



European
Social
Charter

Charte
Sociale
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITÉ EUROPÉEN DES DROITS SOCIAUX**

1 October 2013

Case Doc No. 4

Conference of European Churches (CEC) v. The Netherlands
Complaint No 90/2013

**SUBMISSIONS OF THE GOVERNMENT
ON THE MERITS**

Registered at the Secretariat on 27 September 2013



Ministry of Foreign Affairs

**Observations of the Government of the Netherlands
to the European Committee of Social Rights
on the merits of complaint no. 90/2013**

CONFERENCE OF EUROPEAN CHURCHES (CEC)

v.

the Netherlands

Introduction

1. On 5 July 2013, the Executive Secretary of the European Committee of Social Rights forwarded to the Agent of the Government of the Netherlands the Committee's decision of 1 July 2013, declaring admissible the complaint lodged under the Revised European Social Charter ('the Charter') by the CONFERENCE OF EUROPEAN CHURCHES ('the complainant organisation') against the Netherlands.
2. The Government notes that, in paragraph 12 of its decision, the Committee holds that the personal scope of the Charter, adduced by the Government as a ground for inadmissibility of the complaint, cannot be addressed in the context of the examination of the admissibility of the complaint, but will be considered in the context of the examination of its merits. That being so, the Government will, before discussing the substance of the complaint, first reiterate its position on the personal scope of the Charter, as set out in its letter of 3 May 2013 and the appendix thereto.

Personal scope of the Charter

3. The complainant organisation invokes the right of undocumented adults to social and medical assistance (Article 13 § 4 of the Charter) as well as their right to shelter (Article 31 § 2 of the Charter). However, paragraph 1 of the Appendix to the Charter explicitly restricts the scope of those articles to foreign nationals only in so far as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Party concerned. This provision is unambiguous and can, in the Government's view, only lead to the conclusion that persons not residing lawfully in the Netherlands do not fall under the scope of the articles of the Charter that are expressly listed in that provision. Interpretation of treaty provisions may sometimes be called for, but not if the wording of the provision itself leaves no room for interpretation and certainly not if the interpretation applied amounts to a reversal of the ordinary meaning of the provision.
4. In addition and more specifically, Article 13 § 4 of the Charter, upon which the complainant organisation relies, extends the scope of the previous paragraphs of that article to nationals of other Parties lawfully within the territories of the Parties, and thus explicitly singles out persons not lawfully present within those territories. With respect to Article 13 therefore, the Charter contains a dual confirmation that the Contracting Parties intended to restrict the scope of that provision.
5. The Committee has held, notably in its decision in the case of *Defence for Children International (DCI) v. the Netherlands*,¹ that paragraph 1 of the Appendix to the Charter

¹ ECSR decision of 20 October 2009, complaint no. 47/2008.

does not exclude minors unlawfully residing in the territories of the Parties from the protection of the Charter. In its decision on a complaint lodged by the same organisation against Belgium, the Committee underlined '*that an application of this kind is entirely exceptional*'.²

6. The present case concerns not minors – a group which is by definition considered vulnerable, and therefore has specific rights under the Convention on the Rights of the Child which adults do not enjoy – but a more diffuse group of persons who share in common the fact that they reside unlawfully in the Netherlands, but do not necessarily have that status for the same reason or have anything else in common. Extending the Committee's reasoning in the two DCI cases to the present case would go a long way towards turning the exception into the rule and would raise the question of whether paragraph 1 of the Appendix to the Charter has any meaning at all. That question is all the more pertinent in the light of the letter of 13 July 2011 from the President of the Committee to the States Parties to the Charter.³ This letter argues against the desirability of maintaining the restriction laid down in paragraph 1 of the Appendix to the Charter, since, in the President's words, '*such a limitation is hardly consistent with the nature of the charter*'. The President invites States Parties to make a declaration extending the personal scope of the rights enshrined in the Charter.
7. In a letter of 14 October 2011 from the Director of the Europe Department of the Ministry of Foreign Affairs,⁴ the President was informed that the Government could not accept the proposal to abolish the limitations on the personal scope of the Charter as specified in paragraph 1 of the Appendix. In that letter, it was stressed that the proposal to equalise rights wrongly assumes that the persons in question are victims of illegal residence and illegal employment; this assumption ignores their own personal responsibility not to become involved in such situations or, if they do, to put an end to the situation as soon as possible. The Government is not aware of any States Parties having made the declaration proposed.
8. It would appear that the President's request would have been perfectly superfluous if the scope of paragraph 1 of the Appendix could already be adapted to the nature or seriousness of the complaint. If the provision were open to interpretation in the manner proposed by the complainant organisation, the question would arise as to why it is 'hardly consistent with the nature of the Charter' and why states should be encouraged to abolish it.

