



Kingdom of the Netherlands

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Re Reply Note UA NLD 1/2014, joint urgent appeal

Our reference

GEV/PA 155/2015

Dear Sir,

The Permanent Representation of the Kingdom of the Netherlands to the United Nations office and other International Organisations in Geneva presents its compliments to the Office of the High Commissioner for Human Rights and presents herewith the reply of the Government of the Netherlands to the Joint urgent appeal UA NLD 1/2014.

Yours sincerely,

Roderick van Schreven,
Ambassador, Permanent Representative

Joint urgent appeal
UA NLD 1/2014

Reply of the Government of the
Netherlands

Introduction

1. On 12 December 2014, the Office of the High Commissioner for Human Rights ('the Office') forwarded to the Government of the Netherlands ('the Government') a note accompanying a joint urgent appeal (UA NLD 1/2014) from the 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 on the right to non-discrimination in this context, and the Special Rapporteur on the human rights of migrants ('the Special Rapporteurs').
2. In their urgent appeal, the Special Rapporteurs addressed the following questions to the Government:
 1. *Please provide any additional information and any comments you may have on the above-mentioned concerns.*
 2. *Could you please provide us with data on the number of migrants in an irregular situation that are in need of emergency assistance, including disaggregated data on the number of women, children, and people with physical or mental disabilities in need of emergency assistance?*
 3. *Could you please provide us with data on the number of migrants in an irregular situation that are actually provided with emergency assistance by the State, including disaggregated data on the number of women, children, people with disabilities and people with physical or mental disabilities that are provided emergency assistance by the State?*
 4. *Please provide information, including on policies, legislation, ordinances or regulations at the municipal level, which reflects the responsibilities of municipalities in relation to the realization of the right to adequate housing and to the right to non-discrimination in this context.*
 5. *Please provide any information on the health consequences of homelessness in the Netherlands, particularly during the winter months and what is anticipated in this regard with respect to irregular migrants.*
 6. *Could you provide us with information about the right to emergency assistance for minors in an irregular situation and their direct family members? What legislative, administrative, financial, or other measures has your Excellency's Government undertaken in order to*

guarantee the right of irregular migrant children to emergency assistance, following the ECSR's decision in 2009?

7. *Could you indicate the legal and/or non-legal remedies that are available for migrants in an irregular situation that are denied emergency assistance, as well as the necessary procedures to claim such remedies, including an indication of the length of applicable procedures, their costs and the availability of legal aid provided by the State?*
 8. *Could you indicate how many migrants in an irregular situation are expected to be evicted from centers for asylum seekers ('COA locations') between the date of this letter and the expected resolution by the Committee of Ministers in early 2015 and the costs involved with temporarily allowing these migrants to stay in these 'COA locations'?*
 9. *Your Excellency's Government has indicated to Parliament on 20 November 2014 that it intends to enter into a dialogue with municipalities about the issue of homeless migrants in an irregular situation. Does your Excellency's Government intend to discuss how the rights of migrants to non-discrimination regardless of legal status and documentation will be complied with? Please indicate whether your Excellency's Government also intends to consult civil society representatives and homeless migrants in an irregular situation in conjunction with this dialogue and how it intends to take into account their views.*
3. Having forwarded an interim reply to the Office on 4 February 2015, the Government is now ready to provide full answers to the Special Rapporteurs' questions below.

General comments (Question 1)

Facilities available to current and former asylum seekers

4. The Netherlands has a system for the reception and housing of current and former asylum seekers that ensures that no migrant in the Netherlands is forced to live on the street. In addition to providing a basic yet acceptable level of services, the goal of this system is to ensure that asylum seekers can participate in the asylum procedure or, if their asylum application is denied, the return process.
5. Under the current system, asylum seekers receive benefits, housing and facilities during the asylum procedure, collectively known as reception (*opvang*). Those that are granted a residence permit are subsequently placed in public housing. When an asylum application is denied, the person concerned is in principle granted a 28-day period to leave the Netherlands, with government support. During this period the person remains entitled to reception. Asylum seekers who submit a second or subsequent asylum application have a renewed right to

reception if their application is not rejected at the outset in the procedure carried out by the application centre.

