EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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Case No. 3

European Federation of National Organisations working with the Homeless (FEANTSA) v The Netherlands
Complaint No 86/2012

RESPONSE FROM FEANTSA TO THE GOVERNMENT'S SUBMISSIONS ON THE ADMISSIBILITY AND ON THE MERITS

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RESPONSE TO THE GOVERNMENT SUBMISSIONS ON ADMISSIBILITY AND MERITS

Brussels, Belgium
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OBSERVATIONS ON ADMISSIBILITY

Introduction

In the observations on collective complaint 86/2012 The Netherlands government claims partial inadmissibility of the complaint on two grounds. The first ground relates to the exclusion of undocumented migrants from the scope of the Revised European Social Charter (hereinafter: the Revised Charter) on the basis of Paragraph 1 of the Appendix. The second ground relates to the limitation that is mentioned in paragraphs 4 and 7 of Article 19 of the Revised Charter.

First Ground: Scope of the Revised Charter

As observed by The Netherlands government the scope of the Revised Charter is clearly stated in paragraph 1 of the Appendix. The paragraph states that the scope of the Revised Charter does not extend to undocumented migrants. The European Committee on Social Rights (hereinafter: the Committee) on two occasions has extended the scope of the Revised Charter to include undocumented migrants.[1] FEANTSA observes that, although in both collective complaints children were concerned, the reasoning of the Committee for declaring the complaints admissible can be applied in the current complaint. The reasoning was based on the notion that the existence of human dignity could only be properly assessed in the merits stage of the complaints procedure. In the current complaint human dignity is as much at stake as in the complaints mentioned before. FEANTSA further observes that the Revised Charter, similar to the European Convention of Human Rights, is a living instrument that needs to be interpreted in light of current day human rights standards. On the basis of these arguments FEANTSA submits that the first argument of The Netherlands government should be dismissed.

Second Ground: Scope of Article 19 of the Revised Charter

FEANTSA is of the opinion that the scope of Article 19 of the Revised Charter is not a ground for admissibility. The complaint does not only involve undocumented migrants. The application of Article 19 to the complaint should therefore be determined in the merits stage of the complaints procedure.

Conclusion

FEANTSA submits that both grounds regarding admissibility relied on by The Netherlands government should be dealt with in the merits stage of the complaint. FEANTSA therefore asks the Committee to declare Collective Complaint 86/2012 admissible in its entirety.

OBSERVATIONS ON THE MERITS

Treaty obligations

FEANTSA notes that The Netherlands government in its submissions on several occasions refers to the duties of the municipalities and, in relation to quality of shelters, shelter organizations. Although the legal framework in The Netherlands may allocate the roles as described by the government, that does not alter the obligations on the basis of the European Social Charter. It is the State that is bound by the Treaty. The Treaty does not specify how the State organizes itself. It is clear however, that the State at the international level acts as one. That means that the national government cannot hide behind the local authorities when it comes to breaches of the treaty obligations. It is up to the national government to guarantee compliance with the Treaty. It is the national government that can be called to account regarding their obligations at the international level. The Netherlands government fails to recognize this principle.

[1] Collective Complaints No. 14/2003 (FIDH v. France) and No, 47/2008 (DCI v. The Netherlands)

Nationwide access

The Dutch government submits that the law and practice guarantee nationwide access. There are countless examples in which it is proven that this submission of the government is false. The fact that the government submits this statement is not helping the establishment of facts on which the Committee is to base its Decision on the Merits.

The Dutch government refers to the Action Plan of the national government with the so-called G4 cities (Amsterdam, Rotterdam, The Hague and Utrecht), and the "Urban Compasses" for the other 39 municipalities responsible for (emergency) shelter. Although the government provides numbers concerning the Action Plan that does not show the extent to which the Action Plan and Urban Compasses solve the problem. The government shows that a target was set for the G4, and that that target was met. What needs to be shown is whether the target is a meaningful contribution to the problem that exists. Moreover, the question can be asked: what do these numbers say about the other 39 cities in terms of (emergency) shelter?

In paragraph 19 of their submissions the Dutch government refers to the VNG guidelines for nationwide access. The government submits that this guarantees nationwide access. This, unfortunately is not the case. The guidelines are not binding on the municipalities, whatever the actions taken by the Ministry of Health, Welfare and Sport.

The Dutch government admits that municipalities have applied the local connection criterion. The government should show for the purpose of this complaint that they take an active approach to guarantee nationwide access. The government cannot rely, as they do, on the homeless shelters alone to bring local connection issues to their attention. These organizations are often responsible for the execution of the policy. The government should do its own research and take appropriate measures to ensure nationwide access. In the current submission, the government does not even provide one example of how the Ministry has dealt with this issue in the past.

