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## **REVISED EUROPEAN SOCIAL CHARTER**

NGO Contribution to the  
4th National Report on the implementation of  
the European Social Charter (revised)

submitted by

**THE GOVERNMENT OF THE NETHERLANDS**

(Articles 17 and 31  
for the period 01/01/2005 – 31/12/2009)

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**CYCLE 2011**



**NGO report European Social Charter**  
**Thematic Group Children, Families and Migrants**  
**Articles 17 en 31 of the revised European Social Charter**

*Follow-up after the decision on the merits by the European Committee of  
Social Rights about Complaint 47/2008, 27 October 2009*

**The right to housing  
for undocumented  
families with children  
in the Netherlands**

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## Introduction

This document contains the comments of several Dutch NGO's regarding compliance of the Dutch Government with the decision on the merits (47/2008)<sup>1</sup> of the European Committee of Social Rights (hereinafter the Committee). After the introduction we will describe the current policies in the Netherlands regarding reception of migrant and asylum-seeking families and the essence of the Committee's. Subsequently we will describe former Minister of Justice's response to the Committee's decision.

In the Netherlands there are migrant and asylum-seekers families - with children – who, having no right of legal residence (referred to hereafter as undocumented families/children), are obliged to live on the streets pending return to their country of origin. Defence for Children drew the Committee's attention to this problem in complaint nr. 47/2008. In its decision on the 20<sup>th</sup> of October 2009, the Committee concluded that the Dutch policy of refusing shelter to undocumented children violates Article 17, paragraph 1 and Article 31, paragraph 2 of the European Social Charter (ESC). According to the Committee, living on the streets is at odds with the human dignity of children. These practices are not compliant with the government's obligation to offer children - one of the vulnerable groups in society - special protection. As will be argued below, the Netherlands is obliged by international law to prevent homelessness of children and, in consequence, of families..

Articles 17 and 31 ESC specify the government's obligation to provide adequate housing to all children present in our country. Article 17 ESC provides:

The **right of children and young persons** to social, legal and economic protection  
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 organisations, to **take all appropriate and necessary measures** designed: 1. a. 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; b. **to protect children and young persons against negligence, violence or exploitation**; c. **to provide protection and special aid** from the state for children and young persons temporarily or definitively deprived of their family's support.

Specifically on the right to housing Article 31 ESH provides:

The right to housing. With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: 2. to prevent and reduce homelessness with a view to its gradual elimination.

The obligation to children is further detailed in Article 27 (3) of the Convention on the Rights of the Child (CRC), where it is stated: "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 programmes,

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<sup>1</sup> [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47Merits_en.pdf)

particularly with regard to nutrition, clothing and housing.” The Committee also stressed in the above-mentioned decision that the obligations in the ESC take account of the provisions of the CRC.<sup>2</sup>

The Hague Court of Appeal recalled, in its judgment of the 27<sup>th</sup> of July 2010, this obligation as stated in the Committee’s decision. The Court leaves no doubt about the fact that the Dutch Government is obliged by directly enforceable international law to afford effective protection of the rights and interests of children who are present within the State’s territory. Allowing children to live on the streets is a clear breach of this obligation.<sup>3</sup>

The Committee’s decision on 20 February 2010 stirred public concern in the Netherlands. More and more citizens in the Netherlands are concerned about children who are living on the street. To this day no satisfactory solution has been found for these children.

This memorandum focuses in particular on children in families. It is evident that separated children may not live on the street either. For asylum-seeking children, unaccompanied minors and (potential) victims of trafficking shelter will be arranged in most cases. Minors who are not requesting asylum are not covered by those rules as the Central Organ of sheltering asylum-seekers (COA) only provides shelter to asylum-seekers.

### **Current policy**

Families with children will end up on the streets if they fail to return to their home country within set time limits in the Aliens Act 2000 or because they are not eligible for shelter. The *Benefits (Asylum-seekers and other categories of aliens Regulation* (in Dutch: *Regeling verstrekkingen asielzoekers, Rva*) specifies which categories of alien have a right to shelter provided by the Government. Also the *Regulation Benefits for certain categories of aliens* (in Dutch: *Regeling verstrekkingen bepaalde categorieën vreemdelingen, Rvb*) offers daily allowances to certain groups of aliens, like victims of trafficking or honour related violence and children.<sup>4</sup> In addition, the new asylum-procedure which entered into force on July 1<sup>st</sup> 2010 regulates the right to shelter for asylum-seekers whose application has been rejected. However, these arrangements, even when taken together, do not prevent homelessness to all families with children. In the following situations families with children are not eligible for shelter:

- a) Families whose asylum claim has been rejected and who have not left the country after rejection of their asylum claim and after elapse of the time limits which are allowed by the authorities to arrange departure.
- b) Families whose temporary asylum permit is not renewed or will be revoked in consequence of termination of a somewhat more favourable policy regarding groups of persons from (a specific part)

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<sup>2</sup> See note 1, paragraph 26.

