Article 18. The right to engage in gainful occupation in the territory of other parties

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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:

1. to apply existing regulations in a spirit of liberality;

2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;

3. to liberalise, individually or collectively, regulations governing the employment of foreign workers; and recognise

4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.

INTRODUCTION

Article 18 of the Revised European Social Charter provides for the right to engage in gainful occupation in the territory of other parties. It contains a set of rights regarding certain aspects of emigration and immigration of migrant workers.

This provision of the Charter is, compared to the others, relatively *discreet* and *modest* in its ambitions.

This *discretion* is demonstrated by the small amount of commentary devoted to it by the legal literature[1] and by the European Committee of Social Rights (ECSR)[2]: the latest version of the *Digest*,[3] published in December 2022, devotes only a handful of pages to Article 18, which are not fundamentally different from the equally small number of pages that could already be read in the 2018 version of the *Digest*.

Discretion is also evident when reading the *travaux préparatoires* for this provision: neither its initial adoption nor its inclusion in the Revised Charter gave rise to extensive discussions (I).

Modesty is explainable, firstly, when one considers the normative environment in which Article 18 of the Charter operates - its added value is not obvious, particularly with regard to the acquis of Union law (II) - and its limited scope of application, which has to do with its non-inclusion in the 'hard core' of the Charter (III). In terms of substance, the rights guaranteed by Article 18 are characterized by their 'dynamism', which is quite significant considering the socio-economic context in which they were formulated. This characteristic certainly makes the rights contained in Article 18 valuable, but it also explains the limited nature of their performance (IV).

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[1] See for instance: Karin LUKAS, *The Revised European Social Charter: An Article by Article Commentary*, Elgar Commentaries series, 2021, pp. 235-240; Elaine DEWHURST, "Article 18 RSCE. The right to engage in gainful occupation in the territory of other Parties", in Edoardo ALES, et al (eds.) *International and European Labour Law: A commentary*, Nomos Verlagsgesellschaft mbH and Co. KG, 2017; pp. 310-313; Colm O'CINNEIDE, "Migrant Rights under the European Social Charter », in Cathryn COSTELLO, and Mark FREEDLAND (eds.), *Migrants at Work: Immigration and Vulnerability in Labour Law*, Oxford, 2014, pp. 282-302 ; David HARRIS and John DARCY, *The European Social Charter. 2nd edition. (Procedural Aspects of International Law Monograph Series; vol. 25)*, New York, Transnational Publishers, 2001; pp. 200-210; Yannis KTISTAKIS, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter: A Handbook for Legal Practitioners*, 2nd edition, Strasbourg, Council of Europe Publishing, 2016; Matti MIKKOLA, "Social Human Rights of Migrants under the European Social Charter", *European Journal of Social Security*, vol. 10, no. 1, 2008, pp. 25-59 and sp. 39-40; L. SAMUEL, *Droit sociaux fondamentaux. Jurisprudence de la Charte sociale européenne,* Strasbourg, 2nd ed., ed. du Conseil de l'Europe, 2002, pp. 399-420. See also the references mentioned punctually in other footnotes

[2] There is only one "contentious" case concerning Article 18 : ECSR, *European Federation of Public Service Employees (EUROFEDOP) v. Greece*, complaint No. 115/2015, decision on the merits of 13 September 2017

[3] *Digest of the case law of the European Committee of Social Rights*, December 2022, available on https://www.coe.int/en/web/european-social-charter/case-law# (last accessed 17 february 2023)

I. DRAFTING HISTORY[4]

The actual text of Article 18 of the Revised Charter has not been amended[5] since it was first introduced in the Charter of 1961. In 1959, when this Article was drafted, attention was drawn to the initial wording of the provision and the fact that it might give the impression that the regulation and formalities mentioned in the different paragraphs "relate only to the right to leave the country to engage in gainful activity abroad".[6] In order to avoid this misinterpretation, the wording was changed.

Moreover, different points were raised by delegations regarding the scope of application of this provision. One the one hand, the Delegation of Belgium did not agree with the initial draft, which only referred to the employment of foreign workers, and indicated that this Article should apply not only to employees but also to self-employed workers.[7] On the other hand, the Delegation of the Netherlands considered that it should be stated that this Article only applies to nationals of the contracting parties, as in Part I, paragraph 18.[8] However, it was pointed out that this was clarified by the Article heading which mentioned "member countries".[9]

II. ARTICLE 18 IN ITS INTERNATIONAL AND EUROPEAN NORMATIVE ENVIRONMENT

Article 18 of the Charter is part of a larger international and regional body of law dedicated to labour[10] and migration law.[11] However, this instrument is not the one offering most protection to migrant workers.

On the international scene, we should first note the similarities with Conventions 97 and 143 concluded within the International Labour Organisation.[12] The first one[13] - the *Migration for Employment Convention* (Revised), dated 1949 - is limited in its scope to regular labour migration.[14] It provides in particular for the obligation of State parties to take measures "to facilitate the departure, journey and reception of migrants for employment" (art. 4), as well as the obligation to grant immigrants lawfully within its territory, "treatment no less favourable than that which it applies to its own nationals" in respect of several matters, e.g., remuneration, social security,… (art. 6). As Cholewinski notes, "Article 6 is a progressive provision that subsequently influenced similar provisions elsewhere, including the Equality of treatment provisions of European (EU) free movement provisions".[15] Convention 143 - *Migrant Workers (Supplementary Provisions) Convention* (1975) - is broader in scope,[16] as it also addresses the issue of irregular migration, and the fight against its exploitation, while guaranteeing migrant workers - regardless of their status - a number of fundamental rights borrowed from other international human rights instruments. This is the purpose of Part I of the Convention. Part II sets out specific rights for migrant workers in a regular situation,[17] which also overlap with the provisions of Article 18 of the Charter, while going beyond them on certain points. In particular, we should mention equality and non-discrimination (Article 10) and the positive obligations