The Dutch government refers to a list of contact persons to be used in case a person needs to be transferred to another region. This list exists, but has not been updated since 31 October 2011. It is not complete and also refers to contact persons who are employees of shelter organizations. Not all of the contact persons on the list are currently employed by the municipalities. And, not all contact persons have the authority to register people in the Municipal People's Register (GBA) which in effect bars people from access to an ID, shelter and social assistance. To sum up, the list is out of date and rarely used.

If the list were to work, the inter-authority discussions the Dutch government refers to in paragraph 20 do not offer a solution for a homeless person who is denied access. In other words, an inter-authority discussion cannot serve as (emergency) shelter.

Example
A striking example of how local connection and other criteria work can be found in the record of one man. Take the example of person who has moved around; someone who has stayed with friends, been in prison, lived outside of The Netherlands, and has lived on the streets. The lack of clarity regarding where he "belongs" has led to a number of requests for help.

- On 1 March 2012 shelter and social assistance is requested form the municipality of Rotterdam. It is decided that the applicant does not meet the criteria "regiobinding" and "lawful residence" as set by the municipality (attachment 1G).
- On 1 March 2012 shelter and social assistance is requested form the municipality of Breda. It is determined that there is no connection with Breda, and that the person needs to request help in Purmerend (attachment 1C). There is no help offered with the transfer.
- On 9 March 2012 shelter and social assistance is requested from the municipality of Zutphen. It is determined that there was no formal request, and that it is unclear why Zutphen was contacted. It is also mentioned that help can only be given to migrants with appropriate documents (Attachment 1B).

- On 21 March 2012 shelter and social assistance is requested from the municipality of Purmerend. It is determined that there is a need, but that the responsibility lies with another city (Arnhem) or the Immigration Services (IND) (Attachment 1A).
- On 3 April 2012 shelter and social assistance is requested from the municipality of Vught. It is determined that the applicant needs to request help at the municipality of 's-Hertogenbosch, one of the 43 responsible municipalities for homeless shelter (attachment 1D). The request for help is "not processed" because of lack of jurisdiction.
- On 18 April 2012 shelter and social assistance is requested from the municipality of 's-Hertogenbosch. It is determined that the municipality of Arnhem is most suitable and that the lack of residence permit makes the applicant ineligible for help (attachment 1E). There is no further action taken by 's-Hertogenbosch.
- On 12 July 2012 upon a request for shelter and social assistance the municipality of Delft it is decided that the applicant does not stand a chance for help for reasons of, amongst others, registration issues (GBA, shelter), last known registration in Purmerend, and being undocumented (attachment 1F).

This is just the example of one person. Other examples like this exist. The example shows that is it standing practice to add criteria other than "need". Rotterdam for instance lists five (5) criteria: under 23 years old, lawful residence, local connection, social resilience, OGGZ criterion (psychiatric issues). Other cities apply similar criteria. These criteria lead to situations where people in need are excluded from social assistance and shelter. The Central Council of Appeal (CRvB) in its decisions endorses these additional criteria.

Eligibility for shelter – assessing need?

The government in its submissions fails to recognize the importance of assessing the need for shelter or other social assistance. On multiple occasions the government refers to eligibility criteria that go beyond the assessment of need.

The example of Amsterdam is discussed where the multiple problems rule applies. In paragraph 25, the government makes reference to the hardship clause which, in the words of the government, applies to people in a crisis or emergency. Need should be assessed earlier than that. If a state of emergency has been reached there may have already been a breach of Article 31 (2) ESC.

The submission of the government on EU migrants shows a shocking disregard to their human dignity. The EU migrants are portrayed as parasites that, as the government puts it, regard the various forms of night shelter as low-budget accommodation. The government states that EU citizens do not fall within the target group. This blanket ban on EU citizens in (emergency) shelters is yet another example where the government is not assessing the need for such shelter or other social assistance. The government may need an instrument in order to determine who is eligible for shelter. FEANTSA believes that such an instrument should in the view of FEANTSA be based on the need of the person requesting government assistance. Excluding categories of people from shelter does not lead to a proper assessment of need.

Example
There is a case currently before the Committee on the Elimination of Discrimination Against Women (CEDAW) of a victim of human trafficking (G. v The Netherlands, G/SO234/27NLD). The applicant has been recognized by social workers, the police and immigration services as a victim of human trafficking. Standing in the way of providing her with shelter and social assistance is the fact that she has not filed a police report against her traffickers. Need has been established, a non-need criterion (the filing of a police report) is causing her not to be eligible for help.

In paragraph 24 the Dutch government refers to the "comprehensive system of social security" which provides for solutions to prevent homelessness. The government makes reference to the Work and Social Assistance Act (WWB) and Title III (Debt Repayment Natural Persons).

