

Resolution CM/ResChS(2010)6
Collective complaint No. 47/2008
by Defence for Children International (DCI) against the Netherlands

*(Adopted by the Committee of Ministers on 7 July 2010
at the 1090th 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 14 January 2008 by Defence for Children International against the Netherlands;

Having regard to the report transmitted by the European Committee of Social Rights (ECSR), in which it found that legislation and practice in the Netherlands violated the right to shelter within the meaning of Articles 31§2 and 17§1.c of the Revised Charter with regard to children unlawfully present on its territory, for the following reasons:

“ (...) the Aliens Act 2000 unequivocally links entitlement to benefits other than education, necessary medical care and legal aid, to residence status. Thus, children unlawfully present in the Netherlands are not, as a general rule, guaranteed a right to shelter. Exceptions exist where children co-operate with the authorities with regard to their return to their country of origin and under other specific circumstances. However, the Committee notes that there is no legal requirement to provide shelter to children unlawfully present in the Netherlands for as long as they are in its jurisdiction. Moreover, according to section 43 of the Aliens Act 2000, after the expiry of the time limit fixed in the Act on the Central Reception Organisation for the Asylum-Seekers or another statutory provision that regulates benefits in kind, the aliens supervision officers are authorised to compel the vacation of property in order to terminate the accommodation or the stay in the residential premises provided as a benefit in kind.

Article 31§2 of the Revised Charter is directed at the prevention of homelessness with its adverse consequences on individuals' personal security and well being (Conclusions 2005, Norway, Article 31 and ERRC against Italy, Complaint 27/2004, decision on the merits of 7 December 2005, §18). Where the vulnerable category of persons concerned are children unlawfully present in the territory of a state as in the instant case, preventing homelessness requires states to provide shelter as long as the children are in its jurisdiction. Furthermore, the Committee is of the view that alternatives to detention should be sought in order to respect the best interests of the child.

(...) under Article 31§2 States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and must make alternative accommodation available (see Conclusions 2003, France, Italy, Slovenia and Sweden, Article 31§2, as well as ERRC against Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, §41, ERRC against Bulgaria, Complaint No. 31/2005, decision on the merits of 18 October 2006, §52, ATD against France, Complaint No. 33/2006, decision on the merits of 5 December 2007, §77 and FEANTSA against France, Complaint No. 39/2006, decision on the merits of 5 December 2007, §81). (...), since in the case of unlawfully present

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, 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.

persons no alternative accommodation may be required by states, 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.

As this is not the case, the Committee holds that the situation in the Netherlands constitutes a violation of Article 31§2. (...)

Article 17§1.c requires that states take the appropriate and necessary measures to provide the requisite protection and special aid to children temporarily or definitively deprived of their family's support. The Committee observes that as long as their unlawful presence in the Netherlands persists, the children at stake in the instant case are deprived of their family's support in that by law (see section 10 of the Aliens Act) they may not claim entitlement to the benefits or facilities which would, *inter alia*, secure them shelter.

In this respect, the Committee holds that the obligations related to the provision of shelter under Article 17§1.c are identical in substance with those related to the provision of shelter under Article 31§2. Insofar as the Committee has found a violation under Article 31§2 on the ground that shelter is not provided to children unlawfully present in the Netherlands for as long as they are in its jurisdiction, the Committee also finds a violation of Article 17§1.c of the Revised Charter on the same ground."

1. Takes note of the statement made by the respondent government and of the information it has communicated and welcomes the authorities' commitment to ensure the effective implementation of the rights of children unlawfully present in its jurisdiction (see appendix to this resolution);
2. Recognises 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;
3. Looks forward to the Netherlands reporting that, at the time of the submission of the next report concerning the relevant provisions of the European Social Charter, the situation is in full conformity with the European Social Charter.

Appendix to Resolution CM/ResChS(2010)6

Information provided by the Permanent Representative of the Netherlands on 24 February 2010 concerning Collective complaint No. 47/2008

By its letter of 27 October 2009, the European Committee of Social Rights ("the Committee") forwarded to the Government of the Netherlands ("the Government") its report of the same date to the Committee of Ministers, containing its decision of 20 October 2009 on the merits of Complaint No. 47/2008, lodged by Defence for Children International (DCI) and alleging several violations of the Revised Social Charter ("the Revised Charter") by the Netherlands.

