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Secretariat of the European Social Charter
Directorate General of Human Rights
DG II
Council of Europe
67075 Strasbourg Cedex
France

Genève, 17 January 2013

Collective Complaint
CEC v. The Netherlands

1. Purpose of the complaint

The CEC - the Conference of European Churches (hereinafter CEC) requests the European Committee of Social Rights (hereinafter the Committee) to hold that the Dutch government has failed to fulfil its obligations under the Revised Social Charter (hereinafter the Revised Charter) to respect the rights of undocumented adults to food, clothing and shelter.

2. Admissibility

Defendant State

The Netherlands is Party to the Revised Charter and has accepted the collective complaints procedure by signing and ratifying the 1995 Additional Protocol (ratified 3 May 2006).

Status of CEC

CEC - the Conference of European Churches - is the only Europe-wide ecumenical body bringing together Protestant, Anglican, Orthodox and Old Catholic Churches. It offers a space in which Churches come together seeking new ways to work towards the visible unity of the Church of Jesus Christ. CEC provides a means by which its Member Churches can work at European level with several Roman Catholic organisations. CEC is one of the few pan-European civil society bodies, which by virtue of its membership, has a visible and living presence at every level of European society. CEC is a well-recognised and established dialogue partner with the EU institutions, the Council of Europe and other political institutions. These institutions actively seek out the views of CEC and its Member Churches on a range of issues.

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CEC is one of the organizations authorized to lodge a collective complaint under the Revised Social Charter.¹

Article 7 (2) of the Constitution of CEC reads: "The legal signatory for the Conference [of European Churches] shall be the General Secretary together with one of the persons duly authorized by the Central Committee."

For the purpose of the procedure Pim Fischer and Jelle Klaas are appointed by CEC as advisors as mentioned in Rule 25-2 of the Rules of Procedure of the ECSR.

Articles concerned

Article 13 paragraph 4: the right to social and medical assistance;

Article 31 paragraph 2: the right to shelter

Personal scope: adequate shelter for any destitute person

The right to food, clothing and shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity. The Committee interprets the Charter in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, among which its Article 31 § 3(c), which provides that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". The Charter should in so far as possible be interpreted in accordance with other rules of international law of which it forms part. This includes in the present case the interpretation of the provision concerning adequate shelter for any person in need, regardless of whether s/he is lawfully residing on the State's territory. The rights closely linked with life itself are applicable to the specifically vulnerable category of "persons unlawfully present in the Netherlands".² Therefore adults should come, whatever their residence status, within the personal scope of Article 13 § 4 and Article 31 § 2 of the Revised Charter as far as shelter is concerned.

3. The facts

In the decision on the merits in the case of *DCI v The Netherlands* (47/2008) the Committee held that the Charter is violated when undocumented children are denied access to shelter. This complaint concerns undocumented adults residing in the Netherlands who turn to the State for help.

Dutch Law

The Aliens Act 2000 is the general statute concerning migration into the Netherlands and the allocation of residence status to aliens. Article 10 of the Aliens Act 2000 excludes aliens not lawfully present from receiving any government services with the exception of (primary and secondary) education (for children), medical treatment (when necessary from a medical perspective) and assistance in legal matters. Food, clothing and shelter are not perceived by the Dutch State to be a prerequisite of health or life itself.

In the Netherlands access to food, clothing and shelter is made conditional upon obtaining a residence permit. This is stated in the Categories of Aliens Regulations (*Regeling verstrekkingen*

¹ Number 30 in the document of the 1st of January 2012 on International Non-Governmental Organizations (INGOs) entitled to submit collective complaints.

² See complaints 14/2003 and 47/2008.

bepaalde categorieën vreemdelingen), which is administered by the COA³. Migrants without a residence permit [hereafter: undocumented persons] have no right to food, clothing or shelter. An exception is made for asylum-seekers in the first period of their procedure.

The law is crystal clear. Only undocumented migrants belonging to one of the categories specified by law are entitled to food and shelter. All others have no such entitlement and are thus excluded by law.