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[4] See also Karin LUKAS, *cit.*, p. 236.
[5] See Explanatory Report to the European Social Charter (Revised), p. 8.
[6] Seventh session - European Social Charter - Points to be remembered in connection with the final checking of text (6 January 1958), Doc. CE/Soc (58) 1, point 9.
[7] ESC, Collected travaux préparatoires, Vol. 5, 1958, p. 110.
[8] *Ibid.*
[9] *Ibid.* The formulation of the heading finally adopted mentions "other Contracting Parties" (original Charter) " other Parties" (Revised Charter)
[10] Edoardo ALES, et al (eds.) *International and European Labour Law: A commentary*, Nomos Verlagsgesellschaft mbH and Co. KG, 2017.
[11] See Ryszard CHOLEWINSKI, *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment*, Oxford, Clarendon Press, 1997.
[12] For a more extensive discussion of these conventions, see Edoardo ALES, et al (eds.), *cit.,* pp. 848 ff.; Ibrahim AWAD, "Les travailleurs migrants", in Jean-Marc THOUVENIN et Anne TREBILCOCK (eds.), *Droit international social. Droits économiques, sociaux et culturels. T. 2, Règles de droit international social*, Bruxelles, Brulant, 2013, pp. 1319 ff.
[13] To this date, the convention has been ratified by 53 states.
[14] Edoardo ALES, et al (eds.), *cit.,* p. 849.
[15] *Ibid.*, p. 852.
[16] *Ibid.*, p. 850.
[17] See definition of this notion in Article 11 of the Convention.

associated with this principle (Article 12), as well as the adoption of "all necessary measures" (including collaboration with other Members) "to facilitate the reunification of the families of all migrant workers legally residing in its territory" (Article 13). Article 14 is dedicated to "free choice of employment" and the restrictions to which it may be subject.

Still at the international level, but this time in the UN sphere, the Charter's environment also consists of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* ICRMW (1990),[18] which has been ratified by 58 states. However, among those states, only 4[19] are also parties to the - original or revised - European Social Charter,[20] which makes the practical intersections between the two instruments very limited.[21] The purpose of this particularly long and detailed convention[22] is to enshrine a series of 'classic' rights and freedoms to the benefit of all migrant workers and members of their families, whether legally resident or not.[23] In contrast to the above-mentioned Convention No. 143, these are listed *in extenso* and, where appropriate, compared to their classic formulation in 'universal' human rights protection instruments, 'concretized' to be better adapted to the situation of these workers.[24] A series of additional rights are provided for, but this time only for the benefit of migrant workers and members of their families who are documented or in a regular situation: a.o. freedom to choose their residence (Article 39), equality of treatment with nationals of the State of employment in relation to access to educational institutions, Access to vocational guidance and placement services; Access to housing, ... (Article 43).

Council of Europe law also includes, alongside the European Social Charter, a number of instruments specifically dedicated to the protection of migrant workers' rights.[25] The *European Convention on Establishment* (1955), ratified by 12 Council of Europe member states, operates, like the European Social Charter, on a model of reciprocity *ratione personae*: only nationals of other State parties benefit from the rights it enshrines. Among these, we would point specifically to those in Chapter IV, dedicated to the right "to engage in its territory in any gainful occupation on an equal footing with its own nationals", and to its possible limitations.

Last but not least, European Union law plays an important role in the normative environment of Article 18 of the Charter. Free movement of workers is a foundational principle of the European Union, enshrined in Article 15(3) of the EUCFR and Article 45 of the TFEU.

More specifically, those provisions entail the rights of movement and residence for workers, the rights of entry and residence for family members, the right to work in another Member State and to be treated equally with nationals of that Member State.

Over the years, the European institutions have substantiated this freedom by adopting several legislative acts. Regulation 1612/68,[26] the founding regulation on freedom of movement of workers and Directive 68/360,[27] its complementing directive on the abolition of restrictions on movement and residence, have

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[18] Paul DE GUCHTENEIRE and Antoine PÉCOUD, "Introduction: The UN Convention on Migrant Workers' Rights" in Ryszard CHOLEWINSKI, Paul DE GUCHTENEIRE and Antoine PECOUD (eds.), *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, Cambridge, Cambridge University Press, 2010.

[19] Albania, Azerbaijan, Bosnia and Herzegovina and Turkey.

[20] Armenia, which has ratified the Charter, has however only signed the Convention. The same applies to Serbia.

[21] Significantly, no EU Member State has ratified the ICRMW. For an overview of this situation, its explanation and critical analysis, see Marie D'AUCHAMP, *Rights of migrant workers in Europe*, published by the Regional Office for Europe of the UN High Commissioner for Human Rights, 2011, available on https://europe.ohchr.org/Documents/Publications/Migrant_Workers.pdf.

[22] Ibrahim AWAD, *cit.*, pp. 1329 ff.

[23] See, for the particular situation of the latter, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment no. 2 on the rights of migrant workers*, 2013, CMW/C/GC/2.

[24] Marie D'AUCHAMP, *cit.*, p. 11: "The ICRMW does not create 'new rights' for migrant workers and their families. It features rights that have been recognized to all under other core human rights treaties, in particular the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. The ICRMW does however address specific protection needs of migrant workers and members of their families through the formulation of previously recognized rights, and through additional guarantees that are necessary due to the particular vulnerability of migrant workers".

[25] See also *European Convention on the Legal Status of Migrant Workers* (ETS No. 093) (1977), ratified by 11 states.

[26] Regulation 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[27] Directive 68/360/EEC of the Council of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families.

been modernized several times. Currently, the relevant legislative acts are Directive 2004/38[28] on the right of movement and residence and Regulation 492/2011[29] on free movement of workers.