<sup>3</sup> The Court of Appeal of the Hague on July the 27<sup>th</sup> 2010, LJN: BN2164, paragraph 3.6 and 3.8.

<sup>4</sup> The Scheme benefits certain categories aliens stipulates that some people – generally base on vulnerability – can receive a living allowance if they have a (albeit limited) right of residence in the Netherlands but do not, on the grounds of national law, have a right to shelter. These include children whose parents asked for another type residence permit instead of first requesting asylum and for this reason are lawfully resident during the first phase of the procedure, but have no claim under national law to receive shelter. An additional application for special social support (*in Dutch: bijzondere bijstand*) needs to be made for provision to meet housing costs. See also: Central Administrative Appeal Board (CRvB) 24 January 2006, LJN AV 0197.

of a country or belonging to a specific population group is terminated (in Dutch: *categoriaal beschermingsbeleid*).<sup>5</sup>

c) Families who stay in the Netherlands during a (regular) immigration procedure, but do not have a right to shelter under Dutch law.

Ad a) This situation includes families who have applied for asylum but whose application has been rejected. Asylum-seekers are given shelter for four weeks following rejection of the asylum application. Thereafter, the rejected asylum-seekers are entitled to reside for a maximum of twelve weeks in a semi-closed location (in Dutch: *vrijheidsbepenkende locatie*) during which period they must organise their return to their country of origin. If they fail to return, the right to shelter ends and they will be evicted.

Ad b) For example the 'categorical protection' policy for Iraq was ended in October 2008. The temporary residence permits for this group were revoked or not renewed. Persons who were not granted refugee status or subsidiary protection after an individual assessment did or still do have to leave the Netherlands..

Ad c) In this situation persons who have applied for a regular residence permit, for example because the family claims that they cannot leave the Netherlands due to circumstances beyond their control, or persons who appeal for the discretionary competence of the former Minister because of particular, compassionate circumstances, do not have a right to shelter. Since 1<sup>st</sup> January 2010 an exception to this general rule is made if one of the family members has applied for a permit on medical grounds. During the first phase of this procedure on medical grounds the whole family has a right to shelter.<sup>6</sup> In general aliens in a regular immigration procedure do not have a right to shelter.

#### *Where do families stay after being turned out on the streets?*

Homeless families with children sleep in bus stops and in railway stations. It happens in the Netherlands but fortunately not often and not for long. Many citizens in the Netherlands, as well as churches, shelter organisations and municipalities have a strong sense of responsibility for children who live on the streets together with their parents. They find it unacceptable and unhealthy for the children involved. A lot of municipalities arrange - based on their duty of care - temporary shelter. The government believes that these emergency shelters (Dutch: *Noodopvang*) should close, and agreements to do so were made between the State and the Association of Dutch Municipalities (abbreviation in Dutch: *VNG*) on the 25th of May 2007. Because people are still being turned out on the streets, not all municipalities are willing to close the emergency shelters. Under pressure of the above-mentioned agreements many homeless immigrants are being sent to the semi-closed location in Ter Apel, even though it is not clear whether they can return to their country of origin. As explained above, these people will end up on the streets after three months (when they lose their right to stay in the shelter). People who do have a prospect of acquiring a residence permit

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<sup>5</sup> 'Categorical protection' is extended in the Netherlands to a particular group of asylum-seekers or to asylum-seekers from certain countries or regions where the general situation in that area is so bad, that it would show particular hardship to return people to that area. Asylum-seekers covered by the categorical protection are eligible for a temporary residence permit.

<sup>6</sup> See: implementation letter motion Spekman of 7 December 2009, parliamentary paper 30 846, number 16.

residence, will be placed, as much as possible, in reception centres.<sup>7</sup>

Other families with children find (temporary) shelter at houses of civilians, in churches or with small shelter organisations which care about the fate of children living on the streets. However, the primary responsibility for providing shelter to vulnerable groups does not lie with individuals or private institutions, but with the State. It is up to states to prevent homelessness – especially in case of vulnerable persons like children.

