁹.

3. Promotion of co-operation between social services

The scope of this paragraph extends to migrant workers immigrating as well as migrant workers emigrating to the territory of any other State. Contacts and information exchanges should be established between public and/or private social services in emigration and immigration countries, with a view to facilitating the life of emigrants and their families, their adjustment to the new environment and their relations with members of their families who remain in their country of origin²⁰. Formal arrangements are not necessary, especially if there is little migratory movement in a given country. In such cases, the provision of practical co-operation on a needs basis may be sufficient.

Common situations in which such co-operation would be useful would be for example where the migrant worker, who has left his or her family in the home country, fails to send money back or needs to be contacted for family reasons, or where the worker has returned to his or her country but needs to claim unpaid wages or benefits or must deal with various issues in the country in which he was employed²¹.

4. Equal treatment regarding pay, membership of trade unions, housing

This paragraph obliges States to secure for migrant workers treatment not less favourable than that of their own nationals in the areas of: (i) remuneration and other employment and working conditions, (ii) trade union membership and the enjoyment of benefits of collective bargaining, and (iii) accommodation.

States are required to guarantee certain minimum standards in these areas with a view to assisting and improving the legal, social and material position of migrant workers and their families.

¹⁸ Conclusions III, p. 88

¹⁹ Conclusions IV, p. 116

²⁰ Conclusions XIV-1, p. 137, Belgium

²¹ Conclusions XIV-1, p. 165-166

States are required to prove the absence of discrimination, direct or indirect, in terms of law and practice²², and should inform of any practical measures taken to remedy cases of discrimination. Moreover, States should pursue a positive and continuous course of action providing for more favourable treatment of migrant workers²³.

a remuneration and other employment and working conditions;

Under this sub-heading, States are obliged to eliminate all legal and de facto discrimination concerning remuneration and other employment and working conditions, including in-service training and promotion. The provision applies notably to vocational training²⁴.

b membership of trade unions and enjoyment of the benefits of collective bargaining;

This sub-heading requires States to eliminate all legal and de facto discrimination concerning trade union membership²⁵ and as regards the enjoyment of the benefits of collective bargaining, including access to administrative and managerial posts in trade unions.

c accommodation;

The undertaking of States under this sub-heading is to eliminate all legal and de facto discrimination concerning access to public and private housing. There must be no legal or de facto restrictions on home-buying²⁶, access to subsidised housing or housing aids, such as loans or other allowances²⁷.

5. Equal treatment concerning taxes

This paragraph recognises the right of migrant workers to equal treatment in law and in practice in respect of the payment of employment taxes, dues or contributions²⁸.

6. Right to family reunion

This paragraph obliges States to allow the families of migrants legally established in their territory to join them. The worker's children entitled to family reunion are those who are dependent and unmarried, and who fall under the legal age-limit in the receiving state (under the Revised Charter the age limit for admission under family reunion is set at the age of majority, which in most countries is 18 years).

²² Conclusions III, p. 92

²³ Conclusions I, p. 81

²⁴ Conclusions VII, p. 103

²⁵ Conclusions XIII-3, p. 418

²⁶ Conclusions IV, p. 121

²⁷ Conclusions III, p. 92

²⁸ Conclusions II, p. 68

"Dependent" children are understood as being those who have no independent existence outside the family group, particularly for economic or health reasons, or because they are pursuing unpaid studies²⁹.

Conditions and restrictions of family reunion:

a) Refusal on health grounds

A state may not deny entry to its territory for the purpose of family reunion to a family member of a migrant worker for health reasons. A refusal on this ground may only be admitted for specific illnesses which are so serious as to endanger public health³⁰. These are the diseases requiring quarantine which are stipulated in the World Health Organisation's International Health Regulations of 1969, or other serious contagious or infectious diseases such as tuberculosis or syphilis. Very serious drug addiction or mental illness may justify refusal of family reunion, but only where the authorities establish, on a case-by-case basis, that the illness or condition constitutes a threat to public order or security³¹.

b) Length of residence

States may require a certain length of residence of migrant workers before their family can join them. A period of a year is acceptable under the Charter. On the contrary, a period of three years is not in conformity with this provision of the Charter³².

c) Housing condition

The requirement of having sufficient or suitable accommodation to house the family or certain family members should not be so restrictive as to prevent any family reunion³³.

d) Means requirement

The level of means required by States to bring in the family or certain family members should not be so restrictive as to prevent any family reunion³⁴.