Regulation 1612/68 was, at the time, already standing out in contrast to the ambiguous wording of Article 18 of the Charter.[30] The first article of the Regulation already clearly provided that "any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State". Moreover, Article 3 and 4 imposed the abolition of any national rule or measures aiming at protecting the nationals of that State with respect to access to employment.[31] Article 5 guaranteed equal treatment between workers of EU member states in respect of assistance in seeking employment and article 10 already extended the right of equal access to employment with nationals throughout the territory of the host country to the worker's spouse and descendants under 21 years of age or to his dependent relatives in the ascending line.

These rights can be found today in Regulation 492/2011 on free movement of workers. Similarly to Regulation 1612/68, the regulation currently in force sets rules for employment, equal treatment and workers' families. In accordance with the first article of the Regulation, any national of a Member State has the right to take up an activity as an employed person within the territory of another Member State. Those workers should not be treated differently from national workers in respect of any condition of employment and work.[32] Furthermore, migrant workers covered by the Regulation are entitled to receive the same social and tax advantages as national workers,[33] and the same rights and benefits accorded to national workers in matters of housing.[34]

This Regulation,[35] combined with other legislative acts and initiatives[36] in the area of free movement of workers, provide migrant workers[37] with a comprehensive set of enforceable rights. In light of this, the added value of Article 18 of the Charter, particularly for those State parties to the Charter which are also EU Member States, has been very limited.[38]

By contrast, non-EU citizens' right to move freely within the Union in order to work is very limited. It should be noted that specific categories of third country nationals do, by exception, benefit from the right to work in an EU country and enjoy the same working conditions as EU citizens either because they are considered as an EU citizen's family member or because they are nationals of a particular state.[39]

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[28] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[29] Regulation 492/2011/EU of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union.

[30] Ryszard CHOLEWINSKI, *cit.*, p. 299.

[31] *Ibid.*

[32] Article 7 of Regulation 492/2011/EU of the European Parliament and of the Council.

[33] *Ibid.*

[34] Article 9 of Regulation 492/2011/EU of the European Parliament and of the Council.

[35] Although it does not provide for additional rights, Directive 2014/54 (Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers) was adopted in order to facilitate free movement of EU workers and their family members and enhance the effectiveness of the rights contained in the above-mentioned directives. This is namely illustrated by Article 4 of the Directive which stipulates that "each Member State shall designate one or more structures or bodies (…) for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality (…) and shall make the necessary arrangements for the proper functioning of such bodies.

[36] See *infra*.

[37] Who are nationals of an EU Member state and exercise their right to free movement.

[38] David HARRIS and John DARCY, *cit.*, p. 201 ff.

[39] For nationals of Island, Norway and Lichtenstein, the EEA Agreement guarantees equal rights and obligations within the Internal Market for individuals and economic operators in the EEA. Another example is the EU-Swiss agreement on free movement of persons according to which Swiss nationals can live and work freely in the EU. Lastly, according to the EU-Turkey agreement, Turkish workers who are legally employed in an EU country and who are duly registered have, after some fixed time periods, the right to the renewal of their work permit for the same employer, the right to change employers and respond to any other offer of employment for the same occupation and the right to enjoy free access to any paid employment in that EU country. Moreover, Turkish nationals working legally in an EU country are entitled to the same working conditions as the nationals of that country.

Several legislative acts have been adopted aiming at regulating the status of third country nationals who wish to work in the EU but do not fall in these categories. For example, Directive 2003/109[40] concerns third country long-term residents, who may apply for a residence permit in a second Member State only after they have acquired long-term residence status in the first Member State.[41] Directive 2009/50[42] sets out the entry and residence conditions for highly qualified non-EU nationals and their families wishing to work in a highly qualified job in an EU Member state and Directive 2016/801[43] aims at facilitating free movement of researchers and students.

The international and European normative environment of Article 18 of the Charter is, as one can notice, particularly dense. The interaction between all these provisions is complex, given the 'variable geometry' of states that are subject to them - the circles do not overlap -, the variable geometry of their commitments - partial commitments (see *infra*) and *réserves* are numerous - and the fact that some, but not all,[44] of these instruments operate on the basis of reciprocity with regard to their scope *ratione personae* (see *infra*). In spite of this complexity, it appears that, overall, Article 18 of the Charter is not the most generous instrument in this *corpus juris*. In the relations between Member states of the European Union and workers who are nationals of those states or of an EEA state, the added-value of the Charter in relation to European Union law appears to be very limited,[45] although - as emphasized by O'Cinneide[46] - not totally non-existent. The subsidiarity clause contained in Article H of Part III of the Revised Charter is therefore particularly relevant in this context: "The provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected." The Appendix to the Revised Charter expressly confirms that Article 18 does "not prejudice the provisions of the European Convention on Establishment, signed in Paris on 13 December 1955".

III. SCOPE OF APPLICATION

A. Member states' ratification

The system of 'à la carte commitments' set up by the original 1961 Charter (Art. 20) and taken over by the Revised Charter (Part III, Article A, 1, b) did not include Article 18 in the list of rights around which the freedom of acceptance of States is restricted. Its status thus differs from that of Article 19, which is indeed included in the said list. This difference in regime raises questions, as these provisions, although having distinct scopes, do overlap, notably around the principle of equal treatment *vis-à-vis* national workers. In any case, this situation has resulted in a rather modest acceptance rate for Article 18. Of the 35 states that have ratified the Revised Charter, only 16 have subscribed to the whole of Article 18. Five states, on the other hand, have not included any of the paragraphs of Article 18 in their commitments. The rest of the states have made partial commitments.[47] Article 18(3), which is arguably the most 'intrusive' regarding states' migration policies, is often not included in these partial commitments. Conversely, paragraph 4 - which, as we shall see, largely duplicates the achievements of 'ordinary' human rights law - is favoured within these 'partial' commitments.

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[40] Directive 2003/109/EC of the Council of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

[41] According to Article 4 of the Directive, "Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years".