² ECSR decision on the merits of 23 October 2012, *Defence for Children International (DCI) v. Belgium*, complaint no. 69/2011, paragraph 35.

³ [Annexe 1.](#)

⁴ [Annexe 2.](#)

9. It is noteworthy that the President, in his letter, recognises that '*States Parties seem already inclined, and conscious of their duty, to apply social rights beyond the limited personal scope indicated in the Appendix*'. As will be demonstrated below, this holds true for the Netherlands as well. The President's description of the situation is also perfectly in line with the conclusion drawn by the Committee of Ministers in its final resolution in the case of *Defence for Children International (DCI) v. the Netherlands*⁵, where that Committee states that it:

[r]ecognises the limitation of the scope of the European Social Charter (revised) in terms of persons protected, laid down in paragraph 1 of the Appendix to the Charter, but notes that this does not relieve states from their responsibility to prevent homelessness of persons unlawfully present in their jurisdiction, more particularly when minors are involved.

10. It may be concluded that states recognise certain rights *without* there being a basis for such recognition in the Charter, which is further proof that the Charter *itself* is not at issue and that the group of persons whose interests the complainant organisation aims to defend is not covered by the personal scope of the Charter.

Substance of the complaint

Preliminary remarks

11. The complainant organisation complains that the Government is in breach of Articles 13, paragraph 4, and 31, paragraph 2, of the Charter because the Aliens Act excludes persons residing illegally in the Netherlands from governmental services, with the exception of primary and secondary education for children, necessary medical treatment and legal assistance. In particular, the complainant organisation complains that food, clothing and shelter are not perceived by the Government as a prerequisite to health or life itself and are made conditional upon obtaining a residence permit. The Government responds as follows.
12. In a country governed by the rule of law, the responsibilities and obligations of government are described as precisely as possible, as are the responsibilities and obligations of individual citizens. The rights of individuals are therefore by definition never unlimited. It is the task of government to fulfil its obligations and safeguard the rights of individuals. However, government also has a duty to make people aware of their personal responsibility and see that they fulfil their obligations (through enforcement).

⁵ Resolution CM/ResChS(2010)6.

Domestic law, policy and practice

13. Aliens who are under an obligation to leave the Netherlands, either because they are rejected asylum seekers or otherwise, bear personal responsibility for arranging their own departure. The Government does not regard these individuals as victims of the circumstances that have led to their residing illegally in the Netherlands. Unlawful residence is often the result of a conscious choice made after weighing the advantages and disadvantages of illegality versus return to the country of origin. The Government therefore calls upon such individuals to shoulder their personal responsibility to avoid illegality and end their unlawful residence as quickly as possible.⁶
14. Under the law, rejected asylum seekers have twenty-eight days to arrange their departure from the Netherlands. During this four-week period they are entitled to access to reception facilities. The time limit was imposed deliberately in order to urge them to action.
15. The Government offers assistance to help aliens fulfil their responsibility to arrange their departure. In order to facilitate a new start in the country of origin, extensive support for aliens returning independently is offered by the Repatriation and Departure Service (*Dienst Terugkeer en Vertrek, DT&V*), the International Organization for Migration (IOM) and NGOs, most of which are subsidised by the government. The Netherlands provides funding from the 'Voluntary, permanent return and reintegration' grants framework for projects aimed at offering former asylum seekers a future in their country of origin if they return independently. Former asylum seekers are given support in kind, such as training courses, medical support (e.g. a medical passport with relevant health information for care providers in the country of origin) or assistance in finding work or starting a business.⁷
16. In this way the Government makes it possible for aliens to arrange their return to their country of origin within the time limit set by law. Nevertheless, responsibility for departure rests with them. This is not an unreasonable requirement, given that the Immigration and Naturalisation Service (IND) and/or the court decided that these individuals must leave the Netherlands and in view of the fact that they came to the Netherlands on their own initiative.
17. After the statutory time limit runs out, aliens are no longer entitled to access to reception facilities. This does not mean that they automatically become homeless. If the DT&V believes that return can be realised within twelve weeks, a liberty-restricting measure, including accommodation, will be imposed and enforced in the restrictive accommodation where individuals are able to continue preparing their journey to their country of origin.

