



NETHERLANDS

SUBMISSION TO THE UNITED NATIONS COMMITTEE ON ECONOMIC SOCIAL AND CULTURAL RIGHTS

61ST SESSION 29 MAY – 23 JUNE 2017

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INTRODUCTION

From 29 May to 23 June 2017, the United Nations (UN) Committee on Economic, Social and Cultural Rights (the Committee) will review the sixth periodic report of the Kingdom of the Netherlands (the Netherlands) during its 61st session.

In this submission Amnesty International particularly highlights its concerns regarding the right to an adequate standard of living for undocumented migrants in the Netherlands.

THE RIGHT TO AN ADEQUATE STANDARD OF LIVING OF UNDOCUMENTED MIGRANTS (ARTICLE 11)

BACKGROUND

Undocumented migrants residing in the Netherlands are categorically excluded from benefits by several laws introduced over the recent years. The Foreign Nationals Employment Act of 1994¹, the Benefit Entitlement Act (also known as the Linkage Act) of 1998² and various additional laws³ inhibit undocumented migrants in their ability to be self-sufficient. The Foreign Nationals Employment Act imposes financial sanctions for employing undocumented migrants, making it more difficult for them to be financially independent. Additional laws, including the Benefit Entitlement Act, link access to benefits and provisions such as housing, education, welfare benefits or family allowance to a legal residency status. The Benefit Entitlement Act of 1998 provides three exceptions. For minors, access to education is not related to a legal residency status and therefore remains accessible. All who reside in the Netherlands without legal residency status have access to medically necessary healthcare and to legal aid. Access to basic needs such as food, water and clothing are not seen as an exception under this Act. Thus far, there is no national legal basis that unconditionally guarantees access to basic needs for undocumented migrants residing in the Netherlands.

The restrictive measures introduced in the late nineties created destitution and homelessness for many undocumented migrants residing in the Netherlands. Civil society organizations have therefore been offering varying forms of support. In an effort to resolve some of these problems, the government of the Netherlands issued a regulation in 2007 offering legal residency status to all those who had applied for asylum under the old Aliens Act 1965 and were still residing in the Netherlands, after having had their claims for protection rejected, or had not received a decision by 2007.⁴ In the administrative agreement determining the implementation of this regulation, municipalities agreed to end support services for undocumented migrants from 2010 onwards, provided that the national government would minimize the numbers of undocumented migrants ending up on the streets⁵. Although the regulation offered legal residency status to approximately 28,000⁶ people, it did not resolve the issue of restricted access to social benefits for undocumented migrants who were not included in the regulation, nor for rejected asylum seekers who applied for asylum under the new Aliens Act of 2000. Some municipalities, NGOs and civil society organizations therefore continued to be confronted with concerns faced by undocumented migrants at risk of homelessness and destitution.

In a joint communication, the UN Special Rapporteur on extreme poverty and human rights, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and the Special Rapporteur on the human rights of migrants urged the Netherlands to respect its core obligations and provide emergency assistance to homeless migrants in an irregular situation.⁷ After a visit to the Netherlands in 2014, the Council of Europe's Commissioner for Human Rights also raised concerns regarding the current human rights situation of undocumented migrants in the Netherlands, calling on the

¹ Foreign Nationals Employment Act (*Wet arbeid vreemdelingen*), 21 December 1994.

² Act of 26 March 1998 to amend the Aliens Act (2000) and other laws to link claims by foreign nationals submitted to administrative authorities for benefits and facilities, social security benefits, exemptions and permits to a foreign national's legal residence in the Netherlands.

³ Such as the Housing Allowance Act, the Social Assistance Act and Sickness Benefits Act.

⁴ Regulation to settle the legacy of the old Aliens Act, Amendment to the Aliens Circular 2000, WBV 2007/11.

⁵ Administrative agreement between the Secretary of Security and Justice and the Association of Dutch Municipalities regarding migration policy, 25 May 2007.

⁶ WODC (Research and Documentation Centre), *Pardon? Evaluation of the regulation to settle the legacy of the old immigration law*, Cahier 2011-10, The Hague, p. 168.

⁷ OHCHR, letter of 25 February 2016, OL NLD 1/2016.

Netherlands to ensure that “the basic needs, including shelter, clothes and food of irregular immigrants at immediate risk of destitution are met”.⁸ Additionally, the Secretary General of the Council of Europe stated that “people should be treated as human beings regardless of their legal status”,⁹ in line with General Policy Recommendation no. 16 of the European Commission against Racism and Intolerance.¹⁰

LEGAL DEVELOPMENTS

In the cases of *Defence for Children International (DCI) v. The Netherlands*¹¹ and the *Conference of European Churches (CEC) v. The Netherlands*¹², the European Committee of Social Rights (ECSR) ordered the Netherlands to uphold its responsibility under the European Social Charter (ESC) to guarantee an adequate standard of living for undocumented migrants. In the former case, decided in 2009, the ECSR found the Netherlands to be in violation of Article 31 (2) and Article 17 (1) of the ESC by denying children residing unlawfully in the Netherlands access to shelter, observing that children are particularly vulnerable and stated that they are therefore adversely affected by the denial of the right to shelter.

