



European
Social
Charter

Charte
sociale
européenne



20/04/2016

EUROPEAN SOCIAL CHARTER

Comments by Amnesty International on the
9th national report
on the implementation of the revised European Social
Charter

submitted by

**THE GOVERNMENT OF
THE NETHERLANDS**

(follow-up to Collective Complaints 90/2013, 86/2012, 47/2008)

Comments registered by the
Secretariat on 13 Avril 2016

CYCLE 2016

Current status in the Netherlands since the publication of the decision by the European Committee of Social Rights of 10 November 2014¹

Introduction

In this document, Amnesty International aims to provide the European Committee of Social Rights (ECSR) with information on the current situation in the Netherlands concerning the reception of foreign nationals without residency status, and the manner in which the Netherlands has or has not complied with the decision by the ECSR in the case Council of European Churches (CEC) v. the Netherlands (complaint number 90/2013). This report will address, in sequential order:

1. The background of the current Dutch approach to these problems;
2. Developments since the ECSR's decision (cabinet policy and legal precedents);
3. The current practices regarding reception by the Authorities;
4. The current practices regarding reception in the municipalities;
5. Amnesty International's concerns about the current situation and plans in view of the ECSR's decision.

1. Background

In the Netherlands, recent years have seen the adoption of various measures designed to exclude migrants from access to collective facilities, the goal of which is to offer a maximum deterrent for and restrictions on illegal residence. The opportunities for people without a residence permit to perform legal labour - and to become self-sufficient - were subject to substantial restrictions with the Foreign Nationals (Employment) Act of 1995, and since the introduction of the Benefit Entitlement (Residency Status) Act of 1998² and various additional laws,³ migrants residing illegally in the Netherlands are categorically excluded from benefits in kind, facilities or social security benefits. There are three exceptions to this: education for minors of school age, the provision of necessary medical care, and legal assistance. The immediate necessities of life such as shelter, food, water and clothing are not included as exceptions.

As a result of these measures, municipalities found they were having to cope on a more frequent basis with migrants in need of help and without residence rights. This led to tension between the municipalities and the central government.

¹ European Committee of Social Rights. Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013 Decision on the merits. Publication date: 10 November 2014

² Act of 26 March 1998 to amend the Aliens Act and other laws to link claims by foreign nationals submitted to administrative authorities for benefits and facilities, social security benefits, exemptions and permits to a foreign national's legal residence in the Netherlands.

³ Such as the Housing Allowance Act, the Social Assistance Act and Sickness Benefits Act.

In 2007, an administrative agreement was concluded that announced a general pardon for asylum seekers who had reported to the authorities prior to 2001, and who had remained in the Netherlands with the government's knowledge. In exchange for this, an agreement was made for municipalities to terminate (the financing of) emergency accommodation for asylum seekers and other migrants without residence rights who had exhausted their appeals, and this agreement would take effect on 1 January 2010.

2. Developments since the European Committee for Social Right's decision

In response to the decision by the European Committee on Social Rights (ECSR) and the resolution of the Committee of Ministers,⁴ after a series of difficult negotiations between government parties, the cabinet finally presented the so-called *bed, bad en brood-akkoord* (basic needs scheme) on 22 April 2015.⁵

In this proposal, the cabinet makes it clear that it does not see any obligation to assist and accommodate all migrants (in need of help) without a residence permit. A proposal was however made to make some minor modifications to the current practices. The agreement sets out the cabinet's position vis-à-vis the efforts on the part of the Central Government. However, the implementation may not begin until an agreement has been reached with the municipalities. Additionally, the cabinet determined that *'if the additional administrative agreement has not been concluded by 1 November 2015, the cabinet will rely on the administrative agreement currently in effect, and enforce on this basis, for example, by withholding the special budget for the integration of newcomers destined for the municipalities.'*

Despite this determination, negotiations on this agreement have, to date, still not been concluded with the municipalities. Initially, the negotiations were postponed, pending decisions by the two highest courts of justice (see under national judiciary), but as at the present, the Central Government and the municipalities have still not reached an agreement.

Government Proposal 22 April 2015

The most important point of interest is that the proposal links access to reception facilities to the (persuasive) willingness of the individual to cooperate with his or her return procedure. Foreign nationals without residence rights may - under the management of the Repatriation and Departure Service - be temporarily housed at a reception centre (as a preliminary measure lasting several weeks) in five specially designated municipalities. After this, the intention is for

⁴ Resolution CM/ResChS(2015)5 Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013 (Adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers' Deputies)

⁵Ministry of Security and Justice, Letter to Parliament of 22 April 2015, Resolution adopted by the Committee of Ministers in CEC's ESC (European Social Charter) complaint.

them to be relocated to a Freedom-restricting Location (VBL) run by the Central Government. The primary objective of the VBL is to effectuate the foreign national's return. Access to the VBL will only be provided if the foreign national can show that he or she has a (sincere and demonstrable) willingness to return. If, during the stay in the VBL, there is still no demonstrable willingness to return, the foreign national will be removed from the facility.