### **Decision of the European Committee for Social Rights on complaint 47/2008**

Children have a right to be protected, and this protection cannot be found on the streets. This is the essence of the Committee's response to the complaint filed by Defence for Children against the Netherlands.<sup>8</sup> The core essence of this complaint is that the Netherlands violate the rights of the child by allowing children to live out on the streets.

According to the Committee withholding shelter is not compatible with respect for the human dignity of children and does not take into account their particularly vulnerable situation. The Committee considers that the right to shelter is closely linked to the right to live. The right to shelter is a vital element of the respect due to every human being. A shelter should be offered to every child present within Dutch territory. The requirement of human dignity implies also that a shelter has to conform with minimal standards of safety, health, hygiene if the private- or family life of the residents is to be respected.

### **Response of the former Minister of Justice**

*An advice is not a decision*

In reply to parliamentary questions the Minister of Justice responded reluctantly and negatively to the Committee's decision.<sup>9</sup> The Minister of Justice indicated that the Committee's decision is not legally binding and should be considered an advisory opinion.

*However...*

We believe that – regardless of whether or not the decision of the Committee is legally binding - a decision of the Committee, being a supervisory body mandated by the Council of Europe, should be accorded great weight. The Netherlands have ratified the Charter and have accepted the supervisory authority of the Committee.<sup>10</sup> Also, the European Court on Human Rights (ECtHR) has referred in its

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<sup>7</sup> See in this context the judgment of the District Court of Amsterdam on February the 9<sup>th</sup> 2010, LJN BL6113. The Court ruled that in case of such a transfer the COA should provide that the offered housing is appropriate and adequate. The child's specific needs play a role in this context.

<sup>8</sup> See: [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC47Merits_en.pdf) for the Decision on the Merits of the European Committee of Social Rights, on October the 20<sup>th</sup> 2009, nr. 47/2008. This complaint had been written in the context of the test case funded by Defence for Children, financed by the Post Stamp Foundation in the Netherlands.

<sup>9</sup> Answer of the Minister of Justice at questions posed by the Dutch parliament member Spekman, Meeting year 2009-2010, Appendix number 2035. (<http://www.defenceforchildren.nl/images/20/1068.pdf>).

<sup>10</sup> See in this context: the judgment of the Preliminary Provision Judge of the District Court of Utrecht, on April the 6<sup>th</sup> 2010, SBR 10/867 WMO. Paragraph 2.13-2.15, (LJN: BM0846) en the letter of the Dutch Lawyers Committee for Human rights (NJCM) to the Minister of Justice about offering a shelter to failed asylum-seekers (<http://www.njcm.nl/site/comments/list>).



judgments to the (decisions of) the Committee.<sup>11</sup> The judgments of the ECtHR are binding. The Dutch government should stop acting in breach of the (unanimous ) decision of the Committee and the resolution of the Committee of the Council of Ministers of the Council of Europe.<sup>12</sup>

#### *Human dignity also for undocumented persons*

According to the Minister the Committee has unlawfully extended the scope of the ESC by applying the ESC to undocumented *families* in the Netherlands.

#### *However...*

The Committee is the supervisory body that decides on the interpretation of the ESC and is mandated by the ESC which is ratified by the Netherlands. The ESC excludes in the appendix people without legal residence, but the Committee says that an exception should be made where human dignity is at stake. The Minister maintains that the Committee of the Ministers of the Council of Europe in their resolution confirmed that undocumented aliens cannot claim any rights under the ESC.<sup>13</sup> This is contrary to decision 47/2008 of the Committee in which the claims of undocumented children were explicitly determined. Moreover the Committee had already clarified the scope and the conditions for direct applicability of the Charter in a complaint against France.<sup>14</sup> This complaint was about the availability of medical treatment to undocumented people. In this case the Committee also applied the standard of human dignity.

