

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



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Case document No. 1

Defence for Children International (DCI) v. The Netherlands
Complaint No. 47/2008

COMPLAINT

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Secretariat of the European Social Charter
Directorate General of Human Rights – DG II
Council of Europe
7075 Strasbourg Cedex

Amsterdam, 14 January 2008

Collective Complaint **Defence for Children International v. The Netherlands**

Purpose of the complaint

Defence for Children International (hereafter: DCI) asks the European Committee of Social Rights (hereafter: the Committee) to find that the Netherlands government has failed to fulfil its obligations under the Revised Social Charter (hereafter: the Revised Charter) concerning the right of children and young persons to housing.

Admissibility

Defendant State

The Netherlands is Party to the Revised Charter and has accepted the collective complaints procedure by signing the 1995 Additional Protocol (ratified 3 May 2006).

Articles concerned

Article 11: the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable;
Article 13: the right to social and medical assistance;
Article 16: the right to appropriate social, legal and economic protection for the family as a fundamental unit of society;
Article 17: the right of children and young persons to appropriate social, legal and economic protection;
Article 30: the right to protection against poverty and social exclusion;
Article 31: the right to housing;
Alone or read in conjunction with Article E on non-discrimination.

Article 11 of the Revised Charter reads as follows:

With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co operation with public or private organizations, to take appropriate measures designed inter alia:

- 1- to remove as far as possible the causes of ill health;
- 2 – to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
- 3 – to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Article 13 of the Revised Charter reads as follows:

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

- 1 – to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
- 2 – to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
- 3 – to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
- 4 – to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European CRC on Social and Medical Assistance, signed at Paris on 11 December 1953.

Article 16 of the Revised Charter reads as follows:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Article 17 of the Revised Charter reads as follows:

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organizations, to take all appropriate and necessary measures designed:

- 1a – to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
- 1b – to protect children and young persons against negligence, violence or exploitation;
- 1c – to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
- 2 – to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Article 30 of the Revised Charter reads as follows:

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a – to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a

situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

b – to review these measures with a view to their adaptation if necessary.

Article 31 of the Revised Charter reads as follows:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1 – to promote access to housing of an adequate standard;

2 – to prevent and reduce homelessness with a view to its gradual elimination;

3 – to make the price of housing accessible to those without adequate resources.

These pledges can be read alone or in conjunction with the non-discrimination clause of Article E.

Article E of the Revised Charter reads as follows:

The enjoyment of the rights set forth in this Revised 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.

Status of Defence for Children International

DCI is an International Non Governmental Organization with representatives in 42 countries world wide. One of the goals of DCI is to improve and defend the rights of children by means of investigating and denouncing violations of children's rights and taking legal action against these violations.

DCI is one of the organizations authorized to lodge collective complaints under the Revised Social Charter.

DCI-Netherlands has been mandated by DCI to lodge this complaint against the Netherlands on 30 May 2007 (see attachment No.I).

For the purpose of the procedure Mr. Pim FISCHER, Mr. Joris SPRAKEL and Mr. Neal BLOMJOUS are appointed by DCI as advisers as mentioned in Rule 25-2 of the Rules of Procedure of the ECSR.

The complaint is supported by Dutch human rights organizations Stichting LOS*, the Nederlands Juristen Comité voor de Mensenrechten** and UNICEF Netherlands (see attachment No.II).

The complaint

DCI considers housing to be a fundamental right to children on its own as well as a prerequisite to the various other rights granted to children in the Revised Social Charter. For instance even a minimum standard of health is not attainable without adequate housing. Children will be hindered in their development because without adequate housing they will not be able to obtain a proper family life, they will be hindered in their education because of a lack of privacy due to overcrowding.

* Stichting LOS is a competence centre for the assistance of undocumented migrants, website: www.stichtinglos.nl.