[42] Directive 2009/50/EC of the Council of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

[43] Directive 2016/801/EU of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast).

[44] Reciprocity does not apply, for example, to ILO Conventions no. 97 and no. 143 (see, Ibrahim AWAD, *cit.*, p. 1337).

[45] See Andrzej Marian SWIATKOWSKI, *Labour Law: Council of Europe,* 2nd edition, Kluwer, 2016, p. 49; David HARRIS and John DARCY, *cit.*, p. 202.

[46] Colm O'CINNEIDE, *cit.*, p. 292.

[47] This poses difficulties because of the 'overlap' of these paragraphs (see below).

B. Personal scope of application

Unlike the corresponding rights in the International Covenant on Economic, Social and Cultural Rights, which does not contain such a *ratione personae*[48] restriction, Article 18 of the Charter applies only to employees and the self-employed[49] who are *nationals* of Charter-party States.[50] Indeed, the Appendix to the Revised Charter provides that "[...] the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19". Hence, it cannot be deduced from an *a contrario* interpretation of this Article that non-nationals of State parties to the Charter would enjoy the rights set forth by Article 18.[51] Of course, it is known that the ECSR has given a very dynamic interpretation[52] of the Charter, and has, in substance, affirmed that the rights relating to the 'minimum core' essential to the preservation of human dignity[53] could benefit persons who are illegally resident in the State concerned. The ECSR has not yet had the opportunity to enumerate exhaustively the rights included in this category. However, in light of what has been said above (A), it is doubtful whether Article 18 could be included in this list.

In addition to the nationals of the State parties,[54] persons who have been recognized as refugees[55] in the State parties and stateless persons[56] must also be included in the beneficiaries of rights guaranteed by Article 18. Asylum seekers who are not nationals of a State party are, in principle, not covered.[57]

It should also be noted, as mentioned by Swiatkowski,[58] that a person who is a national of a State that has ratified the Charter may invoke Article 18 with regard to the State that has subscribed to this provision, even if his or her State of nationality has not consented to it. It is necessary, but sufficient, that the State of nationality has ratified the Charter, without further specification.

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[48] The Covenant applies to everyone within the jurisdiction of the member state, and the migrant worker can therefore derive rights from it. See UN CESCR, *General Comment no. 18 on the right to work*, 2005, E/C.12/GC/18, pt. 18 ; UN CESCR, *General Comment no. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 2016, E/C.12/GC/23, pt. 47 ; UN CESCR, *Statement on Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, 2017, E/C.12/2017/1, pt. 16.

[49] David HARRIS and John DARCY, *cit.*, p. 203.

[50] Digest of the case law of the European Committee of Social Rights, December 2022, p. 157.

[51] Stefan CLAUWAERT, "Article 19, § 4. The right of migrants workers and their families to protection and assistance", in Niklas BRUUN, et al (eds.), *The European Social Charter and the Employment Relation*, Oxford, Hart Publishing, 2017, p. 346.

[52] See ECSR, *International Federation of Human Right League (FIDH) v. France*, collective complaint No. 14/2003, 8 September 2004.

[53] Colm O'CINNEIDE, *cit.*, p. 291.

[54] See Matti MIKKOLA, "Migrants", in Matti MIKKOLA (eds.), *Social Human Rights of Europe,* Porvoo, Karelactio Legisactio, 2010, pp. 563-564 and pp. 568-569.

[55] See Appendix to the Charter: "Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees". See also ECSR, Conclusions 2015 (Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Cyprus, Estonia, Finland, France, Georgia, Hungary, Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, The Netherlands, Norway, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Sweden, "The Former Yugoslav Republic of Macedonia", Turkey, Ukraine), Articles 7, 8, 16, 17, 19, 27 and 31 of the Charter, p. 11.

[56] See Appendix to the Charter: "Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons".

[57] See Lieneke SLINGENBERG, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality,* Oxford, Hart Publishing, 2014, p. 224.

[58] Andrzej Marian SWIATKOWSKI, *cit.*, p. 330; David HARRIS and John DARCY, *cit.*, p. 203.

Lastly, Article 18 includes any of the migrant worker's family members[59] who are admitted to the country for the purposes of family reunification.[60] Furthermore, this Article applies *ratione loci*[61] to both workers who are already on the territory of the State in question as well as workers who are outside the country and request a permit to work on the territory of that State.[62] Finally, it is accepted that posted workers[63] also fall within the scope of Article 18.

IV. CONTENT

A. General considerations

As François Vandamme points out,[64]

> "The economic and political context at the time of the negotiation of the Charter at the end of the 1950s, which to some extent favoured the international immigration of much-needed labour, has permeated (Articles 18 and 19 of the Charter); this can be felt in the encouragement of employment or gainful activity, the assistance to which these workers and their families are entitled, the principle of equal treatment with national workers in a variety of fields (...) and the invitation to collaboration between the emigration and immigration services of the sending and receiving countries »

This original inspiration, which the authors of the Revised Charter have not called into question, can be seen in the 'dynamic' character of Article 18, which is often[65] emphasized[66]: it sets a series of objectives to be pursued by the States which subscribe to it, a horizon towards which it should be aimed, a threshold to be reached which, once crossed, must be maintained.[67] The *Digest* stresses this particular dimension of the obligations generated by Article 18, despite its limited ambition, and the guidelines for interpretation that must therefore be observed in its implementation:

> "Whilst the provisions of Article 18 do not cover regulations governing the entry of foreigners to the territory of the State Party, the Committee cannot accept an interpretation which would undermine its aim, which is 'to ensure the effective exercise of the right to exercise a gainful activity in the territory of another State Party," by restricting the benefits of liberalisation to only those nationals of other States Parties already in the country'.[68]

Earlier, the same Committee stressed that:

> "The letter and spirit of Article 18 mean that the situation of nationals of States bound by the Charter should gradually become as far as possible like that of nationals".[69]

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[59] The Appendix to the revised Charter specifies, regarding the notion of 'family of the foreign worker' that "(this term) 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". In our opinion, the notion of 'spouse' should be interpreted in an evolutionary manner, as including also the same-sex partner (see, by analogy, ECJ, 5 June 2018, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16).