6. After the statutory departure period has elapsed, aliens no longer have a right to reception. In practice, however, reception may be extended in exceptional circumstances. The Dutch government agency responsible for the reception of asylum seekers (the Central Agency for the Reception of Asylum Seekers; COA) does not have policy rules or a prescribed course of action for applying this criterion, since the nature of such a decision to provide reception does not lend itself to this kind of approach. After all, this option is regarded as a 'safety net' for unforeseen and often serious medical situations. If an alien's medical condition prevents him or her from travelling, he or she is granted – by law or on request – special status guaranteeing the continued availability of reception facilities and medical care.
7. Once the statutory departure period has elapsed, aliens can stay in restrictive accommodation (VBL) facilities, where they receive assistance in arranging their departure. These facilities also provide food, medical care and other services. However, one of the conditions for staying in a VBL facility is that the person concerned must make a genuine effort to arrange his or her departure. In this context, people staying in such facilities are subject to a measure restricting their freedom of movement to the municipality in which the facility is located. Within the framework of aliens supervision and return policy, the Government thus provides aliens with temporary accommodation in a manner consistent with their legal status. In this regard, the services provided by the Repatriation and Departure Service (DT&V) are tailored to each individual's situation. The option of staying in a VBL facility is also available to aliens who have not sought asylum, provided they are willing to cooperate in returning to their country of origin.
8. On 22 April 2015, the Dutch Government decided to introduce an additional 'pre-VBL' phase. Under this arrangement, aliens who have no right of residence and who have not (or have not yet) indicated that they are willing to arrange their departure will in all cases be given accommodation for a limited period during which the authorities will try to convince them to leave. If it becomes apparent within a few weeks that an individual is willing to return, he or she will be transferred to a regular VBL facility to make the necessary arrangements.
9. In addition to the above-mentioned policy framework, there are further options for failed asylum seekers and illegal aliens who may be vulnerable due to their personal circumstances. Unaccompanied minors whose applications have been denied are entitled to remain in reception centres until they reach the age of majority. Unaccompanied minor illegal aliens are placed either in reception facilities operated by the COA or with foster families. Failed minor asylum seekers and illegal alien minors who are accompanied by their families are placed in family accommodation in so far as this is necessary to prevent their situation from becoming a humanitarian emergency. Such families are provided with housing until they return to their country of origin or until every child in the family has reached the age of majority.

10. The COA also has a special cold-weather rule (*vorstcoulanceregeling*). When the outside temperature falls below freezing, aliens who are not eligible for transfer to a detention or VBL facility and are unable to find alternative housing are permitted to remain – temporarily – in the reception centre.
11. If an alien's medical condition temporarily prevents his or her departure, he or she can apply for a deferral, which – if granted – automatically confers a right to reception, including funding for medical care. In addition, under certain conditions, failed asylum seekers with medical problems may qualify for reception while they await a decision on an application for a residence permit on the grounds of medical treatment or a decision on an application to defer departure on medical grounds. Failed asylum seekers also have a right to reception if they have been granted interim relief pending the outcome of the objection or review stage of the procedure and are allowed to await the decision in the Netherlands.
12. Under the 'no-fault policy' (*buitenschuldbeleid*), aliens who are unable to return to their country of origin through no fault of their own are granted a residence permit. This permit is intended for people who have tried to leave the Netherlands but have for some reason not succeeded in doing so. In practical terms, this means that the alien must be able to demonstrate by means of objectively verifiable documents that the relevant authorities in his or her country of origin will not permit him or her to return.
13. Whenever there is the slightest indication of human trafficking, the police inform the alien concerned of his or her right to three months' time to reflect on whether to lodge a criminal complaint. During this period, victims can be placed in a dedicated reception centre for victims of human trafficking (COSM) and their departure is deferred. They also receive financial support under the Regulations on Provisions for Certain Categories of Aliens (*Regeling verstrekkingen bepaalde categorieën vreemdelingen*; RVB) and medical care. The COA places unaccompanied minor aliens who may be victims of human trafficking in secure reception centres where they receive appropriate care and support.
14. In cases where aliens are no longer entitled to reception facilities, psychological and psychiatric problems are also taken into consideration, especially if they might present a danger to the person concerned or to those in his or her immediate vicinity. In addition to the aforementioned possibility of temporarily extending reception facilities in special cases, the Minister of Security and Justice is examining whether the Veldzicht Forensic Psychiatric Centre could in the future provide a solution in such cases. Until such time, the authorities are working closely with the Medical Support Project for Undocumented Aliens (*Medisch Opvangproject Ongedocumenteerden*; MOO), which is subsidised by the Government and several local authorities. The MOO has expertise in the area of supporting illegal aliens with serious medical problems and ensuring that they receive appropriate care.

