

Resolution CM/ResChS(2015)4
European Federation of National Organisations working with the Homeless (FEANTSA)
v. the Netherlands,
Complaint No. 86/2012

*(Adopted by the Committee of Ministers on 15 April 2015
at the 1225th meeting of the Ministers' Deputies)*

The Committee of Ministers,¹

Having regard to Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints;

Taking into consideration the complaint lodged on 4 July 2012 by European Federation of National Organisations working with the Homeless (FEANTSA) against the Netherlands;

Having regard to the report transmitted by the European Committee of Social Rights containing its decision on the merits, in which it concluded:

- unanimously, that there is a violation of Article 31§2 of the Charter

Applicability of Article 31§2 to persons concerned by the complaint

In certain cases and under certain circumstances, the provisions of the Charter may be applied to migrants in an irregular situation. In connection with complaints concerning children, the Committee has held that this is the case with regard to health, medical assistance, social, legal and economic protection and shelter.

Eviction from shelter of persons present within the territory of a State Party in an irregular manner should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness, which is contrary to the respect for their human dignity. States are nevertheless not obliged to provide alternative accommodation in the form of permanent housing within the meaning of Article 31§1 for migrants in an irregular situation.

Alleged violation of Article 31§2 of the Charter

Access to shelter

The government has introduced financial measures for the purposes of guaranteeing access to shelter, as well as undertaken regular reviews of the national situation. It similarly has put in place legislation regulating access to shelter.

So-called community shelter is nevertheless provided only to those who fulfil the criteria of the relevant domestic law (the WMO), that is, to applicants with multiple problems and not self-sufficient. In the non-binding guidelines issued by the Association of Dutch Municipalities, this group of homeless persons is referred to as "the target group".

The local connection criterion further restricts the access to community shelter. Pursuant to it, homeless persons are obliged to establish having resided within the same region for the period of two out of the three years prior to their application for a placement at an emergency shelter.

Those accommodated in community shelters must moreover fulfil any additional criteria in force for shelter distribution in the municipal area. These criteria vary between the responsible municipalities.

¹ In accordance with Article 9 of the Additional Protocol to the European Social Charter providing for a system of collective complaints the following Contracting Parties to the European Social Charter or the revised European Social Charter have participated in the vote: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Republic of Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, "the former Yugoslav Republic of Macedonia", Turkey, Ukraine and United Kingdom.

The government aims to guarantee the access to community shelter by means of the nationwide access principle for those who do not fulfil the local connection criterion. In accordance with the law, community shelter services are accessible to all those who live in the Netherlands.

Pursuant to the government's own submissions, the national access principle is not fully applied in practice. It follows that the government has failed to supervise the provision of shelter by the responsible municipalities in a manner ensuring the provision of community shelter, even without a local connection.

Binding rules have not been issued to the responsible municipalities and to other providers of community shelters on the criteria for the granting of shelter. Similarly, no binding instructions have been issued on the distribution of responsibilities between the municipalities in cases where shelter is ultimately granted outside the municipality of first application.

The authorities acknowledge that the mechanism in force does not cover everyone with a valid claim for shelter. Governmental funding, moreover, only covers the provision of the community shelter to the target group.

The municipalities may on their own initiative provide shelter also to those who do not fall within the target group. Neither party has however provided information on a nationwide practice to this end. It may accordingly not be established that alternative shelter accommodation is available in sufficient numbers with regard to the estimated number of the homeless, who remain outside the community shelter mechanism. No statistics are maintained on the estimated shelter demand.

A significant segment of the homeless is provided shelter neither in law, nor in practice and the scope of the obligation to provide shelter has been restricted in an excessive manner.

Nationals of the Netherlands, as well as all foreigners staying in the Netherlands in a regular manner, have a right to be offered more permanent housing than emergency shelter within a reasonable period. Social housing is insufficiently available in certain areas, which is partially due to the general economic situation. The States Parties should match the increase in need of shelter and the related social housing regardless of the economic situation in order to achieve the steady progress towards the elimination of homelessness, as required under Article 31§2.

In view of the foregoing, the legislation and practice fail to ensure access to community shelter for the purpose of preventing homelessness.

The quality and quantity of shelter available to vulnerable groups

Regardless of the significant steps taken for the purpose of ensuring access to shelter by women and women with children, according to FEANTSA, the number of special shelter places on offer for these groups remains insufficient.

The government has not provided data establishing the sufficiency of shelter places reserved for the vulnerable groups, nor excluded that women may be sheltered in general shelters. Only 35 of the 43 municipalities responsible for shelter provision maintain special women's shelters. Both parties furthermore refer to an established, genuine need for additional family shelters. No specific information is provided on the situation of children in shelters.

