

DECISION ON THE MERITS

Adoption: 10 December 2020

Notification: 11 January 2021

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International Federation of Associations of the Elderly (FIAPA) v. France

Complaint No.162/2018

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter (“the Committee”), during its 317th session in the following composition:

Giuseppe PALMISANO, President
Karin LUKAS, Vice-President
François VANDAMME, Vice-President
Eliane CHEMLA, General Rapporteur
Petros STANGOS
József HAJDU
Krassimira SREDKOVA
Raul CANOSA USERA
Barbara KRESAL
Kristine DUPATE
Aoife NOLAN
Karin Møhl LARSEN
Yusuf BALCI
Ekaterina TORKUNOVA
Tatiana PUIU

Assisted by Henrik KRISTENSEN, Deputy Executive Secretary

Having deliberated on 10 December 2020,

On the basis of the report presented by Petros STANGOS,

Delivers the following decision, adopted on this date:

PROCEDURE

1. The complaint lodged by the International Federation of Associations of the Elderly ("FIAPA") was registered on 13 April 2018.
2. FIAPA alleges that Ordinance No. 2017-192 of 16 February 2017, which sets an age limit of 71 years for candidates for an election to the board of the Order of health-care professionals, is contrary to Articles 5 and 23 and Article E read in conjunction with each of these provisions of the revised European Social Charter ("the Charter").
3. On 16 October 2018, referring to Article 6 of the 1995 Protocol providing for a system of collective complaints ("the Protocol") the Committee declared the complaint admissible.
4. In its decision on admissibility, the Committee invited the Government to make written submissions on the merits of the complaint by 19 December 2018.
5. In application of Article 7§1 of the Protocol, the Committee invited the States Parties to the Protocol and the States that had made a declaration in accordance with Article D§2 of the Charter, to submit any observations they might wish to make on the merits of the complaint by 19 December 2018.
6. In application of Article 7§2 of the Protocol, the Committee invited the international organisations of employers or workers mentioned in Article 27§2 of the 1961 Charter to make observations by 19 December 2018.
7. On 11 December 2018, the Government asked for an extension to the deadline for submitting its submissions on the merits. The President of the Committee extended this deadline until 15 January 2019. The Government's submissions on the merits were registered on 15 January 2019.
8. The deadline set for FIAPA's response to the Government's submissions on the merits was 20 March 2019. FIAPA's response was registered on 12 March 2019.
9. Pursuant to Rule 31§3 of the Committee's Rules ("the Rules"), the Government was invited to submit a further response by 10 May 2019. The Government's further response was registered on 10 May 2019.

10. On 19 July 2019, FIAPA transmitted additional observations in response to the Government's further response.

11. In accordance with Rule 28§3 of the Rules, the President of the Committee invited the Government, if it so wished, to submit a response to the FIAPA's additional observations by 6 September 2019. The Government's response to the additional observations was registered on 6 September 2020.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

12. FIAPA alleges that Article L4125-8 of the Code of Public Health, which was introduced by Ordinance No. 2017-192 of 16 February 2017 and sets the age limit at 71 years at which the candidates can run for election to the councils of the orders of health professionals is contrary to Articles 5 and 23 and Article E read in conjunction with each of these provisions of the Charter.

B – The respondent Government

13. The Government asks the Committee to find that there is no violation of the Charter provisions invoked as the complaint is without subject following the annulment of the disputed provision by the Conseil d'Etat.

RELEVANT DOMESTIC LAW AND PRACTICE

14. **Article 212 of Law No. 2016-41 of 26 January 2016 on the modernisation of the health system** authorised the Government to take by ordinance, in accordance with Article 38 of the Constitution, within a period of eighteen months from the promulgation of this law, the measures aimed at adapting the legislative provisions relating to the orders of the health professions in order, in particular, "to modify the composition of the councils, the distribution of the seats within the various levels and the methods of election and appointment so as to simplify the rules in these matters and to promote equal access of women and men to the functions of members in all the councils (...)