[60] Digest of the case law of the European Committee of Social Rights, December 2022, p. 157; ECSR, Conclusions X-2 (1990), Austria.

[61] According to Swiatkowski, the terms 'a different member state' in Article 18 "is understood by the Committee to be the territory of that state as well as structures located beyond territorial waters being the property of that given member state such as for example oil rig platforms in the north sea" (Andrzej Marian SWIATKOWSKI, *cit.*, p. 49).

[62] ECSR, Conclusions XIII-1 (1993), Sweden.

[63] ECSR, Conclusions 2015, Statement of interpretation on Article 19 § 4.

[64] François VANDAMME, "Les droits protégés par la Charte sociale. Contenu et portée", in Stéphane LECLERC et Jean-François AKANDJI-KOMBÉ (eds.), *La Charte sociale européenne*, Bruxelles, Bruylant, 2001, pp. 31-32 (own translation)

[65] ECSR, Conclusions II (1968), Statement of interpretation on Article 18: "The very wording of these provisions gives them, as was stressed (see Conclusions I (1969), General Introduction, para. 13), a dynamic character, implying an evolution of the provisions and of their application, which should be shown in every biennial report".

[66] Andrzej Marian SWIATKOWSKI, *cit.*, p. 49.

[67] Andrzej Marian SWIATKOWSKI, *cit.*, p. 55 and references to the case law of the ECSR; ECSR, Conclusions II (1968), Statement of interpretation on Article 18: "For instance, as already recognised in the Committee's Conclusions I (United Kingdom, Article 18), where no specific regulation exists, there can obviously be no question of liberalising its application".

[68] See also, among others, ECSR, Conclusions XIII-1 (1993), Sweden.

[69] ECSR, Conclusions II (1968), Statement of interpretation on Article 18.

This originality of Article 18 - its dynamism,[70] its gradualness - also constitutes its limit: its concretisation, in this logic of 'more or less' rather than 'all or nothing', is certainly not obvious, and leaves room for a wide margin of appreciation to the benefit of states.

A final, but important, clarification is needed. Like any human rights instrument, the Charter must be interpreted as a 'coherent whole'. This holistic interpretation implies obvious alliances and symbioses - notably with Article 19[71] - but also the avoidance of conflicts. From the latter point of view, it goes without saying that States could not use Article 18 to justify such deregulation that they would fail to meet their other obligations under the Charter to protect foreign workers - including domestic workers, who are particularly vulnerable to trafficking and economic exploitation.

B. Article 18 § 1: applying regulations in a spirit of liberality

According to the first paragraph of Article 18, State parties undertake to apply the regulations to the citizens of other State parties to the Charter 'in a spirit of liberality'. The boundaries to be drawn between the obligations under Article 18 § 1 and those under Article 18 § 3 are not always easy to define. However, the issue at stake is not purely theoretical, since, as we have seen (*supra*), some States have undertaken to comply with § 1, but not with § 3.

However, it is generally accepted[72] that Article 18 § 1 concerns the application of standards and the administrative practices followed in this respect, whereas Article 18 § 3 concerns the enactment of standards and their actual content, which is not the same thing.[73] As stated by Swiatkowski, "even strict legislation interpreted in accordance with the guidelines of the article in question does not provide the Committee with a legal basis for issuing decisions on the failure of member states to comply with the standards set out in Article 18(1) of the Charter".[74]

The assessment of compliance with Article 18 § 1 will therefore be based primarily on the analysis of factual and statistical data. The acceptance and refusal rates for work permits are the main criteria for the ECSR's assessment of this 'spirit of liberality'.[75] To do so, the ECSR requires that data be organized by country of origin and that they be differentiated between initial and renewal applications.[76] In addition, the ECSR takes into account the formalities, fees and other costs associated with work permits. Although these elements are specifically mentioned in § 2 of Article 18, the ECSR also considers them as indicators of 'liberality' in the sense of § 1.[77]

Due to the wording of this article, State parties have a wide margin of appreciation and can restrict the access of foreign workers to their labour market by giving economic or social justifications. This could happen, for example, in order to solve the problem of national unemployment by promoting the employment of national workers. However, the implementation of such rules restricting the access of third-country nationals to the national labour market must not result in a total exclusion of non-EU (or EEA)

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[70] This dynamic character would be associated with a non-regression obligation. According to Cholewinski, "It is arguable that Article 18 § 1 operates as an implicit standstill clause precluding contracting parties from making their rules more restrictive", Ryszard CHOLEWINSKI, *The Legal Status of Migrants admitted for Employment. Committee of experts on the legal status and rights of immigrants. A comparative study of law and practice in selected European states*, Strasbourg, Council of Europe Publishing, 2004, p. 11.

[71] On this article, see the contribution of XX.

[72] ECSR, Conclusions 2012, Serbia: "Article 18 § 1 is concerned with administrative practice rather than legal aspects".

[73] Andrzej Marian SWIATKOWSKI, *cit.*, p. 52.

[74] *Ibid.* However, this distinction between the content of the standard and its application is not always very clear in the ECSR's case law. In the Digest, the ECSR states that "regulations preventing nationals of another State Party from applying for work permit, due to the combined effects of the various rules on entry, length of stay, residence and the exercise of a gainful activity would not be in keeping with this provision of the Charter". It seems that the criticism here relates directly to the content of the applied standards. See also David HARRIS and John DARCY, *cit.*, p. 205: "it should be noted that the Committee has not always been consistent in its allocation of issues to particular paragraphs of Article 18 and would sometimes appear to have treated an issue under the wrong paragraph".