Shelter provided for women and women with children thus fails to fulfil the requirements of Article 31§2 with regard to quantity.

No information has been provided on the situation of those young homeless people, who do not have multiple problems and thus are not eligible for a placement in youth shelter. It therefore cannot be established whether these adolescents are provided with sufficient shelter or not.

With regard to the quality of the shelters available to vulnerable groups, emergency shelters must always meet the safety requirements established by the Committee. The States Parties should provide members of vulnerable groups with shelters that are adapted to the needs of those belonging to such groups, as well as ascertain the availability and suitability of special shelters.

It follows that the quality and quantity of shelters available to vulnerable groups do not fulfil the requirements of the Charter.

- unanimously, that there is a violation of Article 13§§1 and 4 of the Charter

Applicability of Article 13 to persons concerned by the complaint

Pursuant to the established practice of the Committee, foreigners who are nationals of States Parties to the Charter and are regularly residing in the territory of another State Party without adequate resources, enjoy an individual right to appropriate assistance under Article 13§1 on an equal footing with nationals, i.e. beyond emergency assistance. Conditions such as the length of residence, or conditions which are harder for foreigners to meet, may not be imposed. Article 13§1 concerns also refugees and stateless people.

Emergency social assistance should be provided under Article 13§4 to all foreign nationals without exception. Also migrants having exceeded their permitted period of residence within the jurisdiction of a State Party have a right to emergency social assistance.

Alleged violation of Article 13 of the Charter

Pursuant to a survey referred to by the government, emergency shelter is not systematically made available to all categories of persons covered by Article 13 with a valid claim for shelter.

The homeless who do not belong to the target group in general have at least one serious problem in addition to the fact of being homeless. No information has been issued on a comprehensive, nationwide practice of granting another type of shelter to this group of homeless. It has moreover not been established how recourse to the general social services or a debt reorganisation would help to ensure immediate emergency housing to a homeless person.

Even though the need for shelter placements cannot be statistically measured, it is nevertheless possible to provide an estimation on the basis of administrative data. No such estimation has been provided.

According to the government, emergency shelter is not provided to migrants in an irregular situation in the overwhelming majority of cases. Emergency shelters are furthermore reserved to those genuinely in serious and acute need. In light of the Committee's caselaw, the aim as such is in keeping with Article 13.

The reasons for the immigration policy behind this situation are noted. The denial of emergency shelter to those individuals who are still in the territory of the Netherlands is nevertheless not an absolutely necessary measure for achieving the aims of the immigration policy. No indication on the concrete effects of this measure has been given.

Even when maintaining the current aims of the migration policy, less onerous means remain available with regard to the emergency treatment provided to those individuals who have overstayed their legal entitlement to remain in the country. Halting the provision of such very basic emergency assistance as shelter, guaranteed under Article 13 as a subjective right, to individuals in a precarious situation, cannot be accepted.

The legal and practical measures denying the right to emergency assistance restrict, in a disproportionate manner, the right of adult migrants in an irregular situation and without adequate resources.

The scope of application of Article 13§4 extends also to those whose asylum claim has been rejected. The right to emergency social assistance is not limited to those belonging to vulnerable groups, but extends to all individuals in a precarious situation pursuant to their human dignity.

With regard to the right to appeal in matters concerning the granting of emergency assistance, there is nothing to establish the efficiency of this right in practice. A functioning appeal mechanism before an independent judicial body is crucial for the proper administration of shelter distribution. It is for the government to ensure that this right is made effective also in practice.

- unanimously, that there is a violation of Article 19§4(c) of the Charter

Applicability of Article 19§4(c) to persons concerned by the complaint

Article 19§4(c) obliges the States Parties to secure the rights provided to migrant workers who are within their territories in a regular manner. Migrants in an irregular situation do nevertheless not prima facie fall within the scope of the Article. Pursuant to the wording of Article 19, the protection granted to migrant workers also extends to the members of their families.

Alleged violation of Article 19§4(c) of the Charter

Pursuant to domestic law, access to shelter may be provided to foreigners who are lawfully resident in the country. Furthermore, the said provision enables the exceptional provision of emergency shelter to those in an irregular situation.

Instead of referring to measures taken to ensure the equal access to emergency accommodation for migrant workers and their families, the government refers to legislation adopted in order to limit the access to emergency accommodation by this group. The right to emergency shelter has especially been proscribed in respect of citizens of the European Union during the first three months of their residence.

The restriction pursues an aim of social and employment policy, as it purports to reserve the right of free residence during the first three months to those EU citizens who are able to sustain themselves and their families without needing to resort to the social assistance system of the receiving member State.