** The Dutch section of the International Commission of Jurists (ICJ), website: www.njcm.nl.

The complaint is specifically aimed at the situation of children living in the Netherlands but who do not have lawful residence. Although housing problems may occur for children that are lawfully present as well, the focus of this complaint is on those children who are residing unlawfully in The Netherlands and are therefore extremely vulnerable.

Unlawful presence can arise from a failed (asylum or regular¹) immigration procedure, but in many cases unlawful presence is not necessarily preceded by an attempt to gain lawful residence. Problems with access to government services may also occur while awaiting a decision on regular immigration. Because regular immigration is considered to be voluntarily, there is usually no entitlement to government services while awaiting the decision.

The group of children not lawfully present in the Netherlands is of considerable size and is by law excluded from most government services. The estimates on the amount of persons not lawfully present in The Netherlands vary. Policy makers estimate the amount of aliens not lawfully present between 75.000 and 185.000 and the amount of children not lawfully present between 25.000 and 60.000².

Scope of the Charter

DCI is aware of the fact that under the Revised Charter aliens not lawfully present cannot claim the rights granted by the Revised Charter. The Appendix to the Revised Charter clearly states that the scope of the Revised Charter is limited to “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”. Refugees and Stateless persons are entitled to an as favourable as possible treatment under the Revised Charter.

A strict interpretation of the Appendix to the Revised Charter would mean that the subjects of this complaint, i.e. children not lawfully present in The Netherlands, are not protected by the Revised Charter. However, referring to the Decision on the Merits in Complaint No. 14/2003, DCI submits to the Committee that housing, on the same grounds as health care, is a prerequisite for the preservation of human dignity. DCI therefore asks the Committee to hold that legislation or practise which denies entitlement to housing to foreign nationals, even if they are on the territory illegally, is contrary to the Revised Charter.

DCI further notes that the Revised Charter is drawn up with the intent to accomplish the effective exercise of the rights granted therein. The Committee has pointed this out by emphasizing the interconnectedness of the Revised Charter and other human rights instruments. The scope of the Revised Charter is broadened by this interconnectedness as Parties to the Revised Charter have

¹ Regular immigration (‘regulier’) is immigration on so-called regular grounds, this means work and study related immigration, immigration for purposes of family forming or family reunion (for non-asylum seekers) and for instance (temporary) extended stay for failed asylum seekers who are in need of medical care.

² Kamerstukken II, 2006-2007, 19 637, nr 60.
Studies by the Netherlands government (WODC) estimate the total amount of aliens not lawfully present at 128.907 people in 2006 of which 88.116 persons are of non European origin. (Van der Heijden, P.G.M, G. van Gils, M. Cruijff en D. Hessen, *Een schatting van het aantal in Nederland verblijvende illegale vreemdelingen in 2005*, Ministerie van Justitie 2006-2, IOPS-Utrecht, Universiteit Utrecht, November 2006).

guaranteed to foreigners not covered by the Revised Charter rights identical to or inseparable from those of the Revised Charter by ratifying human rights treaties.³

A basis in international law

As this collective complaint is aimed at the provision of housing for children specifically, DCI asks the Committee to consider the rights granted in the Revised Charter in light of the Convention on the Rights of the Child (hereafter: the CRC).

The Committee has concluded before that the Revised Charter is directly inspired by the CRC. And that therefore Article 17 of the Revised Charter protects in a general manner the right of children and young persons to care and assistance.⁴ Later on the Committee also noted that the CRC is one of the most ratified treaties, and has been ratified by all member states of the Council of Europe, and therefore it was entirely appropriate for it to have regard for it.⁵

The scope of the CRC is broader than the scope of the Revised Charter. The CRC is aimed to protect all persons under the age of 18 within the jurisdiction of the State Party. Discrimination on any ground in exercising the rights set forth in the CRC is prohibited (Article 2 CRC). This prohibition of discrimination includes discrimination of children who are non-nationals, migrants, refugees and asylum-seekers.⁶

In 2005 the Secretariat of the ESC has drawn up an information document on the children's rights protected by the Revised Charter.⁷ The document states that the Revised Charter protects the rights of children in two ways. Firstly by the specific relevance of certain rights for children, such as family life (Article 16) and health (Article 11). Secondly by rights relating exclusively to children, such as the right to social, legal and economic protection for children (Article 17).