Obligations of the State under international law

General principles

15. Given the existing reception options, the Government believes that in cases where failed asylum seekers choose not to make use of them the authorities are under no obligation to facilitate their residence by continuing to provide accommodation and other services unconditionally.
16. The Government would like to point out that States have the right under international law to control the entry, residence and expulsion of aliens. Aliens policy is an issue dealt with primarily at national level. It would run counter to this principle if States were obliged to recognise the economic, social and cultural rights of those who reside in their territories unlawfully, thereby facilitating the prolongation of an illegal situation. This is precisely why the Benefit Entitlement (Residence Status) Act (*Koppelingswet*) links a person's residence status to his or her entitlement to welfare provisions.

European Convention on Human Rights

17. In its judgment in the case of *N. v. United Kingdom*,¹ the European Court of Human Rights considered that 'although many of the rights it 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 European Convention on Human Rights 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 [...]'. The Court states explicitly that a State is not obliged to offer free unlimited health care to all aliens residing illegally within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States, according to the Court.
18. The Court's judgment in *Ponomaryovi v. Bulgaria*² maintains the same line. In this case, the Court considers that 'a State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programs, 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.'

¹ ECtHR judgment of 27 May 2008, appl. no. 26565/05, containing further references to *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32, and *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161).

² ECtHR judgment of 21 June 2011, appl. no. 5335/05.

19. And, in *Chapman v. the United Kingdom*,³ the Court recalled that article 8 of the European Convention on Human Rights (ECHR) 'does not in terms recognise a right to be provided with a home'. An obligation to provide a specific individual with accommodation might arise in exceptional cases, but the threshold would be high. Such situations almost never arise in practice precisely because of the availability of restrictive accommodation facilities. Moreover, the Convention does not prohibit States from attaching conditions to the provision of reception facilities. The wide margin of appreciation granted to Member States and the legal and social context in which (potential) violations of article 8 of the Convention must be assessed play an important role in this regard.

European Social Charter

20. The joint urgent appeal of 12 December 2014 refers to two reports issued by the European Committee of Social Rights (ECSR) on 9 July 2014 in response to two complaints lodged against the Netherlands under the collective complaints procedure of the European Social Charter (ESC) by the European Federation of National Organisations working with the Homeless (FEANTSA) and the Conference of European Churches (CEC), respectively. On 15 April 2015, the Committee of Ministers of the Council of Europe adopted two resolutions in response to the ECSR's reports, bringing the procedures to a close. In these resolutions, the Committee of Ministers explicitly refers to the limitation of the personal scope of the European Social Charter.⁴ It thus endorses the position adopted by the Netherlands during the procedures that aliens who are not lawfully resident within the territory of a State Party do not fall within the scope of the Charter.

21. It is also worth noting that the resolutions adopted by the Committee of Ministers do not include a call to comply with the ECSR's reports but only a neutral request to report on 'any possible developments' regarding this issue. This underlines the fact that neither the reports by the ECSR nor the resolutions of the Committee of Ministers give rise to an obligation to provide illegal aliens with accommodation and other services unconditionally.

International Covenant on Economic, Social and Cultural Rights

22. The Government recognises that article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes the right to an adequate standard of living, including adequate food, clothing and housing, and that this right also applies to illegal aliens. However, it believes that the ICESCR does not prevent States from requiring aliens to cooperate in arranging their return.

³ ECtHR judgment of 18 January 2010, appl. no. 27238/95, paras. 99-101.

⁴ Operative paragraph 3 of the resolutions.

23. In the Government's opinion, obligations under the ICESCR should be fulfilled in the same way as described above with regard to article 8 of the European Convention on Human Rights. The Government is therefore of the view that international human rights obligations, notably including those ensuing from the ICESCR, do not impose a requirement on the State to offer every alien in an irregular situation access to the social and economic services it provides. A 'fair balance' must be struck between the interests of the alien and the interests of the State in ensuring that shelter and social services remain affordable and accessible as well as ensuring an effective migration policy.

Data on emergency assistance (Questions 2, 3, 6 and 8)