⁶ See also [Annexe 2](#).

The alien's attitude carries considerable weight in the decision to impose a liberty-restricting measure. For return to be effected within twelve weeks it is necessary for the alien to actually cooperate in his or her return. In cases where it cannot be assumed that the alien intends to cooperate, access to reception facilities is terminated and, in principle, no liberty-restricting measure is imposed.

18. Individual circumstances are still taken into consideration, even in the latter situation. Continued access to reception facilities can, in fact, be granted in highly exceptional circumstances. The Central Agency for the Reception of Asylum Seekers (COA) has no policy rules or fixed guidelines for defining this criterion. A decision to allow such access to reception facilities is made on a case-by-case basis and serves as a 'safety net' for unforeseen situations.
19. Unaccompanied minors who have been denied asylum have the right to stay at the reception facility until they turn eighteen.⁸ Unaccompanied minors who are found living in the Netherlands illegally are placed in a young offenders' institution, in a COA facility or a foster family.
20. Minors who are either in the Netherlands illegally or rejected asylum seekers and who live with their family are offered shelter in a family accommodation centre if necessary in order to prevent them ending up in a humanitarian emergency situation. These families are given shelter until they depart for their country of origin or until every child in the family has reached the age of majority.⁹
21. The COA also has a special cold-weather rule (*vorstcoulanceregeling*). When placement in aliens detention or restrictive accommodation is not appropriate and the person cannot arrange another alternative, access to reception facilities will not be terminated during periods of freezing weather.
22. Necessary medical treatment is available for everyone, including illegal aliens. In the case of a medical situation of such a nature that it is a temporary hindrance to departure, the alien concerned can apply for postponement of departure which, if granted, is linked to a right to access to reception facilities.¹⁰ Furthermore, aliens with medical problems may, under certain conditions, be eligible for access to reception facilities while awaiting a decision on their application for a residence permit on the grounds of medical treatment or a decision on a request for postponement of departure.

⁷ <http://english.dienstterugkeerenvertrek.nl/Subsidies/>

⁸ Asylum Seekers and Other Categories of Aliens (Benefits) Order.

⁹ Contrary to what the complaint implies (on p. 3) the House of Representatives had already been informed of this on 24 October 2012.

¹⁰ Section 64, Aliens Act.

23. The purpose of the aforementioned temporary and conditional services is to improve the alien's future prospects by facilitating return to the country of origin. Immigration policy should be geared towards discouraging unlawful residence. The fact that some aliens refuse the aforementioned support and the related services offered by the Government to assist with their return and deliberately choose to live on the streets cannot lead to the conclusion that the Government is obliged to offer (more) services or accept that the people concerned are in the Netherlands to stay. If this were the case, the burden on the Government would be too heavy. It would also contradict the alien's statutory obligation to leave. Return policy would be completely undermined, which would be at odds with the sovereign right of countries to determine the criteria for admission to and residence within their territory.
24. There may be circumstances that prevent aliens from leaving and that cannot be attributed to an action or omission on the part of the individual concerned, particularly if the authorities of the country of origin or a country of previous residence refuse to grant admission to their territory. This situation is also taken into account in immigration policy. Aliens in this situation are eligible for a 'no-fault' residence permit. This is related to the personal responsibility aliens have for their departure: they are obliged to make every effort to effect their departure, but are not expected to do the impossible.
25. The Government is convinced that the system as described strikes a just balance between requirements of humanity and the Government's duty to enforce the law, particularly the Aliens Act.

Specific situations mentioned in the complaint

26. In its complaint, the complainant organisation refers to many instances where individual aliens or groups of aliens have unsuccessfully attempted to improve their situation through litigation or otherwise. The Government is not prepared to discuss individual situations in the framework of the present proceedings, which are based on a collective, not an individual, right of complaint. Such discussion would require an in-depth examination of individual files, for which the current proceedings are inadequate. Suffice it to say, the Government does not necessarily accept the description of individual cases set forth in the complaint. Moreover, some of the individual cases referred to are currently still the subject of other legal or quasi-legal proceedings. The mere fact that their outcome is uncertain makes them unfit to support the complaint.
27. The Government will, however, respond to various allegations in the complaint concerning certain groups of illegal aliens, which have clearly manifested themselves as such and whose interests are therefore more apt for being discussed under the present proceedings.