What the government does not mention is that the local connection criterion excludes a person not only from accessing a shelter, but also from registering with the municipality, thus making it impossible to apply for any form of social assistance or social security. Furthermore, under the WWB persons run the risk of having their benefits reduced for a prolonged period of time as a penalty. The penalty concerned is considered an "own responsibility" risk for people receiving benefits. Ultimately it may result in the loss of tenancy (rental contract) due to lack of payment. In The Netherlands, landlords can evict tenants after three months of rent arrears.

The government also does not mention that access to Title III debt resolution is limited in various ways. Given the rise in demand for debt resolution, courts apply the rules strictly. It may very well be that a strict application of the rules is beneficial to society as only those who really deserve debt resolution will get help. It is by no means the safety net the government claims it to be. There are just too many grounds for refusal. A second admission into the debt resolution program is out of the question altogether.

Undocumented migrants

The government submits that it is acting in accordance with international law by denying undocumented migrants access to shelter. The government claims a need to have a restrictive migration policy in order to control influx and motivate irregular migrants to leave on their own accord. This is standing policy in The Netherlands and endorsed by the case law of the appeals courts.

FEANTSA is not claiming a right of residence for undocumented migrants as that is up to the State to determine. That element of sovereignty is an undisputed principle of international law. What is at stake however, is the human dignity of a considerable group of undocumented migrants in The Netherlands. This group does not have residence status but cannot leave. This might happen because of statelessness, but more often the country of origin does not recognize the migrant as citizen. The migrant is then faced with an impossible situation. Staying in The Netherlands is not allowed, and returning is also not an option.

In its complaint FEANTSA has made reference to both complaint 14/2003 and 47/2008 in which the Charter was considered applicable to undocumented children. The reason for applying the Charter to their cases had to do with the vulnerable nature of children and the fact that they do not have a choice in where they stay. A choice that is often made by the parents.

Although there may be instances of "abuse"[2], there is a large number of undocumented migrants (including families with children) who cannot leave The Netherlands. Even if they wanted to leave they would not have the option as they lack documentation. This leaves them in a situation of destitution and at the mercy of charity organizations or at the mercy of private individuals. The latter example puts undocumented migrants at great risk of abuse and exploitation.

In its submissions the Dutch government refers to possible solutions that the undocumented migrant may have in case of destitution. Option one is voluntary return. As described above, this is not an option for all undocumented migrants. It is also a solution with limitations. In the first place because the shelter offered is a form of imprisonment as the migrant is not free to leave the premises. Secondly because it is limited in duration; if the return is not successful the provision of shelter is discontinued, leaving the undocumented migrant on the streets.

The second option the government describes is that the undocumented migrant turns to churches or other charity organizations for help. However, it is not the charity organizations

[2] Abuse of the shelter facilities is a phrase used by the government. The shelters are often of such quality that only the destitute would stay there, or when an alternative is not available. For example, for a tourist who loses his/her possessions, money and travel documents support to return to their home might be a better option than the provision of emergency shelter.

who signed the Charter. The State has obligations to assess the need for those who turn to them for help. The government cannot shift this responsibility to charity organizations, however well-intentioned. Ultimately the Charter is an instrument that is intended to create rights for individuals and obligations for the State.

In as far as the Dutch government refers to the Article 8 ECHR decisions of the Centrale Raad van Beroep (Central Appeals Council or CRvB) FEANTSA points out that a migrant needs to be in very poor medical condition to meet the requirements set in those cases. The standard being that you cannot sustain yourself on the streets because of the medical condition. The law still states that undocumented migrants are not to be helped. In each case as described above a court order is needed to get shelter awarded. The State, represented by the CRvB, is taking the wide margin of appreciation as awarded by the European Court of Human Rights literally. It is questionable whether the same margin should apply to Article 31 and 13 (4) of the Charter.

Example
Before the European Court of Human Rights a case is pending concerning a lawfully residing mother and her undocumented adult son (Yeshtla v The Netherlands, Application No. 37115/11). The mother, Ms Yeshtla, receives benefits from the State and also housing benefits. Ms Yeshtla had to choose between losing the housing benefits, which she could not afford, and putting her son on the streets. Upon questions of the Court (attachment 2A) The Netherlands government replied that the so-called Linkage Principle should not have been applied in this case (attachment 2B). In the meantime the applicant was denied housing benefits up to the highest court judging on the matter.

Availability and quality of (emergency) shelters:

The government in its submissions states that a large investment has been made in the availability and quality of (women's) shelters. In paragraph 52 the government concludes that the government has sufficient measures in place in regards women's access to shelter. The numbers provided by the government do not prove anything other than that money has been invested. There is no assessment made on how many shelters are needed and whether that demand is met. The government has therefore failed to submit relevant data regarding the availability of shelters.