I. - In the conditions provided for in Article 38 of the Constitution, within a period of eighteen months from the promulgation of this law, the Government is authorised to adopt by ordinance any measure aimed at adapting the legislative provisions relating to the Orders of the health professions in order to:

1° develop the competences of the Orders' bodies with a view to strengthening the regional tier and increasing the supervision exercised by the national council of public service missions carried out by regional bodies;

2° alter the composition of councils, the allocation of seats at the various tiers and election and appointment procedures so as to simplify the rules on these matters and promote equal access for men and women to the office of member in all the councils;

3° consider the implications of Law No. 2015-29 of 16 January 2015 on regional boundaries, regional and département elections and changes to the election timetable for the organisation of the Orders' tiers;

4° strengthen the Orders' powers to ensure compliance with the legislation relating to the benefits granted to health professionals by companies manufacturing or distributing health products;

5° allow Ordinance No. 2015-899 of 23 July 2015 relating to public procurement to be applied to the Orders' national councils;

6° with regard to the Order of Pharmacists, lay down provisions allowing a locum to fulfil the duties of a licensed independent pharmacist who is unable to practice owing to exceptional circumstances;

7° review the composition of the Orders' disciplinary bodies to align them with the requirements of independence and impartiality;

8° with regard to the Order of Masseur-Physiotherapists and the Order of Chiropractors-Podiatrists, clarify the conditions for the effective exercise of the profession to allow retired elected representatives to sit on the bodies of the Order.

II. - A bill of ratification shall be tabled in Parliament within three months following the publication of each ordinance provided for in the present Article.

15. Ordinance No. 2017-192 of 16 February 2017 on the adaptation of the legislative provisions relating to the orders of health professions established an age limit of 71 years of age to apply for an election to be a member of a council of one of these orders or assessor of a disciplinary chamber attached to one of these orders.

16. More specifically, Ordinance No. 2017-192 of 16 February 2017 on the adaptation of the legislative provisions relating to the orders of health professions inserted into the public health code, among the provisions common to the various councils of the medical professions (doctors, dental surgeons, midwives), an Article **L4125-8** under which "The age limit to be a candidate for an election to be a member of a council or assessor of a disciplinary chamber is 71 years old on the closing date for receipt of the declarations of candidacy" (article 5 of the ordinance).

Article L4125-8

Persons aged seventy-one years or over on the closing date for receipt of notices of candidature may not stand for election as a member of a council or an assessor of a disciplinary chamber.

17. It also inserted in the same code, among the provisions common to the various councils for the profession of pharmacist, Article **L4233-9** under which "the age limit to be a candidate for an election to be a member of a council is aged 71 on the closing date for receipt of nomination papers"(article 12 of the ordinance).

Article L4233-9

Persons aged seventy-one years or over on the closing date for receipt of notices of candidature may not stand for election as a member of a council.

18. The ordinance amended article **L4321-19** of the public health code to make Article L4125-8 of the same code applicable to the order of masseurs-physiotherapists (article 15, 12 °, c) of the ordinance).

Article L4321-19-1

An Inter-Département Council of the Order of Masseur-Physiotherapists of La Réunion-Mayotte is competent for masseur-physiotherapists practising in La Réunion and for masseur-physiotherapists practising in Mayotte.

Under Article 19 of Ordinance No. 2017-192 of 16 February 2017, these measures shall come into force after each of the Order's councils has been renewed following that Ordinance's publication;

Decision of the Conseil d'Etat (No. 409985 of 27 April 2017)

Article 1: The application by the Council of the Order of Masseur-Physiotherapists of Hauts-de-Seine département and other parties is rejected.

Article 2: The Council of the Order of Masseur-Physiotherapists of Hauts-de-Seine département and the Minister for Social Affairs and Health shall be notified of the present Ordinance.

Decisions Nos. 409412, 409869, 409874, 409871 and 409875 of 25 May 2018 of the Conseil d'Etat ruling on a dispute

Article 1: The application by the Council of the Order of Physicians of Hautes-Pyrénées département is deemed admissible.

Article 2: The Ordinance of 16 February 2017 is annulled insofar as it inserts Article L4125-8 into the Public Health Code.

Article 3: The applicants' other submissions are rejected.

Article 4: The State shall pay the Regional Council of the Order of Physicians of Midi-Pyrénées and the Council of the Order of Physicians of Haute-Garonne département 1 500 euros each under Article L761-1 of the Code of Administrative Justice.

Article 5: The Regional Council of the Order of Physicians of Midi-Pyrénées, the Council of the Order of Physicians of Haute-Garonne département, the Prime Minister, the Minister of Solidarity and Health and the Council of the Order of Physicians of Hautes-Pyrénées département shall be notified of the present decision.

RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe

19. The European Convention on Human Rights 1950 ("the Convention") includes the following provision:

Article 13 of the Convention – Right to an effective remedy

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

B. European Union

20. Charter of Fundamental Rights of the European Union includes the following provision:

Article 25

The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

Article 47

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

C. World Health Organisation

21. Report of September 2009 on ageing, which emphasises that support for the elderly requires the upkeep of their social inclusion

D. United Nations

Report of the Independent Expert on the enjoyment of all human rights by older persons

Right to work

58. Participation in the labour market enhances the self-esteem of older persons, their social inclusion and their financial security. Older workers should enjoy equality of opportunity and treatment in relation to all aspects of work and conditions of employment in all sectors. The practices, attitudes and legal framework that affect the equal participation of older persons in employment need to be analysed in order to design measures to prevent employment discrimination and effectively address existing barriers to older persons' participation in the workforce.

59. The establishment of a repertory of skills or an online platform of older persons serves several purposes. It enhances the esteem in which the valuable contribution of older persons is held within the family and society and enhances intergenerational solidarity. At the same time, it encourages older persons to continue to remain active and productive and enables older persons' know-how, expertise and skills to be matched up with employers' needs for expertise and advice. A critical mass of data is required for optimal functioning of the repertory. That may require awareness-raising campaigns in order for older persons to register. Encouraging volunteerism is another way to empower older persons to continue contributing to their communities and foster a positive image of older persons as contributing members of society. Employers' and networking fairs have similar objectives.

60. Changing the attitudes of employers towards older workers and raising employers' awareness of the business benefits of hiring older workers may help to create new opportunities for older persons. Other measures to encourage employers to recruit and retain older workers include financial and technical assistance. Employment of older persons in public services in designated areas, such as auxiliary roles for a limited period, should also be considered.

61. Improving older persons' access to the labour market can also be achieved by providing older jobseekers with career counselling, labour market training and subsidies for business

start-ups, as well as job mediation. Opportunities for older persons with reduced work ability can be created by temporary sheltered employment and an enabling environment, including transportation support, work-related rehabilitation, mobile counselling and experience-based counselling. Ongoing research on incentives and conducive environments that would allow older persons to extend their working lives beyond the pensionable age is important to assess the changes that need to be made in regulations, taxes, training and company environments to promote the right of older persons to work.

THE LAW

Preliminary considerations

22. The Committee considers that the present complaint in substance falls within the scope of Article 23 of the Revised Charter.

23. However, the Committee considers that the complaint raises three issues which deserve separate consideration. These are, firstly the issue concerning the applicability of Article 5 in the instant case, secondly, the issue concerning the right to an effective remedy and, thirdly, the issue of the applicability of Article E prohibiting discrimination in the enjoyment of rights guaranteed by the Charter.

Applicability of Article 5

24. The Government contests the applicability of Article 5 in the instant case. The Government considers that Article 5 guarantees the right to organise and also covers participation of trade unions in various consultation and collective bargaining activities. It guarantees the right of workers to form and join trade unions to protect their economic and social interests, such as the right of trade unions to organise their activities and formulate their action programme. The Government maintains that the professional orders at issue in the present complaint, whose mission is defined by the Code of Public Health, cannot be regarded as organisations covered by Article 5. These orders are the guarantors of professional competence, ethics and the quality of the service provided to patients. Therefore, the Government considers that Article 5 is not applicable to the orders of health professionals.

25. In its reply to the Government's arguments that a professional order does not have the status of a trade union and therefore, does not fall within the scope of Article 5, FIAPA maintains that because of the particular organisation of the health professions in France, the role and mission of professional orders cover both trade union representation and as well as protection of the rights and interests of members. Professional orders have a dual function to draw up the operating rules of the profession and be a disciplinary body responsible for enforcing them.

26. According to FIAPA, the objective of these orders is to guarantee the independent exercise of the professions and for this reason, their statute envisages not only the role of representation and protection of interests of professionals, as in

case of trade unions but also a regulatory and disciplinary power over its members. In other words, professional orders have the power to represent their members as well as to sanction their professional misconduct.

27. In this context, FIAPA asserts that professional orders have prerogatives and powers which can be assimilated with those of trade unions. For this reason, according to FIAPA, professional orders should be protected from any interference from legislative and executive power as regards their mode of operation, in accordance with Article 5 of the Social Charter.