Practice

The situation of accompanied, but undocumented children has changed in the wake of the Committee's decision in *DCI v The Netherlands* (47/2008). After that decision and many national court decisions it was understood that destitute children should under all circumstances receive help.⁴ The State's reaction was however reluctant, to say the least. To address the problem of children living on the streets, the State created the possibility for rejected asylum-seeker families to request a liberty restricting measure.⁵ Where such a measure is taken, the family is allowed to reside in a so-called 'liberty restricted location'.⁶ On 21 September 2012 the Dutch Supreme Court held, referring *inter alia* to your Committee's decision in *DCI v The Netherlands*, that shelter should be offered to destitute, undocumented families.⁷ At present the State is still studying this decision.

Attempts have been made to obtain shelter for destitute undocumented adults as well. These proceedings were only successful in a handful of cases in which the Central Administrative Court⁸ held that extreme vulnerability and hardship was established.⁹ In most cases however, where extreme vulnerability could not be proven, the right to assistance and shelter was denied, leaving the person without shelter, sanitation or food. This applied even in the case of a 61 year old man with reduced heart function, swollen liver, diabetes and swollen feet and lower legs,¹⁰ and in the case of two men with AIDS.¹¹

In principle medical assistance is available to all persons living in the Netherlands. But that people are bereft of food, clothing and shelter does not give rise to outrage. The destitute person is considered responsible for him or herself. The right to basic provisions such as food and shelter is thus denied in the Netherlands. The situation of those living undocumented in the Netherlands, some year in, year out, can only be described as frightful. To survive on the streets, deprived of

³ Centraal Orgaan Opvang Asielzoekers, the authority responsible for the shelter and care of asylum-seekers.

⁴ Adviescommissie vreemdelingenzaken, (Advice Committee on Aliens), March 2012.

⁵ Vrijheidsbeperkende maatregel.

⁶ De Gezinslocaties in Gilze Rijen en Katwijk: geen plek voor een kind (The family locations in Gilze Rijen and Katwijk: no fit place for a child) <http://www.ecpat.nl/images/20/1644.pdf>

⁷ Hoge Raad 21 September 2012 LJN: BW5328, par. 3.5.5.

⁸ The Central Administrative Court is the highest administrative court in matters concerning social and economic rights.

⁹ In one case the Central Administrative Court was convinced by the medical evidence that the health of the applicant would be substantially threatened unless shelter was given: 19 April 2010 LJN: BM0956, par. 4.8.3; In another case (9 September 2011 BT1738) the Central Administrative Court was convinced by medical evidence that the severely psychotic man would be a danger to his own life and that of others, were medical treatment to be withheld. In a third case the Central Administrative Court recognized the claim of a mother with serious complications in pregnancy and her son to receive benefit, in order to ensure that she would not have to leave the place where they were living: 14 March 2012, BV9270.

¹⁰ Central Administrative Court 11 May 2012, LJN BW6227.

¹¹ Central Administrative Court 16 May 2012, LJN BW7019; Central Administrative Court 12 June 2012, LJN BW9140.

food, clothing and shelter, forsaken, is terrifying. Denial of shelter means sleep deprivation, as we are reliably informed, a real killer. A relentless deterioration of health and premature death ensues, inevitably.

Undocumented persons are socially isolated, the outcasts. This isolation leads to desperate measures. At the end of 2011 a group of undocumented migrants who had fled Somalia and Iraq and then got stuck in the Netherlands - unable, as they were, to return to the place where they came from - started a civil protest. This courageous action made visible the unsightly problem of stuck, desperate people lacking the most elementary means of survival. In all official statements and in all court cases regarding this protest, the State has made it clear that it will not consider offering shelter to undocumented migrants without attaching conditions such as the person preparing him- or herself for enforced return to the country of origin.

In 2011 and 2012 various groups of undocumented migrants encamped at various public locations in the Netherlands. One of these encampments swelled to almost 400 people. The State installed toilets and provided drinking water. The camps were tolerated for several weeks but were in most cases forcibly evicted by the police. In November 2012, when the camp 'We are here' in Osdorp, Amsterdam was forcefully evicted, some hundred undocumented migrants, helped by local activists, squatted an empty church. The Amsterdam municipality has stated that it will tolerate the so-called 'Refuge Church' (*Vluchtkerk*) and has promised not to evict the church until March 2013.¹²

The encampments and Refuge Church made the headlines in the Netherlands and sparked a lot of discussion in parliament. They have shown that there is a real and persistent problem faced by hundreds of undocumented migrants who cannot return or who for whatever reason are not removed from the Netherlands, who nevertheless have no right to shelter.