Although the rights of children are covered by the Revised Charter, DCI in this collective complaint will also refer to the corresponding right in the CRC. DCI deems this relevant because it shows the intention of the international community to protect all children, irrespective of their status. The latter includes residence status, as laid down in article 2 of the CRC. The Committee on the Rights of the Child has declared several times that *all* children enjoy *all* rights as protected by the CRC⁸. The Netherlands being Party to the CRC further shows the commitment to the protection of children's rights by the Netherlands government. It shows there is persistence in that commitment by signing different treaties to the same effect. The Netherlands government can therefore be held to their commitment.

³ European Committee of Social Rights, *Conclusions 2005, Statement of Interpretation on Article 11, §5, p. 10.*

⁴ FIDH v. France, Collective Complaint no. 14/2003, Decision on the Merits of 5 September 2003, §3.6.

⁵ OMTC v. Ireland, Collective Complaint no. 18/2003, Decision on the Merits of 7 December 2004, §§ 61-63.

⁶ UN Doc. CRC/C/58, p. 10, §27.

⁷ Children's rights under the European Social Revised Charter, Information Document prepared by the Secretariat of the ESC, 18 November 2005.

⁸ UN doc CRC/GC/2005/6, para 12.

The exclusion of unlawful aliens in the Netherlands

In 1998 the Benefits Entitlement Act (Koppelingswet)⁹ was introduced in the Netherlands. The main purpose of the Benefits Entitlement Act was to exclude aliens that are not lawfully present in the Netherlands from all public services. The idea behind this is that by excluding unlawfully present aliens access from public services, it is no longer possible for them to extend their (unlawful) stay. Justification for this exclusion is, that the alien not lawfully present is primarily responsible for the situation he or she is in. In other words, they are held accountable for their own predicament.

Implementation of the Benefits Entitlement Act was executed thoroughly. Although the government called for leniency when applying the Benefits Entitlement Act¹⁰, the law was instead interpreted rigidly by government agencies and the Courts. After the introduction of the law, aliens not lawfully present in the Netherlands were excluded from all public services and lost their entitlement to shelter, food and easy access to medical care. Relevant laws were changed to achieve this exclusion. Ultimately banning aliens not lawfully present from society.

In the explanatory memorandum to the Benefits Entitlement Act¹¹ the government stated that three exceptions were made to the exclusion of unlawful aliens based on international law: education, legal assistance and medical treatment. The principle of the Benefits Entitlement Act, that is to exclude aliens not lawfully present from all public services, is now laid down in the Aliens Act 2000 (Vreemdelingenwet 2000)¹² and other relevant substantive laws.

The Aliens Act 2000 is the general law concerning migration to the Netherlands and the allocation of residence status to aliens. According to the immigrant's residence status he or she is entitled to public services. Article 10 of the Aliens Act 2000 excludes aliens not lawfully present from receiving any government services with the exception of (primary and secondary) education (for children), medical treatment (when necessary from a medical perspective) and assistance in legal matters.

Work and Social Assistance Act (Wet Werk en Bijstand - WWB)¹³ – Articles 11-2 en 16-2 WWB

The Work and Social Assistance Act is the so-called safety net in the Netherlands system of benefits. This means that if people have no other means of income they will be eligible to the benefits granted in this law. The benefits received through the Work and Social Assistance Act should be considered social assistance benefits as they are not dependant on an affiliation to a social security scheme aimed to cover a particular risk, or any requirement of professional activity or payment of contributions.

There is a regime for general living costs, such as housing, food and health insurance ('algemene bijstand'), and a regime for extraordinary living costs

⁹ Act of 26 March 1998, Stb. 1998, 203.