[75] ECSR, Conclusions 2012, Serbia: "a high percentage of successful applications by nationals of States Parties to the Charter for work permits and for renewal of work permits and a low percentage of refusals has been regarded by the Committee as a clear sign that existing regulations are being applied in a spirit of liberality".

[76] ECSR, Conclusions XVII-2 (2005), Spain.

[77] ECSR, Conclusions IX-1 (1990), United Kingdom.

Charter nationals from the national labour market, nor in a significant restriction of their ability to access the national labour market.[78]

C. Article 18 § 2: simplify existing formalities and reduce or abolish chancery dues and charges

Once again, the boundaries between the obligations contained in Article 18 § 2 and those resulting from Article 18 § 3 are not easy to draw. As Swiatkowski[79] points out, the liberalisation of rules governing the employment of foreign workers, as referred to in Article 18 § 3, will often, if not necessarily, result in a simplification of existing formalities within the meaning of Article 18 § 2. There is therefore an overlap, which, as with Article 18 § 1, raises a difficulty with regard to States which have entered into partial commitments. The ECSR assumes and resolves this difficulty - at least on a theoretical level - by recalling, in the latest edition of the *Digest*, that "(f)ormalities and dues and other charges are one of the aspects of regulations governing the employment of workers also covered by Article 18 § 3 but are dealt with specifically under (Article 18, § 2)".[80]

According to the ECSR, "conformity with Article 18 § 2 presupposes the possibility of completing formalities related to the employment of foreign workers 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".[81] It also implies that "waiting times for requisite permits (residence and work) must be reasonable".[82] In its recent conclusions on Ukraine,[83] the ECSR thus concluded that the existence of a "dual procedure for obtaining work and residence permits" does not fit in with the simplification horizon set by Article 18 § 2. In another example,[84] Greece was "condemned" for violating Article 18 § 2, the ECSR having concluded that "the procedure for issuing work permits was very complex and that all the formalities it had previously criticised continued to apply".[85] In this case, Greece relied on its duty to safeguard the rights of foreigners legally residing in the country and to combat illegal immigration to justify not simplifying its procedures for granting and renewing work permits.[86]

Moreover, these permits must be distributed within a reasonable time.[87]

Article 18 § 2 imposes an obligation on States that have subscribed to it to reduce or abolish chancery fees and other charges paid either by foreign workers or by their employers. The obligation imposed is, like Article 18 as a whole, dynamic in nature: State parties must make concrete efforts to *progressively reduce* the level of fees and other charges imposed.[88] To this end, they must demonstrate that they have taken steps in this direction.[89] The obligation of *progression* is logically accompanied by an obligation of *non-regression*: unless

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[78] ECSR, Conclusions 2012, Statement of interpretation of article 18 § 1 and 18 § 3. The ECSR uses this principle to criticize the 'priority rule' then in force in the European Union: "this (EU Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment) states *inter alia* that EU Member States will consider requests for admission to their territories for the purpose of employment only where vacancies cannot be filled by national and Community manpower, or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market. In this regard the Committee notes, however, that in order not to be in contradiction with Article 18 of the Charter, the implementation of such policies limiting access of third-country nationals to the national labour market, should neither lead to a complete exclusion of nationals of non-EU (or non-EEA) States parties to the Charter from the national labour market, nor substantially limit the possibility for them of acceding the national labour market. Such a situation, deriving from the implementation of "priority rules" of the kind just mentioned, would not be in conformity with Article 18 § 1, of the Charter, since it would prove an insufficient degree of liberality in applying existing regulations with respect to the access to the national labour market of foreign workers of a number of States Parties to the Charter. It would also be contrary to Article 18 § 3, since the State in question would not comply with its obligation to progressively liberalise regulations governing the access to the national labour market with respect to foreign workers of a number of States Parties to the Charter".

[79] Andrzej Marian SWIATKOWSKI, *cit.*, p. 53; Lenia SAMUEL, *cit.*, p. 410.

[80] Digest of the case law of the European Committee of Social Rights, December 2022, p. 158.

[81] ECSR, Conclusions 2016, Armenia.

[82] *Ibid.*

[83] ECSR, Conclusions 2020, Ukraine.

[84] For other examples of 'simplification', see Andrzej Marian SWIATKOWSKI, *cit.*, p. 54.

[85] ECSR, Conclusions XIII-2 (1994), Greece.

[86] *Ibid.*

[87] ECSR, Conclusions XVII-2 (2005), Portugal; ECSR, Conclusions 2020, Ukraine.

[88] ECSR, Conclusions 2012, Statement of interpretation of article 18 § 2.

[89] *Ibid.*

there is a 'good reason' (e.g. to cover the increase in treatment costs or inflation), an increase is not conceivable.[90] Beyond this dynamic obligation, the assessment of which remains in essence relative, the ECSR sometimes provides figures, in absolute terms, on admissible or inadmissible financial costs under Article 18 § 2. Extrapolating data from some of the most recent findings, the *Digest*[91] mentions that the fee of €48 charged to employers for obtaining a work permit for a foreign worker, and of €108 for a temporary stay or €264 for a permanent stay, is excessive. The same applies to fees ranging from €266 to €1536 for work permits.

D. Article 18 § 3: liberalize regulations governing the employment of foreign workers

Paragraph 3 of Article 18 requires the parties to the Charter to progressively liberalise, individually or collectively, regulations relating to the employment of foreign workers.

The obligation thus imposed is divided into two areas.