The actions and the reaction of the government also show that it acknowledges the problem.

Since the start of the actions the government has given three reasons for providing shelter in situations not provided for in the Aliens Act: extreme winter conditions¹³, the prevention of security problems¹⁴ or to end the deadlock¹⁵.

CEC notes that the Netherlands sometimes does provide shelter. Help is therefore possible, contrary to the Government's official denial of this. Shelter was provided when there was a threat to public order (posed by the encampments). This leads to the situation that whether destitute people obtain help depends upon whether public opinion is swayed. Only those who that protested, who had the courage and physical strength to camp outdoors, were offered shelter. Others, who were physically too weak to join the protests, were not.

CEC draws attention to a particular group of undocumented migrants, less in the public eye than the campers in the Refuge Church, to whom access to food, clothing and shelter is also denied. This group is formed by refugees from Tibet who fled to Europe in fear of political persecution by the Chinese government. CEC is in contact with a group of about forty Tibetan undocumented migrants living

¹² English version of the Vluchtkerk website: <http://www.devluchtkerk.nl/en/home>.

¹³ Sessions 2011-2012, file number 1708, 2nd March 2012.

¹⁴ <http://www.volkskrant.nl/vk/nl/2844/Archief/archief/article/detail/3100417/2011/12/31/Onderdak-van-overheid-voor-protesterende-asielzoekers.dhtml>

¹⁵ Sessions 2011-2012, file number 2528, 15th May 2012 .

in the Netherlands, mainly in Utrecht and Amsterdam. The Dutch government, being neither able nor willing to expel these people to China, has nevertheless condemned them to a life of misery, stress and extreme poverty in the Netherlands. And although for many of them help has been sought from the municipalities, the requests were all refused and the position of courts is to date that the State is not obliged to alleviate in any way their desperate condition.

The Dutch policy of denial of shelter to destitute adults has been brought to the attention of the Human Rights Committee respectively the Committee for the Elimination of Discrimination Against Women in two cases lodged at the end of 2012: one concerning a Ghanaian man with AIDS, the other concerning a Roma woman brought from Bulgaria to the Netherlands where she was forced to work as a prostitute.¹⁶

4. Human rights standards

If a country really lacks resources, the international community must step in. The Netherlands is however a rich country. Expensive medical assistance is in principle available, whilst food and shelter is denied. Rejection of the destitute has nothing to do with the public recourses of the Netherlands. The State refuses to meet international standards to which it has voluntarily decided to bind itself, complying not even with the minimum core obligations.

The Committee on the Elimination of Racial Discrimination stated in General Recommendation 30 that States should respect the right of non-citizens to an adequate standard of physical and mental health. The Economic and Social Council of the UN stated in General Comment No. 12:

øThe human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone. The committee affirms that the rights to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by their means at their disposal, States have the obligation to fulfil (provide) that right directly.ö

The minimum standards appear from the decision of the European Court on Human Rights [hereafter: the European Court] in *M.S.S. v Greece and Belgium*, in which the abysmal standard of accommodation provided to those seeking asylum in Greece was held to violate Article 3 European Convention on Human Rights [hereafter: ECHR].¹⁷ Although in that case the obligations undertaken by Greece under the European Reception Directive weighed heavily, the European Court's remarks on the inhumanity of applicants'situation is of relevance to the present application:

õ In the light of the above and in view of the obligations incumbent on the Greek authorities under the European Reception Directive (see paragraph 84 above), the Court considers that the Greek authorities have not had due regard to the applicant's vulnerability as an asylum seeker and must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.

¹⁶ *G. E. v The Netherlands* nr G/SO 215/51 NLD (GEN) and *D. G. v The Netherlands* G/SO 234/27 NLD (GEN).

¹⁷ Eur. Court H. R., Case of *M.S.S. v Belgium and Greece*, Judgment of 11 January 2011, Application no. 30696/09, par. 263.