28. FIAPA considers that under Article 5 of the Charter, the States should promote freedom for workers and employers to form organisations for the protection of their economic and social interests and to join these organisations. Article 5 of the Social Charter applies to professional orders because of the mission of public service that they assume. Moreover, the organisation of the health professions in France naturally provides for collective bargaining.

29. FIAPA thus maintains that Article 5 of the Charter should apply to the orders of the health professions and the Ordinance in question is in violation of Article 5 as it restricts the right to certain groups to organise.

30. The Committee recalls that Article 5 of the Charter enshrines the individual freedom of workers and employers to form organisations representing the interests of workers or employers. The present complaint concerns measures in domestic law affecting one aspect of the internal life of such organisations, that is to say the right of persons who are already their members, to be elected to the governing bodies of the order of health professionals. The Committee considers that the right to stand for election to the governing body of an organisation representing the interests of workers or employers, is inseparable from the membership in such organisation and therefore, Article 5 is applicable in the present case.

31. The Committee considers that the orders of health professionals in question in the present complaint are organisations representing the economic and social interests of their members, while being competent - on the basis of public law - to ensure the professional and moral integrity of their members in the workplace and in relation to the services provided to their patients, and to this end having disciplinary powers in respect of such members. The Committee notes that the mission of health professional orders is twofold: on the one hand, a regulatory, supervisory and disciplinary function based on public law provisions and, on the other hand, a function of representing the interests of their members in the economic and social sphere. Furthermore, the Committee recalls that Article 5 does not expressly refer to trade unions, but to all local, national or international organisations which are set up to protect the economic and social interests of their members.

32. In the light of the above, the Committee considers that that the orders of health professionals fall within the scope of Article 5 of the Charter.

33. Accordingly, Article 5 is applicable in the present case.

Right to an effective remedy

34. The Committee observes that in its submissions FIAPA argues that because Ordinance No. 2017-192 of 16 February 2017 has not obtained the status of a law, the injured parties are deprived of any legal remedy against it. According to FIAPA, for this reason the health professionals on whom the Ordinance has been imposed do not have any competent court in which they can bring collective proceedings to dispute its constitutionality, legality or compliance with international law.

35. FIAPA maintains that the Ordinance in question remained unnoticed by the associations of the medical professions whose modus operandi it changed, as it did not allow for any collective proceedings. Therefore, FIAPA claims that the procedural situation is incompatible with the collective right enjoyed by every citizen to be covered by the principles of the Charter, which, upholds the indivisibility of all human rights.

36. FIAPA further asserts that as the entry into force of Article L4125-8 was set following the subsequent renewals of each of the professional councils in each department, such temporal arrangement has forced the citizens concerned to initiate long individual proceedings which are incompatible with the application deadlines linked to each council election in which they intend to stand.

37. FIAPA alleges that this situation is incompatible with Article 13 of the European Convention on Human Rights as well as Article 47 of the Charter of Fundamental Rights of the European Union.

38. FIAPA also refers to the decision of the Conseil d'Etat (No. 409985 of 27 April 2017) rejecting the appeal by the council of masseurs and physiotherapists of the department of Hauts de Seine and other parties acting in an individual capacity, in which they asked for the suspension of the application of point 12 of Article 15 of Ordinance No. 2017-192 of 16 February 2017, which made Article L4125-8 applicable to masseurs and physiotherapists under the transitional measures set out in this text and its implementing decree. The Conseil d'Etat notes in its decision that the department-level council disputed the order in question only several months after its publication and hence that the applicants were debarred from disputing the terms of an order either collectively or individually.

39. Therefore, FIAPA claims that the France has failed to guarantee that every citizen has an effective remedy under Ordinance No. 2017-1092 of 16 February 2017 within a reasonable time.

40. The Committee notes that the Government does not provide any comment on this allegation.

41. The Committee recalls that several provisions of the Charter require the existence of an effective mechanism of appeal or review in order to ensure that the rights concerned are upheld and that there are effective remedies for those who have

been unlawfully treated. However, the Committee considers that the issue at stake in the present complaint which concerns circumstances in which legislative acts can be contested, does not fall within the scope of the Charter provisions invoked by FIAPA. It also notes that while FIAPA refers to Article 13 of the European Convention on Human Rights as well as Article 47 of the Charter of Fundamental Rights of the European Union, it does not demonstrate a link to pertinent provisions of the Charter.

