EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 17931/16
Gadaa Ibrahim HUNDE
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 5 July 2016 as a Chamber composed of:

Luis López Guerra, *President,*
Helena Jäderblom,
Johannes Silvis,
Branko Lubarda,
Pere Pastor Vilanova,
Alena Poláčková,
Georgios A. Serghides, *judges,*

and Stephen Phillips, *Section Registrar,*

Having regard to the above application lodged on 23 March 2016,

Having regard to the decision to grant priority to the above application under Rule 41 of the Rules of Court,

Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Mr Gadaa Ibrahim Hunde, is an Ethiopian national who was born in 1992 and lives in Amsterdam. He was represented before the Court by Mr P. Fischer, a lawyer practising in Haarlem. The facts of the case, as submitted by the applicant and as apparent from public documents, may be summarised as follows.

### A. Background to the case

2. In December 2012 a group of approximately 200 irregular migrants in the Netherlands who – as rejected asylum-seekers – were no longer entitled

to State-sponsored care and accommodation for asylum-seekers, squatted the St. Joseph Church in Amsterdam. These irregular migrants formed an action group called "*We Are Here / Wij Zijn Hier*" seeking attention for and relief from their situation. During their stay there, the St. Joseph Church was colloquially referred to as the Refuge Church (*Vluchtkerk*). It appears that the group was evicted from the Refuge Church on 31 March 2013.

3. On 4 April 2013 the municipality of Amsterdam offered temporary shelter to the original members of the group "We Are Here" who had been staying in the Refuge Church since December 2012. Accordingly, 159 persons were housed temporarily in a former detention facility on the Havenstraat in Amsterdam – which came to be known as the Refuge Haven (*Vluchthaven*) – until 31 May 2014. The remaining persons from the Refuge Church who had been evicted from there and not been offered shelter in the Refuge Haven, squatted an indoor car park, which came to be known as the Refuge Garage (*Vluchtgarage*).

4. A number of residents of the Refuge Garage initiated administrative proceedings against the municipality of Amsterdam demanding that they be provided with shelter, food and clothing. In one of those proceedings, lodged by three residents of the Refuge Garage, not including the applicant, a provisional measure (*voorlopige voorziening*) was granted on 17 December 2014 pending further appeal proceedings before the Central Appeals Tribunal (*Centrale Raad van Beroep*). At the request of the three petitioners, the provisional-measures judge (*voorzieningenrechter*) of the Central Appeals Tribunal ordered the municipality of Amsterdam to provide overnight shelter, a shower, breakfast and dinner to the petitioners. In that decision, account was taken of the fact that the Netherlands Institute for Human Rights (*College voor de Rechten van de Mens*) had found degrading living conditions in the Refuge Garage. In addition, regard was had to two decisions of the European Committee of Social Rights (hereinafter the "ECSR") of 1 July 2014, in which the Netherlands was found to have breached Articles 13 § 4 and 31 of the European Social Charter (hereinafter the "Charter") by failing to provide adult irregular migrants with adequate access to emergency assistance, that is food, clothing and shelter (see paragraph 37 below).

5. In response to this provisional measure, the Association of Netherlands Municipalities (*Vereniging van Nederlandse Gemeenten*) – in agreement with the Deputy Minister of Security and Justice (*Staatssecretaris van Veiligheid en Justitie*) – set up a scheme to offer basic provisions to irregular migrants, the so-called Bed, Bath and Bread Scheme (*bed-bad-broodregeling*). That scheme entailed that the central municipalities[1] would provide basic accommodation to irregular migrants

1. In the Dutch administrative system, a central municipality performs a specific function for surrounding communities in the setting of an intercommunal cooperation scheme under the Joint Regulations Act (*Wet Gemeenschappelijke Regelingen*).

including night shelter with shower facilities, breakfast and dinner, starting from 17 December 2014. It was announced from the outset that this scheme would be temporary, awaiting the adoption of a resolution by the Committee of Ministers of the Council of Europe concerning the ECSR's two decisions, pursuant to Article 9 of the Additional Protocol to the European Charter Providing for a System of Collective Complaints. Although these resolutions were adopted by the Committee of Ministers on 15 April 2015 (see paragraph 38 below), the scheme has been prolonged and is currently still in place.