It follows that, through the fault of the authorities, the applicant has found himself in a situation incompatible with Article 3 of the Convention. Accordingly, there has been a violation of that provision.¹⁸

The position of those who are now living in the Netherlands on the streets is not different from that of the applicants in *M.S.S. v Greece*, except that the climate in Greece ó winters mild and rainy, summers long and dry - is considerably better than in the Netherlands, a matter of considerable importance to those living on the streets. In *Yordanova v Bulgaria*¹⁹ the European Court acknowledges that the right to shelter is protected by Article 8 ECHR when it condemned the decision-making of the Bulgarian authorities regarding the re-housing of Roma people who were camped at places which were not authorized, as follows:

õIn addition, it is noteworthy that before issuing the impugned order the authorities **did not consider the risk of the applicantsø becoming homeless** if removed. They attempted to enforce the order in 2005 and 2006 regardless of the consequences and, while they signed an agreement containing an undertaking to secure alternative shelter, they later disregarded it and declared that the risk of the applicantsø becoming homeless was õirrelevantö (see paragraphs 27-42 above). The Court considers, however, that in the specific circumstances of the present case, in view, in particular, of the long history of undisturbed presence of the applicantsø families and the community they had formed in Batalova Vodenitsa, the principle of proportionality required that **due consideration be given to the consequences of their removal and the risk of their becoming homeless.**²⁰ (Emphasis added)

It emerges from these decisions that the European Court, although not entrusted with the task of safeguarding social and economic rights, evidently considers that everyone, regardless of status, residing in a rich country like the Netherlands should have access to basic human needs: food, clothing and shelter.

5. Violation of Article 13 § 4 Revised Social Charter

It is recognised in international law that a State may determine who enters and resides on its territory. Those not admitted by the State have no right to be treated the same as those who are admitted.²¹ They may be subject to expulsion as long as this does not violate human rights. Notwithstanding these rules, the State is subject to a minimum core obligation to provide food, clothing and shelter.

Practice and law in the Netherlands are not in conformity with Article 13 § 4 of the Revised Social Charter. As the Committee has stated, need is the only permissible criterion for the offer or refusal of help.²² In the Netherlands adults who are undocumented are excluded and do not receive any help at all. The Committee has been clear in the past regarding the rights of undocumented,

¹⁸ Eur. Court H. R., Case of *M.S.S. v Belgium and Greece*, Judgment of 11 January 2011, Application no. 30696/09, par. 263-264.

¹⁹ ECtHR, Case of *Yordanova and others v Bulgaria*, Application no. 25446/06, Judgment of 24 April 2012.

²⁰ See also Eur. Court H.R., *Yordanova and others v Bulgaria*, Judgment of 24 April 2012, Application no. 25446/06, par. 126. See your Committee's Conclusions 2003, France, Italy, Slovenia and Sweden, Article 31§2; *ERRC v. Italy*, Complaint No 27/2004, decision on the merits of 7 December 2005, § 41; *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006, § 52; *ATD v. France*, Complaint 33/2006, decision on the merits of 5 December 2007, § 77 and *FEANTSA v. France*, Complaint No 39/2006, decision on the merits of 5 December 2007, § 81.

²¹ Eur. Court H. R., *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 19, § 43 and Eur. Court H. R. *Beldjoudi v. France*, judgment of 26 March 1992, Series A no. 234-A, p. 27, § 74.

²² European Committee of Social Rights, 20 October 2009, 47/2008, (*DCI v The Netherlands*).

destitute children. In this case we invite the Committee to clarify the rights of undocumented, destitute adults.

The personal scope of Article 13 Revised Social Charter is broad. Because need is the only criterion for granting social assistance, any person can be eligible for social assistance.²³ Based on Article 13 § 4 Revised Social Charter even people not lawfully present (undocumented) in the territory of a member state must be eligible for social assistance.²⁴ In the case law of the Committee need still is the main criterion for eligibility which means that emergency social assistance - food and shelter - should be given up until the moment at which the unlawfully present person can be repatriated.²⁵

The Committee has already noted that a State is not required to grant undocumented persons access to the regular social assistance scheme, but a State is required to provide at least temporary assistance, of an appropriate nature, where such persons are faced with an immediate state of need. Although Article 13 Revised Social Charter does not stipulate in which manner social assistance is to be given, i.e. in cash or in kind, the system should be organized in such a way that it is accessible for all who are destitute.²⁶