42. Consequently, the Committee decides not to examine the issue of the existence of an effective remedy.

Applicability of Article E in the instant case

43. The Committee recalls that the function of Article E is similar to that of Article 14 of the Convention. Referring to the Court's Belgian linguistics judgment of 1968, the Committee considers that Article E has no independent existence and must be combined with one of the Charter's substantive provisions.

44. As regards the instant case, the Committee observes that FIAPA invokes discriminatory treatment in the enjoyment of rights guaranteed by Articles 5 and 23 treatment and alleges age discrimination.

45. The Committee recalls in this connection that a national situation complying with the substantive provision concerned may nonetheless infringe Article E read in conjunction with the provision in question on the ground that it is discriminatory in nature. The Committee considers in the present case that even if no question arises as to the violation of Article 5 read alone, at the heart of the present complaint lies the question of whether a group of persons has been deprived of the right to participate in the function of representation by a trade union of its members, because of their advanced age and, consequently, whether this group of people has been discriminated against. It is for this reason that the Committee will examine whether there has been a violation of Article E read in conjunction with Article 5.

46. With regard to Article 23, FIAPA alleges discrimination against the elderly in the exercise of their right of membership of the councils of the orders of health professionals, which, according to FIAPA, amounts to social exclusion of the persons in question. The Committee recalls in this regard that one of the primary objectives of Article 23 is to ensure the right of elderly persons to take part in society's various fields of activity. This right should be granted to everyone, active or retired, without discrimination. The Committee considers that standing in an election to the governing body of an organisation, in which the person concerned is a member, can be regarded as an act of participation in a societal field of activity which under Article 23 should be ensured to everyone without discrimination. Since Article 23 is the specific expression of the right not to be discriminated against on the basis of age the Committee will examine the situation solely from the angle of this provision without it being necessary to have regard to Article E of the Charter.

I ALLEGED VIOLATION OF ARTICLE 23 OF THE CHARTER

47. Article 23 of the Charter reads as follows:

Article 23 – The right of elderly persons to social protection

Part I: “Every elderly person has the right to social protection.”

Part II: “With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

- to enable elderly persons to remain full members of society for as long as possible, by means of:

- a. adequate resources enabling them to lead a decent life and play an active part in public, social and cultural life;
- b. provision of information about services and facilities available for elderly persons and their opportunities to make use of them;

- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;
- b. the health care and the services necessitated by their state;

- to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.”

A – Arguments of the parties

1. The complainant organisation

48. FIAPA refers to Article 5 of Ordinance No. 2017-192 of 16 February 2017 which amended the Public Health Code and created Article L4125-8. It provides that to be entitled to stand for election as a member of the council of health professionals orders or an assessor on a disciplinary board, candidates must be no older than 71 on the date after which no more candidatures can be accepted. According to FIAPA the Ordinance prohibits health professionals aged over 71 from taking an active part in protection their economic and social interests and the ethical supervisory activities of their organisations. This provision applies to all health professionals within their own professional association, namely doctors, dentists, nurses, midwives, masseurs and physiotherapists.

49. FIAPA alleges that the Ordinance No 2017-192 is contrary to Article 23 of the Charter, which requires the States to enable elderly persons to remain full members of society for as long as possible and to enable them to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able to. FIAPA considers that the provision in question is a step backward in relation to society’s progress towards greater longevity and participatory old age. This decision contributes to the social exclusion of the elderly.

50. FIAPA claims that in the instant case, the issue at stake is not the enjoyment of the right of the elderly to remain full members of the society general but to continue to take part in the democratic life of the governing bodies of the health professions and continue to offer their fellow professionals the benefit of their expertise, their experience and their availability. FIAPA believes that withdrawing the right to take part in the work of a governing body is not compatible with upholding the right of older people to live in the community so that they can freely exercise their rights and obligations as citizens.

51. FIAPA states that by implying that health professionals over the age of 71 do not in principle meet the requirements of independence and impartiality which must govern the membership of the governing bodies of the health professions, the Ordinance establishing Article L4125-8 of the Public Health Code is not only discriminatory but also insulting towards the professionals concerned.

52. FIAPA refers to the argument of the Government that the age limit for participating in the ordinal functions of health professions does not affect the conditions allowing to remain a member apart entire society (resources, dissemination of information, and facilitates to use services ...). In this connection, FIAPA believes that the Government has a restrictive conception of the prerogatives of citizens who do not limit themselves to respecting the basic functions of daily life, but who must include the exercise by citizens of all ages of their functions resulting from their professional activity and their inclusion in all social and professional life.