Developments in the national judiciary

In response to the decision by the ECSR, in a preliminary decision, the Central Appeals Tribunal (CRvB) found in December 2014 that municipalities were required to provide overnight shelter with a bed, shower, evening meal and breakfast, or at any rate, up to two months after the resolution adopted by the Committee of Ministers.⁶ The reason that the CRvB took this measure was because it was not possible to exclude the chance that the ECSR's decision could influence decisions from Dutch courts regarding the reception of migrants without a residence permit. On 23 December, the District Court of The Hague held that reception in a Freedom-restricting Location (VBL) and the condition to which this was subject, namely cooperation with the departure procedure, was not unreservedly satisfactory.⁷ On 8 May 2015, the District Court of Amsterdam held in a number of cases that the right to reception is an unconditional right for all migrants without a residence permit.⁸

These legal precedents, for which an attempt was made to draw a connection in the ECSR's decision, came to an end on 26 November 2015. The two highest administrative courts of justice, the Central Appeals Tribunal (CRvB)⁹ and the Council of State¹⁰ rendered (simultaneous) decisions in this matter. Both courts of justice found that neither Article 13 (4) nor Article 31 (2) of the ESC (European Social Charter) were binding, and do not lend themselves for direct application by the court. Although the ECSR is designated as being the authoritative body, this authority is not demonstrated in these judgments.

The Council of State found that in offering reception in a VBL to asylum seekers or migrants without residence rights who have exhausted their appeals, the Central Government is entitled to demand that these individuals cooperate with the procedure for their departure from the Netherlands.¹¹ The criterion for cooperation with the return procedure may not be imposed

⁶ CRvB 17 December 2014, ECLI:NL:CRVB:2014:4259

⁷ District Court of The Hague (hearing location Utrecht), 23 December 2014, ECLI:NL:RBDHA:2014:16477

⁸ District Court of Amsterdam, 8 May 2015, ECLI:NL:RBAMS: 2015:2649/2650/2651/2653/2654/2655/2656

⁹ CRvB 26 November 2015, ECLI:NL:CRVB:2015:3803

¹⁰ ABRvS (Administrative Jurisdiction Division), 26 November 2015, ECLI:NL:RVS:2015:3415

¹¹ In this decision, the ABRvS (Administrative Jurisdiction Division) distances itself from the starting point of the ECSR's decision, that the right to basic facilities exists regardless of whether or not someone intends to cooperate

only in the case of foreign nationals who, due to their mental state, are not capable of overseeing the consequences of their actions and omissions. The burden of proof for demonstrating these 'special circumstances' lies with the foreign national.

The Central Appeals Tribunal (CRvB) determined that municipalities are allowed to refer individuals to a State-run removal centre/VBL for the provision of the basic necessities ('*bed, bad en brood*'), which is subject to conditions for social assistance.

3. Current situation I: reception provided by the Authorities

General reception facilities for foreign nationals without residence rights

In the Dutch system, the Central Agency for the Reception of Asylum Seekers (COA) offers facilities during the asylum procedure and for a period of 28 days after the rejection of the asylum application. This period is intended for the voluntary return to the country of origin. After the 28-day period, migrants who are willing to cooperate with their departure, and those who are expected to be able to leave within twelve weeks, will be offered shelter at the Freedom-restricting Location (VBL). Placement in this type of facility currently almost always means that the migrant must report daily, and that he or she may not cross the municipal borders.¹² When, in the government's opinion, there is a risk of withdrawal from supervision, or the foreign national evades or hinders the return, he or she may be placed in immigration detention pursuant to Section 59 of the Aliens Act¹³. Placement in the VBL is subject to the previously mentioned criterion of sincere and demonstrable willingness to return. If this criterion is not satisfied, foreign nationals may be removed from the VBL. The situation in which they subsequently end up depends heavily on the manner in which the municipalities deal with homeless foreign nationals (see practical situation in municipalities).