¹⁰ In the explanatory memorandum to the Benefits Entitlement Act the Netherlands government recognizes the fact that some aliens not lawfully present are in the Netherlands with the government's knowledge and consent. Therefore the memorandum states that aliens not lawfully present should not rigidly be deprived of all government services. Kamerstukken II, 1994-1995, 24 233, nr. 3, §2.1.

¹¹ Kamerstukken II, 1994-1995, 24 233, nr. 3.

¹² Act of 23 November 2000, Stb. 2000, 495.

¹³ Act of 9 October 2003, Stb. 2003, 375.

('bijzondere bijstand'). People not lawfully present in the Netherlands are excluded from both these benefits by law (Article 11-2 WWB). The usual exception that is applied to people that live in dire circumstances, the so-called 'hardheidsclausule', does not apply to aliens who are not lawfully present (Article 16-2 WWB).

For children not lawfully present in the Netherlands problems arise from their exclusion from the Employment and Benefits Act because as a result they cannot meet the costs for living a decent life which is necessary to maintain their human dignity.

(1) The first problem children not lawfully present face is that they cannot secure adequate housing, food, clothing and medical insurance¹⁴ because they are excluded from receiving 'algemene bijstand'.

(2) 'Bijzondere bijstand' can be granted for a variety of costs ranging from costs for school activities¹⁵ to costs to cover a (medically indicated) diet. Therefore not being eligible for 'bijzondere bijstand' prevents children not lawfully present from the full development of their personality and of their physical and mental capacities.

General Child Benefit Act (Algemene Kinderbijslagwet - AKW)¹⁶ – Article 6-2 AKW

Every parent in the Netherlands is entitled to a three-monthly benefit for the fact that they have a child. People not lawfully present are excluded from this benefit (Article 6-2 AKW). As the money is meant to compensate some of the extra costs needed to raise a child not receiving this money hinders the child's full development. DCI bases this conclusion on the explanatory memorandum to the General Child Benefits Act. The (then) Netherlands government designed the General Child Benefits Act for the purpose of better raising and educating children and to stimulate the full development of the child by reducing material need of the families.¹⁷

Social Support Act (Wet maatschappelijke ondersteuning - WMO)¹⁸ – Article 8-1 WMO

The Social Support Act covers costs related to disability and (emergency) shelter. People not lawfully present in the Netherlands cannot apply for these provisions (Article 8-1). Children with disabilities will suffer from being excluded from receiving the proper aid for their disability as well as children of abused women who, because of their unlawful presence, cannot secure access to shelter.

¹⁴ DCI deems a medical insurance necessary because, although the Aliens Act 2000 does not exclude unlawful aliens from medical treatment, and access to medical treatment is in a way guaranteed, a medical insurance usually covers more than the treatment that is granted in practice, which is treatment that is necessary from a medical perspective.

¹⁵ Access to education is guaranteed for all children because of Article 10 Aliens Act 2000. However, costs for certain school activities are not covered and have to be paid separately. Unlawfully present children run the risk of missing out on socially necessary school outings. They therefore run the risk of becoming socially excluded, thus compromising their human dignity.

¹⁶ Act of 26 April 1962, Stb. 1962, 160.

¹⁷ Kamerstukken II, 1957-1958, 4953, nr. 3, p. 14-15.

¹⁸ Act of 29 June 2006, Stb. 2006, 351.

Issues under the European Social Revised Charter

Introduction

This complaint focuses on the right to housing (article 31 ESC) and the related rights; to health (article 11 ESC), medical and social assistance (article 13 ESC), protection for the family unit (article 16 ESC), special protection for children (article 17 ESC) and protection against poverty and social exclusion (article 30 ESC).

Housing

For people in the Netherlands, whether they are lawfully present or not, there is no provision for factual housing. Housing provisions are financial in nature and include a socially controlled rent system and a tax refund ('woonkosttoeslag') based on the income-to-rent ratio. People with no income are eligible for Social Assistance Benefits as described above that may help them secure housing.