53. FIAPA asserts the regulation of the elections to the councils of the orders of health professionals should be in accordance with the principle of inclusion of the elderly in society and the maintenance of their prerogatives as citizens, free and equal in rights with their colleagues.

54. In its reply to the Government's observations FIAPA states that it takes note of the repeal or annulment by the Conseil d'Etat of Ordinance No. 2017-192 of 16 February 2017. It notes that with this annulment, health professionals should no longer be excluded from the participation in the administrative and judicial functioning of their orders, in accordance with Article 23 of the Charter and all of France's legal commitments. FIAPA notes, however, that even if by three decisions of the Conseil d'Etat dated 25 May 2018, subsequent to its complaint, the present complaint has become devoid of purpose, it was well founded at the time it was submitted.

55. FIAPA therefore requests that the present complaint be transmitted to the Committee of Ministers with the observations of the Committee that the situation in question is not unique in the French legislation. It requests that it be recommended to the Government, by the Committee of Ministers, to be vigilant in the drafting of its laws and regulations, particularly when it legislates by ordinance.

2. The respondent Government

56. The Government refers to Article 212 of the Law No. 2016-41 of 27 January 2016 on the modernisation of the health system, which has empowered it to take measures within the deadline of 18 months from the date of the entry into force of this law aiming at adapting the legislative provisions in the area of orders of health professionals. In particular, the Government was asked to modify the composition of councils, repartition of seats among different levels and the electoral rules with a view to simplifying them and to promote equal access of women and men to these councils.

57. To this end, Ordinance No. 2017-192 of 16 February 2017 set the age limit to 71 years to stand for the election as a member of these councils. In particular, the Ordinance introduced Article L4125-8 as well as Article L4233-9 in the Health Code. It also amended Article L4321-19 making Article L4125-8 applicable to the order of masseurs-kinesitherapeutes.

58. According to the Government, the measure setting the age limit for candidates for election as members of the councils of the order of health professions or as an assessor of a disciplinary chamber has not intended to undermine the terms and conditions allowing persons concerned to remain members of the society (resources, dissemination of information and facilities for to use services). Therefore, the Government contends that there was no violation of Article 23 of the Charter.

59. The Government further indicates that the Ordinance in question was not ratified by the legislator and gave rise to three litigation proceedings initiated respectively by the councils of the order of physicians of the Midi-Pyrénées region and of the Haute-Garonne department, the councils of the order of pharmacists of the Auvergne and Midi-Pyrénées regions and the departmental council of the order of masseurs-kinesitherapists of Hauts-de-Seine.

60. By three decisions of 25 May 2018, the Litigation Section of the Conseil d'Etat, ruling in united chambers, annulled the aforementioned provisions of Ordinance of 16 February 2017 on the following grounds:

- on the one hand, that such provisions, which had the effect neither of simplifying the rules of eligibility within the ordinal bodies, nor of promoting equal access of women and men to the functions of members of the councils, did not fall within the scope of the authorisation given to the Government by the aforementioned provisions of Article 212 of the Law No. 2016-41 of 27 January 2016;
- on the other hand, by inserting the new provisions into the Public Health Code, the Government had exceeded the limits of the empowerment he had to legislate by ordinance.

61. Articles L4125-8 and L4233-9 of the Public Health Code were therefore removed from the internal legal order as from 25 May 2018.

62. According to the Government, in view of the annulment by the Conseil d'Etat of the provisions contested by complainant, there is no longer any need for the Committee to rule on the merits of this complaint. The Government therefore requests the Committee to take note of this annulment and to declare that the present complaint

has become without object. According to the Government, the provision relating to the age limit having been annulled, it belongs to the legislator to make a new provision, which may furthermore deviate from that taken by Ordinance of 16 February 2017. It will then belong to the domestic courts, if seized thereof, to rule on the conventionality of a new provision with regard to the objectives of general interest which will have been pursued by Parliament.

63. Thus, if FIAPA asks the Committee of Ministers to indicate to France to be vigilant in the drafting of its laws, and regulations, particularly when it legislates by ordinance, it is clear that the Conseil d'Etat has controlled the action of the Government intervening by ordinance, cancelling the provision which was precisely the subject of the present complaint.