The first area is *access to the national labour market*. According to the ECSR, restrictions on the access of foreign workers to the national labour market do not have to be abolished overnight[92] - the obligation is only gradual - but they should not be too burdensome, especially with regard to the specificities determining the geographical area where these activities can be carried out and the requirements to be met.[93] In its recent conclusions on Ukraine, the ECSR recalls "that 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".[94]

Of course, State parties may continue to require work permits for foreigners seeking employment in their territory, but they may not prevent nationals of State parties from obtaining employment for reasons other than those set out in Article G of the Charter.[95] According to Article G, only restrictions "prescribed by law and […] 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"[96] are permitted. Therefore, the only occupations from which foreigners may be excluded are those directly related to the protection of public interest or national security and which require the exercise of public authority.[97]

In European law, Article 45(4) TFEU contains a similar exception. According to this provision, Member States may reserve access to employment in the public service to their nationals. The Court of justice of the European Union has interpreted this derogation restrictively. According to the Court's established case law, this exception concerns "posts involving direct or indirect participation in the exercise of powers conferred by public law or duties designed to safeguard the general interests of the State or of other public authorities"[98] such as internal or external security of that State. The Court has also stated that these criteria must be assessed on a case-by-case basis in light of the nature of the tasks and responsibilities of the post concerned.[99]

In order to avoid conflict with Article 18 of the Charter, the implementation of such policies restricting access of third-country nationals to the national labour market should neither result in the total exclusion of nationals of non-EU (or non-EEA) State parties to the Charter from the national labour market nor substantially impede upon their ability to access the national labour market. Such a situation, resulting from

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[90] Digest of the case law of the European Committee of Social Rights, December 2022, p. 159.
[91] *Ibid.*, p. 158.
[92] Andrzej Marian SWIATKOWSKI, *cit.*, p. 56.
[93] Digest of the case law of the European Committee of Social Rights, December 2022, citing ECSR, Conclusions V (1977), Germany.
[94] ECSR, Conclusions 2020, Ukraine.
[95] The wording of the commitment in point 18 of Part I is quite explicit: "The nationals of any one of the Parties have the right to engage in any gainful occupation in the territory of any one of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons".
[96] ECSR, Conclusions XI-1 (1989), Netherlands; ECSR, Conclusions 2005, Cyprus.
[97] Digest of the case law of the European Committee of Social Rights, December 2018, p. 176.
[98] See ECJ, 2 July 1996, *Commission of the European Communities v Hellenic Republic*, C-290/94, and more recently ECJ, 10 September 2014, *Iraklis Haralambidis v Calogero Casilli*, C-270/13.
[99] *Ibid.*

the application of rules prioritizing nationals of that state, would not be compliant with Article 18, §3, as the state in question would be failing to fulfil its obligation to gradually liberalize regulations governing access of foreign workers from a number of State parties to the Charter to the national labour market.[100]

A *second area* concerns the *recognition of certificates, qualifications and diplomas*.[101]

To guarantee the effectiveness of the right set forth in Article 18 § 3, State parties must provide for rules governing the recognition of foreign diplomas and professional certifications, to the extent that such qualifications are required to engage in a gainful occupation as employee or self-employed worker.[102]

A requirement for foreign workers to possess certificates, professional qualifications, or diplomas that have only been issued by national authorities or educational and training institutions of the host State, without allowing for the recognition of such certifications obtained as a result of substantially equivalent qualifications issued by the same kind of institution in other State parties, would constitute a serious obstacle to access the national labour market, and a violation of the principle of non-discrimination.[103] Once again, there is a parallel here with the case law of the Court of Justice of the European Union on free movement of workers,[104] it being understood, however, that EU law has reached a level of harmonisation on this point which goes beyond what can be expected from the application of the Charter. The European Union has indeed taken several complementary initiatives in order to facilitate mobility of workers amongst Member states. A first example is the development of a system of recognition of professional qualifications completed in other EU Member States. In this context, Directive 2005/36[105] (amended by Directive 2013/55) provides for the automatic recognition of a number of professions namely in the health sector. The European Professional Card, introduced in 2016, constitutes a second example. Through an electronic procedure, workers can now apply to have their regulated profession recognized in another Member state.[106]

One final and very important question concerns the migrant worker's rights *in the event of loss of employment*.

The ECSR considers that a worker's residence permit cannot be revoked on the sole ground of loss of employment, forcing him/her to leave the country.[107] Additional 'exceptional circumstances' must be invoked to carry out an expulsion of a migrant worker.[108] The recent conclusions on the Netherlands put it this way: "in cases where a work permit is revoked before the date of expiry, either because the work contract is prematurely terminated, whether or not through the fault of the worker, or because the worker no longer meets the conditions under which the work permit was granted, it would be contrary to the Charter to automatically deprive such worker of the possibility to continue to reside in the state concerned and to seek another job and a new work permit, unless there are exceptional circumstances which would authorise expulsion of the foreign worker concerned, within the meaning of Article 19 § 8".[109] The same conclusions add that the "automatic withdrawal of that person's residence permit with no possibility of seeking new employment" based on "early termination of the employment relationship of a foreign national (for professional misconduct)" is not in conformity with Article 18 § 3 of the Charter[110].

In March 2021, the ECSR issued a statement on Covid-19 and social rights[111] highlighting that the pandemic is seriously affecting some of the rights guaranteed by the Charter such as the rights to employment, work and social security. More precisely, the ECSR addressed unemployment caused by Covid-19 and emphasized the fact that migrant workers are often among the first to lose their jobs and face many obstacles when

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[100] ECSR, Conclusions 2012, Statement of interpretation of article 18 § 1 and 18 § 3.
[101] Digest of the case law of the European Committee of Social Rights, December 2022, p. 159.
[102] ECSR, Conclusions 2012, Statement of interpretation of article 18 § 1 and 18 § 3.
[103] Digest of the case law of the European Committee of Social Rights, December 2022, p. 160.
[104] ECJ, 5 February 2015, *European Commission v Kingdom of Belgium*, C-317/14.
[105] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications.
[106] Commission Implementing Regulation (EU) 2015/983 on the procedure for issuance of the European Professional Card and the application of the alert mechanism pursuant to the Professional Qualifications Directive.
[107] ECSR, Conclusions XI-1 (1989), Netherlands.
[108] ECSR, Conclusions 2012, Statement of interpretation of article 18 § 1 and 18 § 3.
[109] ECSR, Conclusions 2020 - Netherlands - Article 18-3. See also ECSR, Conclusions 2012, Statement of interpretation of article 18 § 1 and 18 § 3, and Elaine DEWHURST, cit., p. 312
[110] ECSR, Conclusions 2020 - Netherlands - Article 18-3
[111] ECSR, Statement on COVID-19 and social rights adopted on 24 March 2021.