Amnesty International welcomed the September 2012 decision of the Dutch High Council¹³ following the ruling of the ECSR in *DCI v. The Netherlands* to provide reception services to minors and their families in an irregular situation. However, we remain concerned that unconditional access to shelter for adult undocumented migrants is not guaranteed in national legislation.

In 2014, in the case of the *CEC v. The Netherlands*, the ECSR found the Netherlands in violation of Article 13 (4) and Article 31 (2) of the European Social Charter. It stressed that “when human dignity is at stake, the restriction of the personal scope should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter”. In both cases the committee recognised that the right to shelter is crucial for the respect of every person’s human dignity.¹⁴

Amnesty International is concerned that the ruling of ECSR in the case of *CEC v. The Netherlands* has not been reflected in national law. On 26 November 2015, the Central Appeals Tribunal (CRvB)¹⁵ and the Council of State (ABRvS),¹⁶ the highest Dutch courts, found that neither Article 13 (4), nor Article 31 (2) of the ESC were binding and accordingly could not be applied by Dutch courts directly. The Council of State found that the government of the Netherlands was entitled to demand a person’s cooperation with the return procedure in return for being offered shelter while awaiting return.¹⁷

On 29 June 2016, the Council of State¹⁸ concluded (again) that the municipality of Amsterdam has no domestic nor international legal obligation to provide shelter to undocumented migrants, and that the existing night-shelter facility should be regarded as favourable policy outside the law. The decisions of the Council of State and the Central Appeals Tribunal conclude the exhaustion of domestic remedies.

Access to basic needs irrespective of immigration status to guarantee an adequate standard of living for undocumented migrants residing in the Netherlands is thus not secured in Dutch national legislation.

CURRENT SITUATION

In response to the decision on immediate measures by ECSR¹⁹ on the complaint of CEC, published on 25 October 2013, several municipalities have begun to introduce or expand reception facilities for undocumented migrants. After the final ruling of the ECSR and the subsequent resolution of the Committee of Ministers,²⁰ the government of the Netherlands proposed a basic needs scheme (*bed, bad, brood*

⁸ Commissioner for Human Rights of the Council of Europe, Report following his visit to the Netherlands from 20 to 22 May 2014, CommDH(2014)18, para. 131.

⁹ Press release ‘Irregularly present migrants: “firewalls” needed to prevent denying human rights through sharing personal data’, Strasbourg, 10 May 2016.

¹⁰ European Commission against Racism and Intolerance, *General Policy Recommendation no. 16*, CRI(2016)16.

¹¹ *Defence for Children International v. The Netherlands*, Complaint no/47/2008, 20 October 2009

¹² *Conference of European Churches v. The Netherlands*, Complaint no/90/2013, 1 July 2014.

¹³ High Council, No. ECLI:NL:HR:2012:BW5328, 21 September 2012

¹⁴ *DCI v. The Netherlands*, para 47 and *CEC v. The Netherlands*, para 74

¹⁵ CRvB 26 November 2015, ECLI:NL:CRVB:2015:3803

¹⁶ ABRvS, 26 November 2015, ECLI:NL:RVS:2015:3415

¹⁷ In this decision, the ABRvS (Administrative Jurisdiction Division) distances itself from the starting point of the ECSR’s decision that the right to basic facilities exists regardless of whether or not someone intends to cooperate with the return procedure.

¹⁸ ABRvS, 29 juni 2016, ECLI:NL:RVS:2016:1782

¹⁹ *Conference of European Churches v. The Netherlands*, Complaint no/90/2013, Decision on Immediate Measures, 25 October 2013.

²⁰ Resolution CM/ResChS(2015)5 Conference of European Churches (CEC) v. the Netherlands, Complaint no. 90/2013 (Adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers’ Deputies).

akkoord).²¹ This scheme introduced a plan to install reception facilities in five designated municipalities, conditional upon the willingness of the undocumented migrants concerned to comply with the return procedure. Under the scheme, undocumented migrants may temporarily be housed at these reception centres on the condition that they declare a sincere and demonstrable willingness to return. Municipal shelter facilities should in turn be closed.

The basic needs scheme was heavily criticized by local governments. After several rounds of negotiations, an agreement could not be reached between national and local government on the implementation of this basic needs scheme.²² In response to the termination of negotiations, the Minister for Immigration stopped financing municipal reception facilities and stated his intention to sanction municipalities that continue to offer facilities to undocumented migrants.²³ The stalemate between local and national government continues, with some municipalities opting to continue operating existing shelter facilities from their own budgets. However, the future for these facilities is unclear. In addition, the existing facilities vary greatly in the quality of services they provide and have insufficient capacity.