64. Under these conditions, the Government continues to maintain that there is no longer any need for the Committee to rule on the merits of the present complaint.

65. The Government maintains that FIAPA's claim that there is a violation of Article 23 of the Charter has become irrelevant following the annulment by the Conseil d'Etat of the disputed provision and in any event, in the Government's view it was unfounded even before this annulment.

B – Assessment of the Committee

66. The Committee recalls that under Article 23 of the Charter the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular to enable elderly persons to remain full members of society for as long as possible. Article 23 of the Charter is the first human rights treaty provision to specifically protect the rights of the elderly. The expression "full members" means that elderly persons must suffer no ostracism on account of their age. The right to take part in society's various fields of activity should be granted to everyone active or retired, living in an institution or not.

67. The Committee observes that by decisions of 25 May 2018, the Conseil d'Etat annulled the provisions of Ordinance of 16 February 2017 and therefore, Articles L4125-8 and L4233-9 of the Public Health Code were removed from the internal legal order. In view of the fact that this annulment is of relevance for the assessment of the instant case, the Committee will examine the situation before and after its entry into force.

68. As regards the situation before the annulment of the disputed provisions, the Committee recalls that Article 23 requires States Parties to combat age discrimination, through the adoption of an adequate legal framework, as a fundamental measure to eliminate discrimination of older persons. The Committee considers that the age limit at issue in the present complaint, while in force under the terms of Ordinance No. 2017-192 of 16 February 2017 amounted to an obstacle for the persons concerned in enjoying their right, enshrined in the Article 23 of the Charter, to remain full members of society for as long as possible, taking into account their own physical, psychological and intellectual capacities (Appendix to Article 23). Consequently, the age limit in

question represented a measure which targeted the exclusion of these persons, on the basis of their age in violation of Article 23 of the Charter.

69. However, following the annulment of the disputed provisions and thus the removal of the age limit, the Committee considers that the discrimination no longer exists, and the situation is therefore compatible with Article 23.

70. The Committee holds that there is no violation of Article 23 of the Charter.

II ALLEGED VIOLATION OF ARTICLE E IN CONJUNCTION WITH ARTICLE 5 OF THE CHARTER

71. Article 5 of the Charter reads as follows:

Article 5 – The right to organise

Part I: “All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.”

Part II: “With a view to ensuring or promoting the freedom of workers and employers to form local, national or international organisations for the protection of their economic and social interests and to join those organisations, the Parties undertake that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom. The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations. The principle governing the application to the members of the armed forces of these guarantees and the extent to which they shall apply to persons in this category shall equally be determined by national laws or regulations. “

72. Article E of the Charter reads as follows:

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

1. The complainant organisation

73. According to FIAPA, under Article 5 of the Charter the States should promote the right of all workers, and by extension all professionals to form local, national or international organisations for the protection of their economic and social interests and to join those organisations. FIAPA considers that the infringement of this right amount to interference in the exercise of ethical supervisory duties that are incompatible with the freedom to organise and the quasi-judicial work of the professional associations when monitoring ethical standards.

74. According to FIAPA, any measure prohibiting a person from exercising the prerogatives of his professional activity, such as the right to join due to his/her age, without further consideration, is arbitrary, non-conforming and disproportionate to the objectives invoked. It creates both de jure and de facto discrimination on the grounds of age.

75. FIAPA notes that the Government itself recognises that the contested measure can be analysed as a difference of treatment between the elderly and those who have not reached the age of 71. However, the Government fails to explain how the differentiation that is made on the basis of age would be reasonable and proportionate to the aim pursued.

76. FIAPA considers that while it is the responsibility of the Government to rejuvenate the functioning of the orders, this objective should not be achieved at the expense of exclusion of elderly health professionals. Therefore, FIAPA believes that there is a violation of Article 5 in conjunction with Article E

2. The respondent Government

77. The Government reiterates that with the disappearance of Articles L4125-8 and L4233-9 of the Public Health Code from the internal legal order as of 25 May 2018, the present complaint is without subject and therefore, there is no violation of Article 5 in conjunction with Article E.

78. The Government nevertheless presents its arguments as concerns the alleged age discrimination in the exercise of the rights guaranteed under Article 5 of the Charter, as regards the situation which prevailed before the above mentioned legislative amendments. The Government states that the principle of equality underlying Article E involves ensuring the same treatment for people in the same situation but also different treatment of people in the different situation. So that a difference in treatment does not constitute a discrimination, it must be based on an objective and reasonable ground and be proportional to the objective followed.