Article 31 ESC – The Right to Housing

The Netherlands has limited government responsibility for factual housing to emergency situations only (homelessness (WMO), abused women (WMO), nursing home care (AWBZ) and psychiatric care (AWBZ)). In all other cases people are responsible for their own housing situation. If someone cannot afford housing due to lack of income, the person is eligible for money in the form of 'algemene bijstand' (in case of insufficient income) and/or a tax refund (depending on the persons income-to-rent ratio). Housing therefore is guaranteed through a social benefits (Article 12 ESC) or social assistance (Article 13 ESC) scheme. Because of this the housing situation of children not lawfully present should be viewed in light of Article 31 ESC in conjunction with Article 13 ESC.

Article 31 ESC emphasizes the importance of adequate housing and the prevention of homelessness. Housing is considered adequate when it is a structurally secure dwelling, safe from a sanitary and health point of view and not overcrowded. This means that there has to be access to basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity etcetera. Also it has to be suitable in light of the number of persons and the composition of the household in residence.¹⁹

As the United Nations Committee on Economic, Social and Cultural Rights puts it: "The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity."²⁰

The prevention of homelessness is specifically aimed at categories of vulnerable people.²¹ Young people and children are among the persons usually considered vulnerable and should therefore be protected from becoming homeless under Article 31 ESC. The Netherlands policy in which rejected asylum seekers lose

¹⁹ European Committee of Social Rights, Conclusions 2003, France, p. 221.

²⁰ CESCR, General Comment no 4, on the right to adequate housing, E/1992/23.

²¹ European Committee of Social Rights, Conclusions 2003, Italy, p. 342.

their right to shelter after 28 days (even if physically they cannot be deported) is clearly not in accordance with Article 31 ESC. Considering the Committee's finding that the CRC is one of the fundamental human rights instruments on which the Revised Charter is based, DCI points out that the right to housing is also protected in article 27 of the CRC.²²

Article 13 ESC – The Right to Social Assistance

Because of the design of the Netherlands system, i.e. providing housing through social assistance benefits, the right to housing cannot be viewed without viewing the right to social assistance. Housing in light of Article 13 ESC should be seen as an adequate resource needed to lead a decent life and meet basic needs in an adequate manner.

It has been established that the right to social assistance benefits should be based on a criterion of need. Social assistance benefits therefore cannot be dependant on an affiliation to a social security scheme aimed to cover a particular risk, or any requirement of professional activity or payment of contributions. This is where social assistance differs from social security as meant in Article 12 ESC. In the end social assistance is intended to cover situations where no social security benefit ensures that the person concerned has sufficient resources or the means to meet the cost of treatment necessary in his or her state of health.²³

As the right to social assistance is based on a criterion of need, the assistance should be granted as soon as the need arises, i.e. the person in question is unable to obtain "adequate resources".²⁴

The personal scope of Article 13 ESC is a broad one. Because need is the only criterion for granting social assistance, any person can be eligible for receiving social assistance benefits.²⁵ Based on Article 13.4 ESC even people not lawfully present in the territory of a member state can be eligible for social assistance benefits.²⁶ In these cases need still is the main criterion for eligibility which means that (emergency) social assistance (food and accommodation) should be given until the unlawfully present person can be repatriated.²⁷

The Committee has noted that persons not lawfully present do not necessarily need to be granted access to the regular social assistance scheme, but they are required to provide temporary assistance, of an appropriate nature, where such persons are faced with an immediate state of need.²⁸ It should be noted that the Netherlands system does not provide for actual housing. The Netherlands therefore can at the moment only fulfil its obligations under Article 31 ESC by granting access to social assistance benefits as specified under Article 13 ESC.

²² Article 27 of the CRC is discussed in more detail later on in this Collective Complaint under article 17 of the Revised Charter.

²³ European Committee of Social Rights, Conclusions XIII-4, Statement of Interpretation on Articles 12 and 13, pp. 34-36.