seeking new ones.[112] The ECSR thus seizes the opportunity of the pandemic to recall the importance of respecting Article 18 § 3 of the Charter, which "requires that the loss of a job does not automatically lead to the withdrawal of a foreign worker's residence permit".[113]

E. Article 18 § 4: recognize the right of nationals to leave the country to engage in a gainful occupation in other Parties to the Charter

States are obligated under this provision to refrain from limiting their citizens' ability to work legally in other states that are Charter parties after they leave their own country. The ECSR has determined that restrictions are in line with the Charter only when they give due consideration to how important travel is in terms of the person's family relations, health, income, occupation, and other similar circumstances.[114]

As determined by Article 18(3) of the Charter,[115] the ECSR has also considered restrictions authorized under Article G of the Charter.[116]

Compliance with Article G involves, first of all, *substantive* requirements relating to the pursuit of a legitimate aim and compliance with the principle of proportionality.

In terms of substantive requirements, this Article must be interpreted in accordance with Article 2 of the Fourth Protocol to the European Convention on Human Rights[117] and Article 12 of the International Covenant on Civil and Political Rights.[118] In its General Comments on Article 12 of the International Covenant on Civil and Political Rights,[119] the Human Rights Committee has stated that "a major source of concern are the manifold legal and bureaucratic barriers unnecessarily affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence".[120] The Committee adds that, regarding the right to movement within a country, it "has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of obstacles making it more difficult to leave the country, in particular for their own nationals".[121]

In practice, restrictions may be permissible if enabling free emigration would go against the public interest or pose a threat to the security of the country. For example,[122] in its conclusions on the Netherlands,[123] the ECSR found that restrictions based on the following grounds were in conformity with Article 18 § 4: "cases of criminal delinquency, maintenance obligations, debts to the State, bankruptcy, military obligations and

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[112] *Ibid.*, p. 7.
[113] *Ibid.*, p. 7.
[114] ECSR, Conclusions 2016, Finland.
[115] ECSR, Conclusions 2012, Georgia.
[116] ECSR, Conclusions 2016, Georgia; ECSR, Conclusions 2020, Serbia. See also Decision on the merits: ECSR, *European Federation of Public Service Employees (EUROFEDOP) v. Greece*, complaint No. 115/2015, decision on the merits of 13 September 2017.
[117] This Article provides that: "§ 2 Everyone shall be free to leave any country, including his own. § 3 No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of order public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[118] This Article provides that: "2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."
[119] Human Rights Committee, *General Comment no. 27 on freedom of movement (article 12)*, 1999, CCPR/C/21/Rev.1/Add.9.
[120] *Ibid.*, § 17.
[121] According to the Human Rights Committee, "these rules and practices include, *inter alia*, lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue passport because the applicant is said to harm the good name of the country" (*Ibid.*, § 17).
[122] Earlier, for other examples, see Lenia SAMUEL, *cit.*, pp. 419-420.
[123] ECSR, Conclusions XI-1 (1986), Netherlands.

security, and are founded on the presumption that the person's departure from the country might permit the person concerned to evade his obligations or might jeopardise the security of the Netherlands or allied States."

The ECSR's contentious case law shows that there are subtle boundaries to be drawn in this respect. In collective complaint no. 116/2016, EUROFEDOP alleged that during the period of compulsory military service in Greece, medical army officers are deprived of the right to leave the country to engage in a gainful occupation in the territory of another contracting Party to the Charter and that this would constitute a breach of Article 18 § 4. However, the ECSR did not follow this conclusion: "[…] during the period of service (either voluntary or obligatory) medical officers cannot leave Greece in order to engage in a gainful occupation abroad. However once they are free of their obligations, there is no restriction on them exercising their right under Article 18 § 4 of the 1961 Charter". The ECSR concludes, on this basis, that "the complaint made by EUROFEDOP concerns exclusively Article 1 § 2 of the 1961 Charter, and consequently holds that there is no violation of Article 18 § 4".[124]

In addition to *substantive* requirements, the existence of *procedural* protection is also necessary for restrictions to the right guaranteed by Article 18 § 4 to be in conformity with Article G. The recent conclusions on Latvia[125] indicate that such restrictions must be based on a "legislative framework", and that there must be "legal remedies to challenge such decisions".

CONCLUDING REMARKS

As announced in the introduction, the impact of Article 18 for State parties to the Charter - when they have subscribed to it - is rather discreet. Its scope of application *ratione personae* is not very generous, and its normative environment often overshadows it. Its strength lies in its dynamic character - it requires constant progress - but this is also its weakness. It does not generally impose clear and immediate results that can be used as 'benchmarks' against which compliance or non-compliance can be identified. Even when this is the case, deviations from these expected results can be justified by Article G, in the implementation of which states also enjoy - according to Karin Lukas' observations[126] - a wide margin of discretion. Dated 2021, the final words of the former Chair of the ECSR are particularly symptomatic of the discretion that we have tried to highlight: "the Committee's case law on this article is not very elaborate, and States parties have had few difficulties in implementing Article 18".[127]

[124] See Decision on the merits: ECSR, *European Federation of Public Service Employees (EUROFEDOP) v. Greece*, complaint No. 115/2015, decision on the merits of 13 September 2017.
[125] ECSR, Conclusions 2020, Latvia.
[126] Karin LUKAS, *cit.*, p. 240.
[127] *Ibid.*

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