In its decision, the Committee concludes, with respect to children unlawfully present in the Netherlands:

- that Article 31§1 of the Revised Charter – access to housing of an adequate standard – is not applicable in the instant case;
- that there is violation of Article 31§2 of the Revised Charter – prevention and reduction of homelessness;
- that there is violation of Article 17§1c of the Revised Charter – protection and special aid for children and young persons temporarily or definitively deprived of their family's support;
- that Article E – non-discrimination – is not applicable in the instant case.

With a view to the Committee of Ministers' examination of the matter on the basis of Article 9 of the 1995 Additional Protocol to the European Social Charter ("the Additional Protocol"), the Government offers the following considerations.

The Government considers that the Committee, in its report, does not reflect and discuss the arguments put forward by the Government concerning the scope of the Revised Charter. In the Government's view, the Committee develops its own reasoning, but does not explain why the Government's arguments were, in its view, invalid. This may, for future purposes, create uncertainty – not just among those states that have already ratified the Additional Protocol, but also among states considering to accede – as to the meaning of the – in itself clear – provision that the Revised Charter applies to foreigners "only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". As an unintended result of this uncertainty, states may be more hesitant to accept the right of collective complaint enshrined in the Additional Protocol, which, at present, is accepted by no more than fourteen member states.

This having been said, we undoubtedly recognise that minor foreign nationals are a vulnerable group deserving special attention and we share the aspiration behind the Committee's report, namely, to avoid any situation where minors are left without shelter. We also confirm that this aspiration is put into practice.

In December 2009, Dutch policy on (unaccompanied) minor foreign nationals was reviewed. The principles underlying this review were based on the obligations following from several human rights treaties, in particular the Convention on the Rights of the Child. The Government firmly believes that it is not in the interest of children to grow up in a situation of illegal residence, which brings with it a number of detrimental consequences to their development. In order to tackle the problems resulting from the illegal residence of minors, interactive policy consultations periodically take place between the implementing services of the Ministry of Justice, municipalities and interest groups. The goal of these consultations is to become aware of illegally resident minors sooner and to ensure effective interventions. Furthermore, we would like to point out that new policy rules are currently being considered relating to a right of residence for minors with serious behavioural problems who are illegally resident in the Netherlands.

As far as unaccompanied minors who are not eligible for an asylum residence permit are concerned, we would note that they will be eligible for guidance, reception, (medical) care and education during their residence in the Netherlands on the ground that they are under age. The Dutch authorities furthermore take the necessary measures to ensure that they can prepare in a careful manner for their return to their country of origin. In addition, a pilot is currently run in nineteen municipalities to encourage the repatriation of former unaccompanied minors and on preventing them from ending up in dubious circumstances as illegal foreign nationals. Under this so called "Prospect experiment" the municipalities receive a state subsidy to cover the costs involved and positive experiences acquired during the pilot will be structurally embedded in the repatriation-related supervision of unaccompanied minor foreign nationals.

With regard to families who stay in the Netherlands illegally, we are of the opinion that the responsibility for organising their departure from the Netherlands rests primarily with the parents. Nonetheless, we facilitate their departure when requested to do so and reception facilities for up to twelve weeks are provided to families preparing their return.

The foregoing clearly shows that the Government of the Netherlands is committed to safeguarding the rights of minors illegally resident in the Netherlands.

Additional information provided by the Permanent Representative of the Netherlands on 22 March 2010 concerning Collective complaint No. 47/2008

The following is intended to supplement the information put forward at the Committee of Ministers' meeting of 24 February 2010.

- The Dutch Government makes every effort to give families who are in the Netherlands illegally the opportunity to arrange their own departure while residing in an accommodation with restricted freedom of movement, so as to prevent them from ending up on the street. If they do not choose to leave of their own accord, the government will try to enforce their departure.

- If, once their asylum application has been assessed in the extended asylum procedure, there is no prospect of their being granted legal residence, families receive intensive guidance in preparing for their departure. Aliens have 28 days to leave of their own accord following the final rejection of their asylum application.
- Families with children may qualify for reintegration assistance if they return of their own accord.
- If the time limit for departure mentioned above is too short, there is the option of placing the alien in an accommodation with restricted freedom of movement for a further 12 weeks, where the preparations for departure continue.
- While the alien resides in this accommodation, the authorities look specifically at the question of whether the person is indeed unable to return through no fault of his own. Furthermore, exceptional circumstances are always taken into account. This can constitute reasons to grant a residence permit after all.
- Families sometimes opt to leave the accommodation of their own accord before the periods mentioned above have elapsed.
- If the parents themselves are obstructing departure, facilities can be withdrawn and the family is instructed to leave the Netherlands. It is not known how often such families fail to act on this and choose to stay in the Netherlands illegally.