#### *The State has its own responsibility*

In response to parliamentary questions on 25<sup>th</sup> March 2010 the former Minister of Justice recognised that minors are a vulnerable group and that they should be protected against homelessness. He also considers that the primary responsibility lies with the parents, who have an obligation to leave the country if they don't have a residence permit for that country.<sup>15</sup>

#### *However...*

The Committee stated clearly that children should have shelter as long as there is no alternative for them. Withholding shelter to these children would put them into a situation of extreme helplessness which is incompatible with the respect for human dignity which is due to them.<sup>16</sup> In the CRC the government's duty to support the parents if they fail to provide shelter to their own children is explicitly stated.<sup>17</sup> The primary responsibility for the basic needs of the child lies with the parents, but the government has its own responsibility if the parents are not able to fulfil it. The Hague Court of Appeal<sup>18</sup> has recently held that the Dutch government has its own responsibility regarding children. That judgment is based on the CRC, the ESC and Article 3 ECHR (inhuman and degrading treatment).

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<sup>11</sup> ECtHR November 21<sup>st</sup> 2008, *Demir & Baykara against Turkey*, number 34503/97; ECHR July 27<sup>th</sup> 2004, *Sidabras & Dziautas against Lithuania*, numbers 55480/00 & 59330/00; ECHR April the 7<sup>th</sup> 2005, *Rainys & Gaspraravicius against Lithuania*, numbers 70665/01 & 74345/01.

<sup>12</sup> Resolution CM/ResChS (2010)6. Collective complaint No. 47/2008 by Defence for Children International (DCI) against the Netherlands (Adopted by the Committee of Ministers on 7 July 2010 at the 1090<sup>th</sup> meeting of the Ministers' Deputies)

<sup>13</sup> See: answer of the Minister of Justice in response to the parliamentary questions of Gesthuizen and Koolman, September the 3<sup>th</sup> 2010, 2009-2010, number 3280.

<sup>14</sup> See: [http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/cc14merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/cc14merits_en.pdf) for the Decision on the Merits of the European Committee of Social Rights on November the 3<sup>th</sup> 2004, number 14/2003.

<sup>15</sup> Answer of the Minister of Justice at questions of the Second Board member Spekman, Meetingyear 2009-2010, Appendix number 2035, 25<sup>th</sup> March 2010.. (

<sup>16</sup> See note 1, paragraph 63.

<sup>17</sup> Article 27, paragraph 3 CRC, see for full text the introduction of this paper.

<sup>18</sup> The Court of Appeal of the Hague on July the 27<sup>th</sup> 2010, LJN: BN2164, paragraph 3.6 and 3.8.

This includes a positive obligation on the government to safeguard children from living on the street if certain circumstances are met:

*‘The Court is of the opinion that the State, after having ratified the treaties in which these provisions appear, has a legal obligation, as far as these provisions have direct effect, to respect that direct effect. Insofar these provisions only contain instruction standards, the State has an obligation to safeguard, through regulations, administrative decisions and measures and other actions, effective protection of the rights and interests of children present in the territory of the State. The Court also believes that according to Dutch national law the protection of children is the government’s responsibility and that the State’s obligations can arise from this responsibility, regardless of whether the above-mentioned treaty provisions – containing the same material standards – have direct effect. These obligations can be the basis of claims by citizens against the States.’<sup>19</sup>*

#### *Children and their right to family life*

In response to parliamentary questions above mentioned on 25<sup>th</sup> March 2010 the Minister of Justice declared that he would be reluctant to separate children from their parents. However, on a later occasion on 28<sup>th</sup> April 2010 the Minister announced in an agreement with the Association of Dutch Municipalities (Dutch abbreviation: VNG), that he sees placement of children in welfare institutions, thus separating them from their parents, as a possible solution for families living on the streets.<sup>20</sup> Also, in the case before the Hague Court of Appeal the Dutch State said that the only possibility for giving shelter to children belonging to an undocumented family is to take child protection measures.<sup>21</sup> In the Netherlands this means that the Child Protection Board requests the Children’s Judge to authorise placement of the children outside the family (in Dutch: *machtiging uithuisplaatsing*). Then the children will be placed in a youth care institution or with foster parents, and their parents will be left on the streets.

*However...*

The Convention on the Rights of the Child (CRC), Article 9(1) requires the State to refrain from separating parents and children ‘unless the separation is necessary in the child’s interests’. Similarly, Article 8 ECHR and Article 5 of the EU Return Directive (2008/115/EC) protect the right to family life of parents and their children. The European Court on Human Rights has held quite explicitly – and on four separate occasions - that the authorities are not entitled to deploy child protection measures just because of poverty of the parents.<sup>22</sup> The principle above is also enshrined in the Dutch child protection measures. The fact that parents are not able to provide housing for their children does not mean that the parents are unable to raise their children.