Because the human right to social assistance benefits is founded on the person's need, the right cannot be limited in time.²⁷ Therefore social assistance should be given as long as the need persists in order to help the person concerned to continue to lead a decent life.²⁸ In the Conclusions on the Netherlands of 2009, regarding Article 13§4, the Committee stated:

“The Committee further asked the Government in a letter whether unlawfully present foreigners who are not entitled to social benefits under these Regulations may nevertheless receive emergency social assistance (food, shelter, clothing) in case of need. The Committee notes that the supplementary information provided by the Government does not reply to this question. Therefore the Committee holds that it has not been established that all persons without resources, whether or not legally present in the Netherlands have a legally recognized right to the satisfaction of basic human material need (food, clothing, shelter) in situations of emergency.

Conclusion

The Committee concludes that the situation in the Netherlands is not in conformity with Article 13§4 of the Revised Charter as it has not been established that all unlawfully present persons in need receive emergency social assistance.”²⁹

In the present case the CEC requests the Committee to hold that the Netherlands has and is continuing to violate Article 13 § 4 of the Revised Social Charter.

6. Violation of article 31 § 2 of the Revised Social Charter

Although, especially in case law, some progress has been made after the decision of *DCI v. The Netherlands*, there is still no unconditional³⁰ access to shelter. The Committee in its Conclusions of

²³ European Committee of Social Rights, Conclusions X-2 Spain p. 121 and Conclusions XIII-4, pp. 54-57.

²⁴ European Committee of Social Rights, General Introduction to Conclusions XVIII-1 Belgium.

²⁵ European Committee of Social Rights, Conclusions XIII-4, pp. 54-57 and Conclusions XVIII-1 Germany, p. 22.

²⁶ European Committee of Social Rights, Conclusions XIV-1, Netherlands, p. 598.

²⁷ European Committee of Social Rights, Conclusions XIV-1 United Kingdom, p. 845.

²⁸ European Committee of Social Rights, Conclusions XIII-4, pp. 54-57 and Conclusions XVIII-1 Spain, p. 745.

²⁹ European Committee of Social Rights, Conclusions 2009 (Netherlands), p. 32.

³⁰ The state has offered shelter in certain cases on condition that the person is prepared to co-operate with plans for his or her deportation.

2011 on the Netherlands regarding Article 31 § 2 observed that the situation, as far as children are concerned, is still not in conformity with the Revised Charter:

“The Committee holds that until shelter is provided regardless of residence status, the situation of rejected asylum seekers or persons whose asylum status is not renewed or revoked is in conformity with the requirements of Article 31 § 2 as recalled above (see “Right to shelter”).³¹”

In its Conclusions on the Netherlands 2011, regarding Article 31 § 2, the Committee stated:

“According to Article 31 § 2, homeless persons must be offered shelter as an emergency solution. Moreover, to ensure that the dignity of the persons sheltered is respected, shelters must meet health, safety and hygiene standards and, in particular, be equipped with basic amenities such as access to water and heating and sufficient lighting. Another basic requirement is the security of the immediate surroundings (*DCI v. the Netherlands*, § 62).

Since the right to shelter is closely connected to the right to life and is crucial for the respect of every person’s human dignity, under Article 31§2 of the Charter, States Parties are required to provide adequate shelter also to children unlawfully present in their territory for as long as they are in their jurisdiction. (*DCI v. the Netherlands*, §§ 47 and 64).

As regards persons unlawfully present within the territory, since no alternative accommodation may be required by States for them, eviction from shelter 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 (*DCI v. the Netherlands*, § 63).³²”

All persons in need should be helped with food, clothing and shelter; particularly children, but not only children. The position taken by the Netherlands is contrary to human rights standards. The State has an obligation to provide shelter and prevent homelessness under Article 31 § 2 Revised Charter.

7. Conclusion

CEC asks the Committee to hold that law and practice in the Netherlands is not in conformity with Article 13 § 4 and Article 31 § 2 Revised Social Charter.

CEC asks also the Committee to indicate what the Dutch State has to do in order to comply with its obligations.

Sincerely,



Rev. Dr Guy Liagre
General Secretary



Mrs Henriette Brachet
Finance Officer

³¹ European Committee of Social Rights, Conclusions 2011 (Netherlands), p. 37.

³² European Committee of Social Rights, Conclusions 2011 (Netherlands), p. 37.