24. Answering a question on the number of migrants in an irregular situation that are in need of emergency assistance is inherently problematic, as it would be for any State. As confirmed above, aliens actively cooperating in their departure from the Netherlands are entitled to accommodation in reception facilities. However, this does not mean that all other illegal aliens are in need of emergency assistance. It must be assumed that many aliens fulfil their obligation to leave the Netherlands on their own initiative following the denial of their asylum applications. Others will avoid contact with the authorities. By definition, the Government has no information on the number – or the personal situation – of illegal aliens other than those preparing for their departure in cooperation with the authorities.
25. The same applies to the question of how many migrants in an irregular situation are expected to be evicted from COA locations, and the costs involved in temporarily allowing these migrants to remain at these locations. The issue of whether a failed asylum seeker can be required to leave a COA location in the absence of an ensuing arrangement to return to his or her country of origin depends on the attitude of the individual concerned. As explained above, under the Dutch system there is no need for illegal aliens to live on the street without support services, provided they act in accordance with their statutory obligation to leave the Netherlands. Given the crucial importance of the attitude adopted by each individual, it is impossible to provide the requested data where future situations are concerned.
26. With regard to migrants in an irregular situation who are provided with emergency assistance, the Government would observe the following. In addition to the above-mentioned policy framework, there are further options available to failed asylum seekers who remain in the Netherlands illegally and who could be vulnerable due to their individual circumstances. While their applications are being processed, such individuals are housed in asylum seekers' reception centres. In practice, a person whose asylum application has been denied may be permitted to remain in a reception centre in very exceptional circumstances. The COA does not have policy rules or a prescribed course of action for applying this criterion, since the nature of such a decision to provide reception in special individual cases does not lend itself to this kind

of approach. This option is regarded as a 'safety net' for unforeseen situations, often of a serious medical nature.

27. If an alien's medical condition temporarily prevents his or her departure, he or she can apply for a deferral, which – if granted – automatically confers a right to reception, including the funding of medical care.
28. In addition, unaccompanied minor asylum seekers (including those whose applications have been denied) are entitled to remain in reception centres until they reach adulthood. Homeless unaccompanied minor aliens are placed either in reception centres operated by the COA or with foster families. Failed minor asylum seekers and illegal alien minors who are accompanied by their families are placed in family accommodation in so far as this is necessary to prevent their situation from becoming a humanitarian emergency. Such families are provided with accommodation until they return to their country of origin or until every child in the family has reached the age of majority. On 1 May 2015, 1,906 people were living in family accommodation.

Role of municipalities (Questions 4 and 9)

29. There are no municipal schemes for aliens who are residing illegally in the Netherlands. Where necessary, however, municipalities are authorised to offer individuals in their jurisdiction who require emergency assistance a bed for the night. Such assistance is provided for a single night and is followed by the offer of a reasonable alternative to the person concerned. For aliens with no right of residence, such an alternative will fall within the system of reception facilities described above. The municipality's powers in this regard are based on the mayor's general authority to maintain public order.
30. As noted above, the Government has decided to establish a new reception facility for aliens without a right of residence in the Netherlands (the pre-VBL phase). Under this arrangement, those who have not (or have not yet) indicated that they are willing to arrange their departure will in all cases be granted accommodation for a limited period during which the authorities will try to convince them to leave the country. The Government will consult with the municipalities on how these facilities are to be established and operated.
31. Incidentally, in two judgments given on 17 December 2014, the interim relief judge of the Central Appeals Court for Public Service and Social Security Matters imposed a temporary order concerning failed asylum seekers residing in Amsterdam who are obliged to leave the Netherlands. Under these judgments, as of 17 December 2014 the municipality of Amsterdam must provide such persons with a bed for the night, a shower, breakfast and an evening meal. This order, obliging the municipality to provide basic reception facilities, is temporary and applies until two months after the adoption of the aforementioned resolutions of the Council of

Europe's Committee of Ministers in response to the collective complaints procedures lodged against the Netherlands under the European Social Charter. The Government has promised the municipalities financial support to enable them to implement these judgments.

Health consequences of homelessness (Question 5)

32. In the Netherlands, emergency medical care is available to all aliens, even those without a right of residence. Such care is exempted from the scope of the Benefit Entitlement (Residence Status) Act, which links a person's residence status to his entitlement to welfare provisions. The Government has established a special fund, subsidised from the central government budget, to cover the cost of providing emergency medical care to illegal aliens. In 2014, the fund paid out the sum of 31 million euros.
33. In addition, the COA applies the aforementioned cold-weather rule when the outside temperature falls below freezing. Almost all municipalities, which are responsible for providing support services under the Social Support Act (WMO), have a cold-weather scheme for the homeless. When this scheme is in operation, night shelters are opened up to all homeless people, regardless of their residence status.

Remedies (Question 7)

34. In cases in which the State does not automatically provide accommodation, an alien can apply in writing for accommodation to the Ministry of Security and Justice. If the alien concerned believes that the options offered by the Government are inadequate, he or she can object to the relevant decision and, ultimately, turn to the courts. All aliens, including those residing in the Netherlands illegally, are entitled to legal aid if they lack financial resources. In addition to emergency medical care, legal aid is exempted from the scope of the Benefit Entitlement (Residence Status) Act. At present, various cases are pending before the Netherlands' highest administrative court.