Families with children

In 2012, the Supreme Court of the Netherlands found that the Netherlands has a legal obligation to provide adequate facilities and care for children without a residence permit, if the parents do

with their return, and for the period that the individual remains in the jurisdiction of the Netherlands. European Committee of Social Rights: Decision on the merits. **Publicity**: 10 November 2014 117. *The Committee observes in this connection that the scope of the Charter is broader and requires that necessary emergency social assistance be granted also to those who do not, or no longer, fulfil the criteria of entitlement to assistance specified in the above instruments, that is, also to migrants staying in the territory of the States Parties in an irregular manner, for instance pursuant to their expulsion. The Charter requires that emergency social assistance be granted without any conditions to nationals of those States Parties to the Charter who are not Member States of the Union. The Committee equally considers that the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion.*

¹² Section 56 of the Aliens Act

¹³ Section 59(1) of the Aliens Act. If the interests of public order or national security so require, with a view to removal, Our Minister will place foreign nationals in custody who: a. do not have legal residence status; b. have legal residence status pursuant to Section 8 under f, g and h, yet are not foreign nationals as defined in Section 59 a or 59b.

not have the financial resources to do so themselves.¹⁴ In its decision, the Supreme Court referred, amongst others, to the decision of the ECSR and Committee of Ministers in the Defence for Children case against the Netherlands.¹⁵ In response to this decision, the Netherlands expanded the reception facilities in the existing family locations for asylum seekers to include minor children and their parents without residence permits.¹⁶ These facilities are austere, as they are geared toward people who are leaving.¹⁷ With the exception of Sundays and holidays, families must report daily, and are not permitted to leave the municipal borders. The reception facilities are geared toward return, yet are not subject to further conditions or periods of time. Prior to their removal, (families with) children may be placed in the secure family facility (GGZ) in Zeist for a maximum period of two weeks.

Vulnerable people

If an acute medical emergency arises,¹⁸ the Dutch government offers reception at a COA (Central Agency for the Reception of Asylum Seekers) facility.¹⁹ Dutch courts determined that individuals, on the grounds of a combination of other factors (than medical), can also belong to the category of vulnerable people, who, pursuant to Article 8 of the ECHR are entitled to reception.²⁰ If an appeal based on an acute medical situation fails, the foreign national is dependent on the facilities that are offered in that municipality.

4. Current situation II: Practices in the municipalities

Since, up to the present (.. February 2016), an agreement still has not been reached between the municipalities and the government, the municipalities are implementing their own local policy. The number of municipalities offering reception facilities (usually in the form of overnight shelter) has increased since the European Committee for Social Right's decision.²¹ It appears that many municipalities have found confirmation in the ECSR regarding their efforts to find more pragmatic solutions at a local level. However, this has resulted in a high degree of diversity

¹⁴ Supreme Court, 21 September 2012, ECLI:NL:HR:2012:BW5328

¹⁵ ECSR 20 October 2009, DCI versus the Netherlands, 47/2008

¹⁶ *Parliamentary Papers II* 2012/13, 19637, no. 1587

¹⁷ *Parliamentary Papers II* 2011/12, 29344, 85

¹⁸ An acute medical emergency is defined as a situation in which the person concerned suffers from a disorder, for which, based on the current medical-scientific views, it has been established that the lack of immediate treatment during this phase of the disorder will lead to death, disability, or another form of severe mental and/or physical injury or harm.

¹⁹ Reception pursuant to Section 3 (3) opening words and under f, g and n of the Rva (Asylum Seekers and Other Categories of Aliens (Provisions) Regulations 2005); ABRvS (Administrative Jurisdiction Division), 22 November 2013, JV (judicial survey) 2014/21

²⁰ CRvB 4 June 2014, ECLI:NL:CRVB:2014:1995; CRvB 20 October 2012; ECLI:NL:CRVB:2012:BY1369

²¹ Report, Amnesty International 10 November 2015. *Mensenrechten op straat; Bed, bad, brood en de menselijke waardigheid in Nederland* (Amnesty International: Human rights on the street: Basic needs and human dignity in the Netherlands)

in the existence of reception facilities, the level of services provided at these, and the conditions associated with them.

In December 2015, Amnesty International published an overview of reception practices and policy in various municipalities. The information found creates an extremely varied picture of the situation, with various forms of reception and terms of admission. The overview shows that in most municipalities, there is still always the possibility that migrants can end up on the street. Sometimes this is due to the lack of reception facilities in a certain municipality, or because they do not satisfy the conditions, or because the facilities offered are not suitable. In many (large) municipalities, the reception facilities are restricted to overnight reception. In order to avoid having to spend the night on the street, many migrants in Amsterdam and other locations are seeking shelter in vacant office buildings, occupied by squatters. They are fully dependent on aid from individuals in this situation. The facilities in these buildings are also often extremely poor.

Full (24-hour) reception is only available on a very limited basis in most municipalities, and is usually only meant for vulnerable people. The criteria for becoming eligible for 24-hour reception are not always clear and are usually restricted to medical criteria.

The shape municipal facilities take in the (near) future will be heavily dependent on the agreement that has to be concluded with the Central Government.