²⁴ European Committee of Social Rights, Conclusions XIII-4, pp. 54-57 and Conclusions XIV-1 Portugal, pp. 701-702.

²⁵ European Committee of Social Rights, Conclusions X-2 Spain p. 121 and Conclusions XIII-4, pp. 54-57.

²⁶ European Committee of Social Rights, General Introduction to Conclusions XVIII-1 Belgium.

²⁷ European Committee of Social Rights, Conclusions XIII-4, pp. 54-57 and Conclusions XVIII-1 Germany, p. 22.

²⁸ European Committee of Social Rights, Conclusions XIV-1, Netherlands, p. 598.

Although Article 13 ESC does not stipulate in which manner social assistance is given, i.e. in cash or in kind²⁹, the Netherlands system is clear as it only provides social assistance benefits in cash. Under Article 13 ESC exclusion from cash benefits is only allowed if access to benefits in kind is granted.

Finally it should be noted that because social assistance benefits are based on need it cannot be limited in time.³⁰ Therefore social assistance should be given as long as the need persists in order to help the person concerned to continue to lead a decent life.³¹

The Parliamentary Assembly of the Council of Europe has stated that the right to housing is one of the minimum rights that should apply to everyone: "Adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants".³²

Housing as a prerequisite to other Revised Charter rights

Without adequate housing people have difficulty achieving the various rights granted by the Revised Charter. In this sense the right to housing is a prerequisite to the achievement of other rights such as the right to health (Article 11 ESC), the right to the full development of the family (Article 16 ESC) and the right to an environment that guarantees a full development of mental and physical capacities (Article 17 ESC).

Article 11 ESC – The Right to Health

With regard to the right to health for children not lawfully present, the Netherlands government has a provision in the form of access to health care on the basis of necessity. The need is determined by medical professionals and in practice meets a minimum standard of health care.

Unfortunately the health of children not lawfully present is in peril as there is no provision for housing. This means that these children often have to live in housing that, due to overcrowding, does not meet the standard of adequacy as defined by the Committee. Unlawfully present children are often faced with unsanitary situations and often a lack of basic amenities such as (clean) water, heating and electricity due to the fact that they cannot pay the bills. This lack of water, heating and electricity can lead to health problems.

For children in particular the right to health is also protected by Article 24 of the CRC: "State Parties recognize the right of the child to the enjoyment of the highest attainable standard of health (...)".

²⁹ European Committee of Social Rights, Conclusions XIII-4, pp. 54-57.

³⁰ European Committee of Social Rights, Conclusions XIV-1 United Kingdom, p. 845.

³¹ European Committee of Social Rights, Conclusions XIII-4, pp. 54-57 and Conclusions XVIII-1 Spain, p. 745.

³² Mr Ed van Thijn, Human rights of irregular migrants. Parliamentary Assembly Doc 10924, 4 May 2006.

Article 16 ESC – The Right to The Full Development of the Family

Based on Article 16 ESC member states have an obligation to ensure the full development of families by means of social and family benefits and housing provisions. The conclusion that can be drawn from the wording of Article 16 ESC is that without adequate housing no family life is possible. This conclusion is supported by the Decision on the Merits in Collective Complaint No.15/2003 in which the Committee concluded that Article 16 also covers the availability of suitable family housing.³³ In this sense adequate housing is a prerequisite to family life and therefore the well being and development of the child as a member of the family. DCI further notes that the Netherlands government is bound by jurisprudence on family life as is based on Article 8 of the European Convention on Human Rights.

Again, bearing in mind the Committee's finding that the CRC is one of the fundamental human rights instruments on which the Revised Charter is based, DCI refers to Article 16 of the CRC in which the right to protection of family life and privacy of children is laid down.

Article 17 ESC – The Right to Full Physical and Mental Development

By ratifying Article 17 ESC the Netherlands government has made a pledge to undertake to take measures that ensure the effective right of children to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities. In order to achieve this the Netherlands government has a duty to ensure that children have the care and the assistance they need for this purpose. This care and assistance cannot be achieved without access to adequate housing. As such housing is a prerequisite to the rights established by Article 17 ESC.