Amnesty International is particularly concerned about the government of the Netherlands' intention to sanction municipal reception facilities. In the case of *Hunde v. The Netherlands*, an Ethiopian asylum seeker claimed that the Netherlands was in violation of Articles 3 and 8 of the European Convention on Human Rights,²⁴ since he was forced to live in inhumane conditions in a parking garage referred to as the *Vluchtgarage*. Although the European Court of Human Rights deemed the case inadmissible, it stated that by setting up a special scheme providing basic needs for undocumented migrants the Dutch authorities have not remained inactive or indifferent. Dismantling these facilities would lead to more undocumented migrants being at risk of destitution and homelessness and could potentially lead to violations under the European Convention on Human Rights.

The government of the Netherlands has proffered several arguments to support its claim that it is guaranteeing an adequate standard of living for undocumented migrants. In the report of the State Party, the government of the Netherlands states that restrictive accommodation²⁵ is available to undocumented migrants who "are actively prepared to cooperate on their return".²⁶ The facility aims to enable the return of undocumented migrants and is accessible only if the applicant declares a sincere and demonstrable will to return. Without the prospect of return, an eviction may take place after twelve weeks. A clear and transparent regulation on what is needed to comply with this criterion does not exist. Additionally, linking the provision of shelter facilities to a person's willingness to comply with return, creates needless barriers for migrants to access necessary shelter. Both the Fundamental Rights Agency²⁷ and the European Commission Against Racism and Intolerance²⁸ have stated that "firewalls" should be installed between migration control and access to basic facilities and that the provision of services to undocumented migrants should be decoupled from interference by immigration enforcement policies and institutions.

The Netherlands has a regularization procedure for undocumented migrants who cannot return to their country of origin through no fault of their own (*buitenschuldvergunning*).²⁹ The standard of proof is high, and what is deemed sufficient to prove that one is unable to return through no fault of their own is unclear.³⁰ Therefore, few people apply for this permit (50 applications in 2016) and even fewer are granted it (10 permits in 2016).³¹ The low number of residence permits granted under this procedure does not provide a solution for undocumented migrants to access their basic needs.

In the State Party report, the Netherlands states that, regarding homelessness, municipalities - under the Social Support Act (*Wet maatschappelijke ondersteuning*) - "have both the responsibility and resources to

²¹ Ministry of Security and Justice, Letter to Parliament of 22 April 2015, Resolution adopted by the Committee of Ministers in CEC's ESC (European Social Charter) complaint.

²² Ministry of Security and Justice, Letter to Parliament of 29 November 2016, Further interpretation regarding the process on agreement Local Aliens Facilities, Kamerstuk 19637, nr. 2264.

²³ Ministry of Security and Justice, Letter to Parliament of 21 November 2016, Kamerstuk 19637, nr. 2259.

²⁴ European Court of Human Rights, *Hunde v. The Netherlands*, application no. 17931/16

²⁵ Freedom Restricted Location (VBL) in Ter Apel. People residing in the Freedom Restricted Location are obliged to remain within the boundaries of the municipality and have a daily reporting duty.

²⁶ Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: The Netherlands*, 20 May 2016, E/C.12/NLD/6, para 99.

²⁷ Fundamental Rights Agency (2013) 'Apprehension of migrants in an irregular situation – fundamental rights considerations'

²⁸ ECRI, *General Policy Recommendation no. 16: On safeguarding irregularly present migrants from discrimination*, 16 March 2016, CRI(2016)16).

²⁹ Aliens Decree 2000, Article 3.48 (2a).

³⁰ See reports by the Advisory Committee on Aliens Affairs, *Where there's a will but no way*, The Hague 2013 or The Dutch Refugee Council, *When return is not possible*, Amsterdam 2013.

³¹ Parliamentary questions (Kamervragen en antwoorden) 01-12-2016 nr 609

ensure that people do not end up on the street.”³² This Act does not, however, apply to migrants in an irregular situation.

The State Party has an obligation to ensure that all persons enjoy the minimum essential levels of each of the rights in the Covenant, including the rights to housing, health, water, and sanitation. The Committee on Economic, Social and Cultural Rights has made clear that, these rights extend to everyone, including non-nationals such as asylum seekers, refugees and stateless persons, regardless of legal status and documentation.³³ Making access to basic shelter for undocumented migrants conditional on their demonstrated willingness to return is inconsistent with this obligation.

RECOMMENDATIONS

Amnesty International recommends that the State Party:

- Ensures that undocumented migrants enjoy minimum essential levels of each of the rights in the Covenant, including the rights to adequate housing, health, water, and sanitation, free from discrimination;
- Puts in place a comprehensive strategy that plans for this, and ensure it is supported by adequate financial and other resources;
- Refrain from making access to these rights conditional on an individual’s willingness to return to their country of origin or last country of residence;
- Takes specific steps to protect and safeguard the needs of marginalized and vulnerable migrants, including children;
- Expand regularization procedures for migrants who cannot be returned.

³² Committee on Economic, Social and Cultural Rights, *Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: The Netherlands*, 20 May 2016, E/C.12/NLD/6, para 130.

³³ Committee on Economic, Social and Cultural Rights, General Comment no. 20, Non-discrimination in economic, social and cultural rights (art. 2, para 2, of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/20, para 30.

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