Once a migrant worker's family members have exercised the right to family reunion and have joined him or her in the territory of a State, they have an independent right to stay in that territory.

²⁹ Conclusions VIII, p. 212

³⁰ Conclusions XVI-1, p. 316, Greece

³¹ Conclusions XVI-1, pp. 227-228, Finland

³² Conclusions I, p. 69

³³ Conclusions IV, p. 126

³⁴ Conclusion XIII-1, p. 209

7. Equal treatment concerning legal proceedings

Under this paragraph, States must ensure that migrant workers residing or working lawfully in the territory of the states parties must benefit from both a treatment not less favourable than that of nationals, and a treatment which takes account of their specific conditions.

Any migrant worker residing or working lawfully within the territory of a state party who is involved in legal or administrative proceedings and does not have counsel of his or her own choosing should be advised that he/she may appoint counsel and, whenever the interests of justice so require, be provided with counsel, free of charge if he or she does not have sufficient means to pay the latter, as is the case for nationals or should be by virtue of the European Social Charter. Under the same conditions (involvement of a migrant worker in legal or administrative proceedings), whenever the interests of justice so require, a migrant worker must have the free assistance of an interpreter if he or she cannot properly understand or speak the national language used in the proceedings and have any necessary documents translated. Such legal assistance should be extended to obligatory pre-trial proceedings.³⁵

8. Safeguards against expulsion

This paragraph obliges States to prohibit by law the expulsion of migrants lawfully residing in their territory, except where they are a threat to national security, or offend against public interest or morality³⁶.

The legislation of a number of countries has already gone beyond this requirement by providing that neither may expulsion be imposed, even where the right to reside is forfeited especially in connection with circumstances of unemployment, upon migrant workers who have previously resided lawfully in their territory for a certain time and/or entered into marriage there or had offspring³⁷.

Both in these countries and in those whose legislation embodies no provision of this kind, several types of problem are posed by the situation of migrant workers who, being without employment, are ineligible for renewal of their residence permits and thereby at risk of removal from the territory:

1. Firstly, if they have conferred the right of residence on a spouse and/or children, loss of their own right of residence cannot affect their family members' independent rights of residence, which may have a longer term of validity than their own.
2. Secondly, for as long as a migrant workers' family members hold a right of residence it must not be possible to remove even a foreigner, who has personally lost this right except where they

³⁵ Conclusions 2011, General introduction, statement of interpretation, p 7

³⁶ Conclusions VI, p. 126

³⁷ Conclusions 2011, General introduction, statement of interpretation, p. 8

endanger national security or offend against public interest or morality; such is the implication of Article 8 of the European Convention for the Protection of

Human Rights as often interpreted by the ECtHR, especially by the decisions in the cases of *Berrehab v. Netherlands* of 21 June 1988 and *Mengesha Kimfe and Agrau v. Switzerland* of 2010. The *Berrehab* decision found that the "economic well-being of the country" was not apt to justify the expulsion or removal of a foreigner whose daughter also resided in the territory of the state wishing to take this measure. The *Kimfe and Agrau* decisions disallow the same ground with regard to a restricted residence measure in two different cantons imposed on two spouses whose removal does not seem feasible at least for some time.