5. Situation in the Netherlands in view of the ECSR decision

Amnesty International has determined that the current situation, as well as the approach the Central Government plans to take to this issue going forward, goes against the grain of the ECSR decision with regard to several points:

- First of all, Amnesty International has determined that in its proposal for an agreement with the municipalities, the cabinet makes it clear that it does not see any obligation by the central government to offer unconditional reception facilities to all migrants without a residence permit who are in need of assistance.
- In particular, Amnesty International believes the demand for *sincere and demonstrable willingness to return* is in violation of the ECSR's decision. The ECSR explicitly states that emergency aid may not be subject to any conditions. The provision of basic facilities may not be made dependent on the willingness to return. The ECSR also asserts that the withholding of emergency accommodation has not been proven to be necessary to policy in respect of foreign nationals. Nonetheless, the cabinet continues to put forward the latter as the most

important argument in favour of its policy that reception facilities should only be made available if the foreign national demonstrates his or her willingness to leave.²²

- Even when reception facilities are provided at the VBL, these do not, strictly speaking, only involve 'shelter'. At present, placement in the VBL is nearly always accompanied by restrictions on the individuals' freedom of movement. This is why it is also an instrument of control.
- Moreover, shelter at the VBL is temporary. Although the cabinet has decided to refrain from the strict application of the time-period requirement of 12 weeks in certain cases, this would explicitly not mean that the placement will not eventually end. If foreign nationals do not cooperate (or cease cooperating) with their departure and there are therefore no longer any prospects for (voluntary) departure, these individuals will still be removed from the facility.
- In cases in which foreign nationals are dependent on reception from municipalities, access to and the types of shelters available vary in the current practice. In various municipalities, unconditional reception facilities such as those required by the ECSR are not offered to foreign nationals without residence rights (or certain subgroups within this group).
- The level of facilities also varies, and Amnesty International is concerned that the frequent use of overnight reception facilities is not a sufficient form of reception as stipulated by the ECSR. In this form of reception, the foreign nationals are put out on the street during the day. In the interests of the welfare of foreign nationals, 24-hour reception facilities with proper supervision (including assistance for their return) appears to be an important condition.
- Amnesty International has also determined that many foreign nationals in Amsterdam, for example, are choosing to stay in squatted premises instead of the overnight reception facilities since they can also stay at the former during the day. However, these do not offer adequate facilities, and foreign nationals are fully dependent on support from private individuals when they stay at these premises.
- In several municipalities in which there is a policy on reception, there is however a shortage of beds, as a result of which, in practice, not everyone who is eligible for shelter under the ECSR actually receives these services.²³

²² Case studies have shown that this also sometimes applies to people whose application procedure is still ongoing. This may also concern migrants who, through no fault of their own, cannot leave and are involved in a pending asylum procedure to obtain a permit on these grounds, or migrants for whom there are impediments to expulsion pursuant to, for example, Article 3 of the ECHR, yet whose applications for a residence permit have been rejected (for example, on the grounds of Article 1F of the Convention on Refugees), or migrants for whom it has been determined during the asylum procedure that their story and/or their identity are not credible (the question is whether or not they are even capable of making a 'sincere' statement), and who do not have any documentation, or migrants whose residence application procedures are still pending and are based on grounds other than asylum.

- Reception facilities for vulnerable people are falling short. The current policy dictates that shelter will be offered to (families with) children and people with acute medical emergencies. Although Dutch courts determined that individuals can also belong to the category of vulnerable people on the grounds of a combination of other factors (than medical), the concept of vulnerability is still being interpreted in an extremely narrow fashion. The Council of State found that the criterion for cooperation with the return procedure may not be imposed on foreign nationals who, due to their mental state, are not capable of overseeing the consequences of their actions and omissions. The burden of proof for demonstrating these 'special circumstances' lies with the foreign national. In practice, it appears that, in fact, many people with (severe) psychological problems end up on the street and look for shelter in vacant buildings.
- If an agreement is concluded on the basis of the cabinet's proposal, then emergency accommodations for migrants without residence rights may potentially be closed in many municipalities. A system involving a small number of core municipalities can lead to the need for foreign nationals having to travel so far for reception facilities that these essentially become inaccessible. Moreover, this proposal stipulates that municipal reception will always be temporary, and include a transition to (also temporary) reception facilities in the state-run VBLs, stays which are subject to the aforementioned condition of willingness to return.
- The gap in reception facilities is only widened when the decisions from the Council of State and the CRvB are applied as a point of departure. Additionally, municipalities may also refer foreign nationals to the Central Government for reception, even though the Central Government is only required to offer reception provided the foreign nationals demonstrate a willingness to return.

²³ For a description of the practical situation, see the report, *Amnesty International: mensenrechten op straat; Bed, bad, brood en de menselijke waardigheid in Nederland* (Amnesty International: Human rights on the street: Basic needs and human dignity in the Netherlands)