In municipalities like Amsterdam and Utrecht the money that is invested in women's shelters does not lead to an increase in permanent shelter facilities. Instead, women with children are housed in hotels. This may sound like a comfortable facility to most, but it is not a sustainable living environment. The costs of living are higher, as it is not possible to cook for oneself. Other costs like phone calls, internet, television, are more expensive in a hotel. There is a reduced feeling of belonging, and thus an infringement of private and family life.

The government states that the quality of the shelters is primarily the responsibility of the organizations which run them (and their sector association). This however is not the case. There is national and local legislation on safety and hygiene, which is upheld by government authorities and inspections (attachment 4). The law on social support must be read to understand that the responsibility for shelter is a State responsibility. In a recent case of substandard shelter accommodation and services, a shelter was closed down by the municipality.

On 8 February 2013 the State Secretary responsible for shelter answered questions from Parliament on shelter for families, or the lack thereof (attachment 5). In her answer the State Secretary admitted that there is a shortage of places for families. She admitted that it is not in the best interest of children to live in a shelter facility. The solution the State Secretary offers is twofold. On the one hand she says that there is not enough information. She will therefore call for research on the topic. On the other hand she does not want to invest in shelter facilities, but rather in prevention. Laudable as this may be, it might not prove successful in the short term. There is also no specification as to how this prevention is to take effect. More information is promised for the summer 2013.

Progression of the housing situation

The Dutch government concedes that there is not sufficient housing to guarantee progression within reasonable time. The government wrongly claims that this is a situation that has arisen due to the economic crisis in 2008. This is a false assumption. The demand for social housing in a number of municipalities has for decades outnumbered the supply. This shortage in social housing has been accepted by the government. Waiting lists of up to 12 years in Amsterdam are not uncommon, and priority needs cannot always be rewarded, if at all properly assessed. The government has failed to come up with a plan of action to reduce the gap between demand and supply.

Example
The case of a woman who fled to The Netherlands from Somalia is currently before the Central Council of Appeal. She has Dutch nationality, and has severe psychological problems because of her past. This woman has lived on the streets for many years until she sought legal advice. At first she was admitted to night shelters. In the summer of 2010 however, she was admitted to a pension facility (day and night). This facility was offered for one year. By the end of that year she had not been able to secure housing for herself. Without notice, the municipality of Haarlem decided to no longer fund the pension she stayed in. As the need for shelter was still there, the woman was informed that she was eligible for night shelter. In this case not only the retrogression in the housing situation is problematic, as is the lack, or denial, of legal remedy.

CONCLUSION

As to the **admissibility** FEANTSA submits that the admissibility concerns the Dutch government has raised cannot be determined on the basis of the appendix alone, and that it is necessary to consider the protection of undocumented migrants in light of the merits of the case.

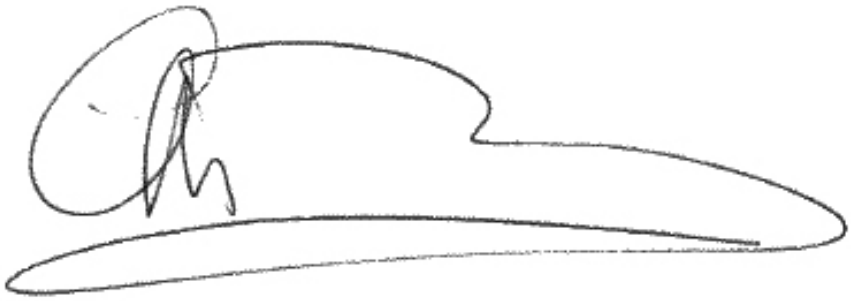
As to the **merits** FEANTSA submits:

- That the nationwide access to shelter is not guaranteed both in law and practice. That there is a shortage in the shelter capacity, progression in housing is not guaranteed, and that need is not the criterion on which requests for help are assessed.

- That the government in its submissions fails to recognize the importance of assessing the need for shelter or other social assistance. On multiple occasions the government refers to eligibility criteria that go beyond the assessment of need.

- That the government submits that it is acting in accordance with international law by denying undocumented migrants access to shelter. This however is not the case; evidence shows that the human dignity of a considerable group of undocumented migrants in The Netherlands is at stake and that the policies of the Dutch government lead to destitution and loss of human dignity of these undocumented migrants.

- That there is no evidence on the statement that availability of shelters and access to shelters is adequately provided. There is no evidence also for the statement that the quality of shelters is primarily a responsibility of the shelters and their sector organization and not a government responsibility.



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