

Collective Complaint 173/2018,
ICJ & ECRE v. Greece:

Key elements from an ECSR perspective

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A quick overview of issues

- Complex facts raising a range of issues in terms of the European Social Charter rights
 - **First collective complaint to deal in-depth with ESC Rights of Asylum-Seekers/Refugees**
- National legal framework evolved over the course of the lifetime of the complaint –with more promised. But clear ongoing issues with practice remained
 - ‘[The Committee] rules on the legal situation and practice prevailing at the time of its decision’ (para 95)
- Demonstrated the value of third party interventions ([Rule 32](#) – currently being amended)
 - UNHCR
 - ETUC

Immediate measures under the Committee's rules

12. The Committee underlines the **exceptional character** of immediate measures. The adoption of said measures must appear “**necessary with a view to avoiding the risk of a serious and irreparable injury and to ensuring the effective respect for the rights recognised in the European Social Charter**” (Rule 36§1), insofar as “the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact” (International Commission of Jurists v. Portugal, Complaint No. 1/1999, decision on the merits of 9 September 1999, § 32).

13. **Any request for immediate measures must establish a tangible situation in which the persons concerned by the complaint find themselves at risk of serious irreparable injury or harm** (Conference of European Churches (CEC) v. the Netherlands, Complaint No. 90/2013, decision on immediate measures of 25 October 2013 § 2; Association for the Protection of all Children (APPROACH) Ltd v. Belgium, Complaint No. 98/2013, decision on immediate measures of 2 December 2013, § 2).

Immediate measures under Rule 36

Indicated immediate measures to government:

- ‘Adopt all possible measures with a view to avoiding serious, irreparable injury to the integrity of migrant minors at immediate risk of life, physical and moral integrity, in particular
 - to ensure the appointment of a guardian at the time that a separated or unaccompanied child in need of international protection is identified as well as the effective functioning of the guardianship system;
 - to ensure the use of alternatives to detention of migrant children, and to ensure in particular that unaccompanied children in police stations, pre-removal centres and Reception and Identification Centres are provided with immediate access to age-appropriate shelters;
 - to ensure access to food, water, education, and appropriate shelter;
 - to ensure access to health care and medical assistance, in particular by ensuring the presence of an adequate number of medical professionals to meet the needs of the children whose rights are the subject of this complaint;
- and
- Ensure that all the relevant public authorities are made aware of this decision.’

Non-implementation of immediate measures...

- **No information** from government on the implementation of the immediate measures
- Complainants 'indicate that the **immediate measures are inherently linked to the merits of the complaint in that they were required to ensure the effective respect of the rights protected under the Charter, in particular to prevent irreparable harm.**' (para 96)
- The Committee wishes to stress the importance of immediate measures in terms of the effective operation of the collective complaints procedure under the Protocol. **States Parties to the Protocol must implement the immediate measures indicated in order to avoid irreparable injury or harm to the persons whose rights are the subject of the complaint. Any failure by a respondent State to comply with immediate measures will undermine the effective exercise of the rights guaranteed by the Charter** (para 99).

NOTE AMENDED [RULE 36](#)! SETS OUT REQUIREMENTS/PROCESS/DEADLINE FOR STATE RESPONSE

Engaging with the ESC Rights of Asylum-Seekers/Refugees

- Complaint dealt with refugee/asylum-seeking children
- ECSR had pre-existing extensive jurisprudence on the ESC rights of children with irregular migration status
- Complaint raised key questions about scope of protection accorded to asylum-seekers/refugees – and even language
 - ‘71. [The Committee] will use the term “migrant children” as referring to both accompanied and unaccompanied migrant children. In doing so, the Committee understands “migrant children” to include asylum-seeking and refugee children.’

The 'personal scope' question

- Paragraphs 1 and 2 of the Appendix to the Charter read:

1. Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, **the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned**, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Parties.

2. **Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees.”**

Engaging with the ESC Rights of Asylum-Seekers/Refugees

- The Committee reiterates that it has previously stated that **the rights guaranteed by the Charter are to be enjoyed to the fullest extent possible by refugees** ([Conclusions 2015, Statement of Interpretation on the rights of refugees under the Charter](#)). The Committee has identified a number of Charter provisions as ... applying to refugees. The level of protection afforded to refugees in respect of these rights, and specific elements thereof, varies in accordance with what the Convention relating to the Status of Refugees provides: **while some of these rights must be guaranteed on an equal footing with nationals** (health care, public relief and assistance and elementary education), **others must be guaranteed to refugees at least on an equal footing with “aliens generally in the same circumstances”** (secondary education, housing). The Committee has also considered **that social rights directly related to the right to life and human dignity and which are part of a “non-derogable core” of rights, must be guaranteed to refugees** (ibid, para. 11). Such rights include those set out in Articles 16 (in so much as it relates to the right of families not to be deprived of shelter), 17§1 and 7§10 of the Charter. **This finding is consistent with the Committee’s findings that these rights apply to children in an irregular migration situation** (see, *mutatis mutandis*, DCI v. Belgium, Complaint No. 69/2011, op.cit., §§38, 85 and 135-136), **albeit that asylum-seeking and refugee children may enjoy greater levels of protection in relation to those rights than children in an irregular migration situation do** (para 82)
- Article 31(1) (state obligation.’to promote access to housing of an adequate standard;’) does not apply to children in an irregular migration situation but does apply to asylum-seeking/refugee children

Key elements and challenges from an ECSR perspective

- Collective complaints focuses on one state but the ‘migrant crisis’ is an transnational issue with a diverse range of states potentially having different degrees of responsibility
- The Committee recalls the basic principle enshrined in Part I of the Charter, according to which “the Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the rights and principles set forth by the Charter may be effectively realised”. **In the situation under consideration here, this principle denotes a duty of international assistance and cooperation which is incumbent on each and every State Party to the Charter, so as to enable the attainment of conditions in which the rights of a very large number of extremely vulnerable children are effectively secured.**

BUT NO FINDING OF VIOLATION!