In this context, and taking into account in particular the short duration of the restriction, the limitation is proportionate with regard to the aim it pursues, as well as in light of the rights to emergency social assistance of those individuals to whom it is applied.

Insofar as the right to appeal to an independent body regarding decisions relating to the distribution of accommodation to migrant workers and their families is concerned, reference is made to the findings under Article 13. The situation also amounts to a violation of Article 19§4(c).

- unanimously, that there is a violation of Article 30 of the Charter

Applicability of Article 30 to persons concerned by the complaint

It follows from the Committee's caselaw that the States Parties are not obliged to apply to migrants in an irregular situation the range of economic, social and cultural measures that are to be taken in order to secure the right to protection against poverty and social exclusion. The co-ordinated approach required by Article 30 involves the adoption of positive measures, most of which cannot be regarded as being applicable to groups not covered by the personal scope of the Charter. Article 30 is thus not applicable to migrants in an irregular situation.

Alleged violation of Article 30 of the Charter

The "aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact". This human rights approach emphasises the very close link between the effectiveness of the right recognised by Article 30 and the enjoyment of the rights recognised by other provisions, such as Articles 13 and 31 of the Charter.

In light of the findings made under Articles 31§2, 13§§1 and 4, as well as 19§4, the legislation and policy concerning the access to emergency shelter has brought about a situation where homeless persons in need of shelter are not always offered shelter regardless of genuine need. This is not in keeping with the obligation to prevent poverty and social exclusion.

It furthermore appears from the latest relevant national survey that measures to improve the co-ordination between the responsible municipalities were envisaged for addressing the situation. The co-ordination between the responsible authorities is currently insufficient for the purposes of Article 30.

Having regard to the information communicated by the delegation of the Netherlands on 16 September 2014 (see appendix to the resolution),

1. takes note of the report of the ECSR and in particular the concerns communicated by the Dutch Government (see appendix to the resolution);
2. recalls that the powers entrusted to the ECSR are firmly rooted in the Charter itself and recognises that the decision of the ECSR raises complex issues in this regard and in relation to the obligation of States parties to respect the Charter;
3. recalls the limitation of the scope of the European Social Charter (revised), laid down in paragraph 1 of the Appendix to the Charter;
4. looks forward to the Netherlands reporting on any possible developments in the issue.

Appendix to Resolution CM/ResChS(2015)4

Address by the Representative of the Netherlands at the GR-SOC meeting of 16 September 2014 – European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands, Complaint No. 86/2012

The ECSR has issued two decisions against the Netherlands (CEC and FEANTSA). My government has serious concerns about these decisions and today I would like to share with you those concerns.

Naturally, we realise that it is not unusual for States to have difficulties with decisions of the Committee, especially when decisions are not entirely favourable for a State. The Netherlands acknowledges that reports and decisions of the ECSR should be given appropriate follow-up in order to repair any violations found and prevent future violations.

However, in the cases now on the agenda, it seems that a straightforward provision of the European Social Charter to which we are all parties, is being ignored. As this should be of concern to all parties, I would like to focus my intervention on that aspect.

The Netherlands is one of the 15 Council of Europe member States that have ratified the collective complaints protocol of the European Charter. In both the decisions against the Netherlands, the ECSR has concluded that the Netherlands is in violation with several provisions of the Social Charter, because the Netherlands has – according to the ECSR – not recognised certain rights enshrined in the Charter to persons unlawfully present on Dutch territory.

In the appendix to the Social Charter the Contracting Parties aimed to exclude from the scope of the Charter all aliens who are not lawfully residing on the territory of a Party. This provision is fully coherent with the sovereign right of States to decide on the entry of foreigners on their territory.

It is unchallenged that by introducing this provision, State Parties had in mind a limited personal scope of the Charter. And they still do so, given the lack of favourable response to a letter dated 13 July 2011 of the President of the ECSR, by which Parties were invited to abandon the provision.

The ECSR's unwarranted interpretation risks jeopardising the trust that States place in what they have agreed upon in treaty law. Any interpretation of a treaty should be in good faith and cannot unilaterally impose completely new obligations upon member States. The decisions by the ECSR do not merely contain an extensive interpretation of the treaty provisions; they contain an interpretation which is simply *contra legem*.

We have serious concerns how this will affect the authority of the Committee in the long run and how this will affect the effectiveness of the Social Charter itself. As one result, the majority of States not having accepted the collective right of complaint may be discouraged from doing so.

Therefore, the Netherlands seeks the support of you, our fellow States parties to the Charter, in confirming the validity of the limitation of the personal scope of the Charter.