In earlier Collective Complaint procedures (No. 14/2003 and No. 18/2003) the Committee has interpreted Article 17 ESC in light of the CRC. The Committee noted that Article 17 ESC had been directly inspired by the CRC and that the article therefore protects in a general manner the right of children and young persons to care and assistance. The Committee deemed this appropriate as the CRC is one of the most ratified treaties, and has been ratified by all member states of the Council of Europe.

Given the fact that Article 17 ESC is inspired by the CRC it stands to reason to look at the provisions that should be guaranteed by the CRC.

Article 27 of the CRC reads as follows:

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support program's, particularly with regard to nutrition, clothing and housing.

³³ European Roma Rights Centre (ERRC) v. Greece, Collective Complaint No. 15/2003.

The wording of Article 17 ESC and Article 27 of the CRC is similar. The reason to refer to Article 27 of the CRC lies in the fact that this article mentions the minimum provisions ('material assistance') that should be provided by the State if the parents cannot; nutrition, clothing and housing. Given the fact that the CRC is intended to include all persons under the age of 18 the Netherlands government wrongfully excludes children not lawfully present from social assistance benefits.

It is clear from both Article 17 ESC and Article 27 of the CRC that the parents are primarily responsible to provide for their children. The problem arises when, as is the case in the Netherlands, the residence status prohibits people to work and excludes people from social assistance benefits. This exclusion marginalizes people and leaves them with no legal means of earning an income. In the perspective of DCI exclusion of unlawful aliens can be a choice based on political motivation, but this choice should never lead to poverty, malnutrition and homelessness of children.

Article 30 ESC – Protection against Poverty and Social Exclusion

Article 30 ESC deems housing a prerequisite to prevent social exclusion and poverty. According to the Committee the situation of living in a situation of poverty and social exclusion is a violation of human dignity of human beings.³⁴ Member States are required to remove obstacles to access to fundamental rights, in particular housing and social assistance.³⁵ By excluding children not lawfully present from housing and social assistance benefits by law, the Netherlands government therefore violates the human dignity of these children.

Discrimination

Article E of the Revised Charter in general prohibits member states to discriminate on any ground in the enjoyment of the rights set forth in the Revised Charter. The non-discrimination clause is similar to the non-discrimination article in the CRC. Therefore for the interpretation of the article DCI refers to the interpretation on discrimination as stated in the CRC, article 2.

As stated before on page 6, the scope of the CRC is broader than the scope of the Revised Charter. The CRC is aimed to protect all persons under the age of 18 within the jurisdiction of the State Party. Discrimination on any ground in exercising the rights set forth in the CRC is prohibited (Article 2 CRC). This prohibition of discrimination includes discrimination of children who are non-nationals, migrants, refugees and asylum-seekers.³⁶

³⁴ European Committee of Social Rights, Conclusions 2003, Statement of Interpretation on Article 30, all countries.

³⁵ Ibid.

³⁶ UN Doc. CRC/C/58, p. 10, §27.

Conclusion

By ratifying the Revised Social Charter the Netherlands government has shown its commitment to guarantee the right to housing.

Nevertheless, the law of the Netherlands excludes children not lawfully present from securing adequate housing. Nor is emergency housing available to these children.

By not being able to secure a safe shelter children not lawfully present in the Netherlands are denied their human dignity and the right to develop themselves fully, both physically and mentally.

As the Netherlands government also has no factual provision for housing the Netherlands government does not fulfil its obligations under the Revised Charter concerning the right to housing.

DCI asks the European Committee on Social Rights to consider the arguments in this collective complaint and to find that the Netherlands is in violation of Articles 11, 13, 17, 30 and 31 in conjunction with Article E of the Revised Charter.

prof. J.G. Vianen
Chairman Defence for Children International the Netherlands

J.P Kleijburg, MA
Executive director Defence for Children International the Netherlands