3. Thirdly, the impossibility of expelling or removing a migrant worker which follows either from a State Party's undertakings pursuant to the Charter or from choices specific to that state and enshrined in its legislation, presupposes that the migrant worker is not placed in a situation of non-law as regards residence, i.e. holds the necessary documents to travel both in the country and beyond its borders and to obtain the social benefits which can be claimed by migrant workers whose situation is in order.
4. Lastly, national legislation should reflect the legal implications of Article 18§1 of the Charter read in conjunction with Article 19§8 as informed by the case-law of the ECtHR, in keeping with the developments which, for several decades now, have transformed migratory trends. Foreign nationals who have been resident for a sufficient length of time in a state, either legally or with the tacit acceptance of their illegal status by the authorities in view of the host country's needs, should be covered by the rules that already protect other foreign nationals from deportation."

Risks to public health are not in themselves risks to public order and cannot constitute a ground for expulsion, unless the person refuses to undergo suitable treatment³⁸.

The fact that a migrant worker is dependent on social assistance can not be regarded as a threat against public order and cannot constitute a ground for expulsion³⁹.

States must ensure that foreign nationals served with expulsion orders have a right of appeal⁴⁰ to a court or other independent body, even in cases where national security, public order or morality are at stake.

Migrant worker's family members, who have joined him or her through family reunion, may not be expelled as a consequence of his or her

³⁸ Conclusion V, p. 138

³⁹ Conclusion V, pp. 138-139

⁴⁰ Conclusions IV, pp. 129-130

own expulsion, since these family members have an independent right to stay in the territory⁴¹.

The guarantees against expulsion contained in this paragraph only apply to migrant workers and his or her family members if these persons reside legally in the territory of the State⁴².

9. Right to transfer earnings and savings

This provision obliges States not to place excessive restrictions on the right of migrants to transfer earnings and savings, either during their stay or when they leave their host country⁴³.

Migrants must be allowed to transfer money to their own country or any other country.

10. Self-employed migrants

Under this paragraph, States must ensure that the protection and assistance provided for in paragraphs 1 to 9, 11 and 12 are extended to self-employed migrant workers and their families⁴⁴.

States must ensure that there is no discrimination, in law or in practice on the one hand between wage-earners and self-employed migrants, and on the other hand, between self-employed migrants and self-employed nationals. However, even in the case of full equality between wage-earners and self-employed migrants and between self-employed migrants and self-employed nationals, the finding of non-conformity of paragraphs 1 to 9, 11 and/or 12 of Article 19 will lead to a non-conformity of paragraph 10.

11. Language training / mother tongue teaching

Under Article 19§11, States should promote and facilitate the teaching of the national language to children of school age, as well as to the migrants themselves and to members of their families who are no longer of school age⁴⁵. The teaching of the national language of the receiving state is the main means by which migrants and their families can integrate into the world of work and society at large.

The language of the receiving country is automatically taught to children throughout their formal education, but this measure is not sufficient to fulfil the obligations arising out of Article 19§11. States must endeavour to introduce additional educational support alongside formal schooling for migrant workers' children who have not attended the first few primary school years and who may therefore lag behind their classmates who are nationals of the receiving state.

⁴¹ Conclusions XVI-1, pp. 460-461, The Netherlands

⁴² Conclusions II, p. 198, Cyprus

⁴³ Conclusions XIII-1, p. 212

⁴⁴ Conclusions I, p. 87

⁴⁵ Conclusions 2002, pp. 55-57, France

States must furthermore encourage the teaching of the national language in the workplace, in the voluntary sector or in public institutions, such as universities. Such language classes must be provided free of charge in order not to worsen the already difficult position of migrants on the labour market.

In respect of Article 19§12, the teaching of a migrant worker's mother tongue to his or her children contributes to the preservation of the cultural identity of all the migrants concerned while promoting a psychological and mental balance. The more that is done to preserve cultural identity as a reference point in the daily lives of migrants and in particular their children, without prejudice to the customs, lifestyle and traditions of the host societies, the more migrants assert themselves firstly as persons having and owing rights and obligations and secondly as active members of society rather than bystanders at odds with their cultural identities. For this reason States should undertake to promote and facilitate the teaching of the languages most represented among the migrants present on their territories within their school systems or in other contexts such as voluntary associations or nongovernmental organisations.

Further information on the European Social Charter can be obtained by using the following link: <http://www.coe.int/socialcharter>

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