Separating parents from their children for purely economic reasons is not acceptable, says also Jaap Doek, Emeritus Professor Juvenile Law and former chairman of the UN Committee on the Rights of

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<sup>19</sup> The Hague Court of Appeal on July the 27<sup>th</sup> 2010, LJN: BN2164, paragraph 3.6.

<sup>20</sup> See the press release of the Association of Dutch Municipalities (Dutch: VNG), 28 April 2010 April the 28<sup>th</sup> 2010: ‘VNG en Justitie zoeken samen oplossingen voor ex-asielzoekers’, <http://www.vng.nl/eCache/DEF/96/297.html>

<sup>21</sup> The Court of Appeal of the Hague, on July the 27<sup>th</sup> 2010, LJN: BN2164 (Act held by Defence for Children).

<sup>22</sup> ECtHR 21 September 2006, nr. 12643/02 (*Moser v Austria*); ECtHR 26th October 2006, nr. 23848/04 (*Wallova en Walla v Czech Republic*); Eur. Court H.R. 21 June 2007, .nr. 23499/06, (*Havelka v Czech Republic*); ECtHR. 18<sup>th</sup> December 2008, nr. 39948/06 (*Saviny v Ukraine*).

the Child.<sup>23</sup>

The essence of determining whether there is a violation of Article 8 ECHR lies in the test of proportionality. The European Court of Human Rights (ECtHR) has repeatedly held that the government must consider less drastic alternatives to prevent the separation of children from their parents. According to the ECtHR the government should try to find solutions for the lack of material resources (such as the lack of shelter) other than separating the child(ren) from their parent(s). If the State fails to do so, this constitutes a violation of the right to family life (Article 8 ECHR). The use of child protection measures in such cases is a violation of the principle that, in cases of child protection, the State is obliged to work with the least invasive measure. The ECtHR considers in the case *Wallova and Walla against the Czech Republic* that the mere lack of resources is insufficient to achieve such a drastic measure as placement in a public institution. The European Court states that, on the contrary, the state is obliged to help the parents to resolve their financial difficulties. Less drastic measures should have been explored by the Czech authorities to meet the proportionality requirement.<sup>24</sup>

The ECtHR was also clear about this subject in the case of *Moser against Austria*. In this case, a newborn baby was separated from his undocumented mother. The ECtHR held that the Austrian authorities had not sufficiently investigated other options than separating the child from the mother. The fact that the mother had no residence status in Austria at that time did not absolve the Government from this obligation.<sup>25</sup>

## Conclusion

The NGO's that support this paper on the follow-up on decision 47/2008 of the Committee of Social Rights – serving as a contribution to the thematic reporting obligation of the Netherlands on children, migrants and families, to be submitted by the end of October 2010 - are still very concerned about the housing situation of undocumented families in the Netherlands. Until now only rather trivial and temporary measures, for a small group of undocumented families, have been taken. The Dutch Government's response, as articulated by the former Minister of Justice, to decision 47/2008, does not, we suggest, pay sufficient respect to the Committee's work. So far, there appears to be a lack of willingness to remedy the situation and to end the human rights violations as found by the Committee. The solution the Dutch government is currently considering will lead to a new human rights violation: the separation of children and parents because the parents' lack of material resources. We firmly believe the Dutch government should, according to the obligations deriving from Articles 17 and 31 of the ESC, provide shelter for undocumented families as long as no alternative is available and no durable solution – whether it be return or residence – has been found.

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<sup>23</sup> See preface, in: "A home for every child", Defence for Children 2008, p. 3.  
<http://www.defenceforchildren.nl/images/20/998.pdf>

<sup>24</sup> ECtHR September 21<sup>st</sup> 2006, *Wallová and Walla against Czech Republic*, nr. 23848/04, paragraph 74 & 75 and see also ECHR December 18<sup>th</sup> 2008 *Saviny against Ukraine*, number 39948/06, paragraph 57 and ECtHR June 21<sup>st</sup> 2007, *Havelka and others against Czech Republic*, nr. 23499/06, paragraph 61.

<sup>25</sup> ECtHR 21<sup>st</sup> September 2006, *Moser against Austria*, nr. 12643/02, paragraph 70 & 73.

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