28. Reference is made to a 'civil protest' by a group of undocumented migrants from Somalia and Iraq.¹¹ Contrary to the complainant organisation's assertion, the majority of individuals involved in these protests were not aliens who are *unable* to return to their country of origin, but rather aliens who are *unwilling* to return to their country of origin. They have refused to accept the decision denying their asylum application because they disagree with it and with Dutch asylum policy regarding countries such as Iraq and Somalia. They are not trapped in the Netherlands; they are here because they have made a deliberate choice not to make any effort to return to their country of origin. This also applies to the aliens who were in the so-called *Vluchtkerk* (St. Joseph Church in Amsterdam) and have since moved to the *Vluchtflat* (an empty office building in Amsterdam). This group of aliens has been given many opportunities to talk to the DT&V about the possibilities for independent return, but they have refused every offer.
29. The demands of the group of rejected Iraqi asylum seekers who set up a tent camp in May 2012 with a group of rejected Somali asylum seekers illustrate that the problem is unwillingness to leave rather than inability. They wanted changes made to asylum policy on Iraq, a reassessment of the applications of all rejected Iraqi asylum seekers, access to reception facilities for all rejected Iraqi asylum seekers and damages for Iraqi asylum seekers who had been held in aliens detention. They also demanded that aliens be returned to Iraq only on a voluntary basis.
30. The Government's position with respect to the protests was clear and consistent. Campaigns of this nature can never be the basis for changing asylum policy, a product of a democratic process, in general or with respect to a particular country of origin or a specific group of aliens. The Government is looking for a solution to the problem, but one that is consistent with this principle.
31. As the complainant organisation observes, following a demonstration temporary accommodation was offered to approximately 450 aliens, subject to a measure restricting their liberty. This was an exceptional move aimed at de-escalating the situation for the sake of public safety.
32. The Government is unfamiliar with the situation of a group of Tibetan aliens to which the complaint refers. Municipalities and organisations that are confronted with illegal aliens can contact the DT&V to enquire about possible solutions. This applies to the group of Tibetan aliens. The Minister for Immigration recently introduced a moratorium on decisions and expulsions for Tibetan asylum seekers, which means that they are not forced to return and are entitled to access to reception facilities.

References to international standards

¹¹ Page 4 of the complaint.

33. The complainant organisation understandably refers to sources emanating from relevant international organisations, notably General Recommendation No. 30 of the Committee on the Elimination of Racial Discrimination and General Comment No. 12 of the Committee on Economic, Social and Cultural Rights. The Government, while fully respecting the authority of these texts, is of the view that Dutch law and practice as described above are not in conflict with them. In particular, these texts do not ignore the personal responsibility of the individual for his or her well-being.
34. Furthermore, the complainant organisation relies on certain case law of the European Court of Human Rights, notably *M.S.S. v. Greece and Belgium* and *Yordanova v. Bulgaria*, and infers from those judgments that everyone residing in a rich country like the Netherlands, regardless of status, should have access to basic human needs, notably food, clothing and shelter. While the Government is unable to draw the same conclusion from the judgments referred to, and since the complainant organisation itself includes a reference to the Court in its complaint, the Government wishes to draw the Committee's attention to the Court's judgment in the case of *N. v. the United Kingdom*¹², in which the Court developed a particularly balanced approach (emphasis added):

Although many of the rights [the Convention] contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights [...]. Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [...]. Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

35. In line with this is the Court's judgment in the case of *Ponomaryovi v. Bulgaria*¹³, in which the Court found that:

[...] a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory.

¹² ECtHR, judgment of 27 May 2008, appl. no. 26565/05, paragraph 44.

36. In a state governed by the rule of law, therefore, it is necessary to strike a fair balance between the demands of the general interest and the requirements of the protection of the individual's rights. It cannot be concluded from the Court's case law that every rejected asylum seeker has unlimited social and economic rights.

Conclusion

37. From the above, the Government concludes that:

- the group of persons whose interests the complainant organisation aims to defend is not covered by the Charter, by virtue of paragraph 1 of its Appendix and, inasmuch as the complaint relies on Article 13 § 4 of the Charter, by virtue of that Article as well;
- Dutch law, policy and practice, as described above, ensure that the fulfilment of basic human needs is available to everyone in the Netherlands, including unlawfully residing aliens
 - who are preparing their departure,
 - to whom very special circumstances apply, or
 - who are unable to leave the country through no fault of their own,as a result of which the complaint should be declared unfounded.

The Hague, 27 September 2013



Roeland Böcker
Agent of the Government of the Netherlands

¹³ ECtHR, judgment of 21 June 2011, appl. no. 5335/05, paragraph 54.