79. The Government does not dispute that the contested measure can be analysed as a difference in treatment between persons who are over 71 years of age and those under 71 years of age with regard to their membership of the councils of professional orders. However, the Government does not consider that such a difference in treatment represents discrimination in the meaning of Article E of the Charter as it is based on an objective and reasonable cause and is proportional to this cause.

80. Firstly, the Government states that indeed, the age limit at 71, which was provided for by Article L4125-8 of the French code of Public Health (since cancelled), responded to many recommendations various reports of the control bodies on medical orders and paramedics. Its purpose was to modernise and gradually renew the composition of the professional orders.

81. In its report of April-June 2013 concerning the National Council of the Orders of health professionals, the Mission of Inspection of administrative jurisdictions of the Conseil d'Etat recommended the establishment of an age limit for magistrates

presiding the disciplinary chambers of orders. This recommendation of age limit, extended to assessors, elected councilors, was noted in two communications from the Vice-President of the Conseil d'Etat to the Minister of Health in 2014 and 2016.

82. In addition, the Court of Auditors, in its annual public report 2017 published in February 2017, denouncing "a pyramidal structure frozen at the top" of the order of dentists, indicated that the governance of the order, particularly at the national level, was marked by a very low renewal of its leaders. It noted in particular that "the organisation of the Order, the longevity of national leaders at their posts, overrepresentation of inactive members and the under-representation of women has maintained a mode of a self-centered governance, which, combined with the absence of external and internal control, has resulted in abuses.

83. Furthermore, the Government indicates that this age limit was set with reference to the age limit existing for the term of office for ordinary practitioner councillors (77).

84. Finally, according to the Government, the provisions in question did not preclude any professional or other involvement outside the bodies of the councils of orders.

85. Consequently, according to the Government, the setting of an age limit at 71 for applicants for election as a member of the councils of orders of health professionals or as an assessor of a disciplinary chamber cannot be qualified as a discriminatory measure contrary to Article E of the Charter.

86. Therefore, the Government considers that the complaint, which has become without subject since the annulment by the Conseil d'Etat of the disputed provisions, was in any case unfounded.

B – The assessment of the Committee

87. The Committee recalls that Article 5 of the Charter guarantees the right of workers and employers' freedom to organise through forming and joining local, national or international organisations for the protection of their economic and social interests. Article 5 covers not only workers in activity but also persons who exercise rights resulting from work (pensioners, unemployed persons). Under Article 5, the States Parties undertake to ensure that national law shall not be such as to impair, nor shall it be so applied as to impair, this freedom.

88. As regards the situation before the annulment of the disputed provisions, the Committee considers that the age limit of 71 years imposed on candidates for election to the councils of the orders of health professionals represented a differential treatment of persons of this age group as compared to other persons with respect to their right to organise. The Committee observes that the aim pursued by the Government was to reduce the over-representation of inactive members and to support the renewal of leaders at the top of the so-called 'frozen' structures. The Committee also observes that this age limit was introduced in parallel with another ultimate age limit of 77 for the exercise of professional activities.

89. The Committee nevertheless considers that the means chosen were neither reasonable nor proportionate to the aim pursued. The Government itself states that persons affected by the prohibition to stand as candidates to the councils of the professional orders may nevertheless continue to be involved in matters relating to their profession and the bodies with which they are affiliated. This statement demonstrates that the age limit introduced by the impugned Ordinance is not based on sufficient justification. Accordingly, the Committee considers that these measures represented direct discrimination on the basis of age that denied the individuals concerned the benefit of the right guaranteed by Article 5 of the Charter. Therefore, there was a violation of Article E read in conjunction with Article 5 of the Charter.

90. With respect to the situation after the annulment of the disputed provision, the Committee refers to its reasoning under Article 23 and concludes for the same reasons that there is no violation of Article E in conjunction with Article 5 of the Charter.

CONCLUSION

For these reasons, the Committee concludes:

- unanimously that there is no violation of Article 23 of the Charter.
- unanimously that there is no violation of Article E in conjunction with Article 5 of the Charter.



Petros STANGOS
Rapporteur



Giuseppe PALMISANO
President



Henrik KRISTENSEN
Deputy Executive Secretary