## B. Particular circumstances of the case

6. The applicant fled from Ethiopia to the Netherlands in September 2011. His application for asylum was rejected as unfounded. Apart from the fact that, for reasons found imputable to him, the applicant did not hold any identity or travel documents, he was found to have given inconsistent, contradictory, vague and summary statements to the immigration authorities. In July 2013 he was released from immigration detention (*vreemdelingendetentie*) because, according to the applicant who has not provided any further details, an effective removal to his country of origin proved not possible. As a rejected asylum-seeker who had failed to leave the country within the voluntary return grace period of four weeks, the applicant was no longer entitled to State-sponsored accommodation and care in one of the reception centres for asylum-seekers.

7. In December 2013 the applicant, having joined the group "We Are Here", took shelter in the Refuge Garage in Amsterdam together with approximately 100 other irregular migrants. It appears that he lived in the Refuge Garage until March 2015. Meanwhile, the applicant instituted the proceedings set out in paragraphs 9-19 and 20-24 below.

8. On 11 February 2015 the applicant filed a fresh asylum application, which was accepted on 30 March 2015. He was provided with a temporary residence permit for asylum purposes valid from 30 March 2015 until 30 March 2020, based on section 29 § 1(a) of the Aliens Act 2000 (*Vreemdelingenwet 2000*).

### *1. Proceedings lodged against the municipality*

9. On 30 December 2013 the applicant requested the municipality of Amsterdam to grant him State-sponsored care and reception facilities similar to the facilities offered to asylum-seekers by the Central Agency for the Reception of Asylum-Seekers (*Centraal Orgaan Opvang Asielzoekers;* hereinafter "COA"), submitting, *inter alia*, that he found himself in an emergency situation considering the appalling living conditions in the Refuge Garage. He further submitted that he had applied for shelter in the Refuge Haven but that, unlike other irregular migrants from the Refuge

Church in a similar situation, he had not been admitted to the Refuge Haven.

10. The applicant submitted that the living conditions in the Refuge Garage were poor. Housing more than 150 persons, it was overcrowded. A limited, insufficient number of toilets was available and there were no washing facilities. Electricity was not always available. The irregular migrants staying in the garage were dependent on volunteers for food and the atmosphere between them was tense, regularly resulting in confrontations which were sometimes violent. The applicant himself had once been threatened and assaulted by a co-resident in the garage. He had sustained a light stab wound. He had reported that incident to the police.

11. On 31 March 2014 the Mayor and Aldermen (*college van Burgemeester en Wethouders*) of the municipality of Amsterdam, treating the applicant's request as an application for access to community shelter services (*maatschappelijke opvang*) under the Social Support Act (*Wet Maatschappelijke Ondersteuning*), rejected it as the applicant was neither a Dutch national nor did he hold a residence permit as required by the aforementioned act. An exception to that rule could apply when the right to respect for physical or psychological integrity flowing from Article 8 of the Convention was at stake, in particular if the person concerned was a minor or vulnerable because of a medical emergency. However, as the applicant had not provided any medical information – even though he claimed that he required medical care – he was considered as not falling within the category of vulnerable persons.

12. With regard to the fact that the applicant had been denied access to the Refuge Haven, the Mayor and Aldermen held that accommodation at that location had been offered to the original members of the group "We Are Here" who had stayed in the Refuge Church for an uninterrupted period of time and who were willing to cooperate with the municipality and other institutions in the organisation of their return to the country of origin. The applicant did not fulfil those requirements.

13. The Mayor and Aldermen further made reference to the possibility of the applicant requesting the Repatriation and Departure Service (*Dienst Terugkeer en Vertrek*) of the Ministry of Security and Justice (*Ministerie van Veiligheid en Justitie*) to impose a measure on him within the meaning of section 56 of the Aliens Act 2000 in order to gain access to reception facilities at a centre where his liberty would be restricted (*vrijheidsbeperkende locatie*). In such centres the focus is on departure from the Netherlands of the person concerned, meaning that reception facilities are provided on condition that the person concerned cooperates in the organisation of his or her departure to the country of origin.

14. The applicant lodged an objection (*bezwaar*) against the decision of 31 March 2014 which was dismissed by the Mayor and Aldermen on 11 July 2014, in accordance with an advice drawn up by the objections

committee (*Bezwarencommissie*) on 9 July 2014 and on the same grounds as those on which the initial decision had been based. The applicant lodged an appeal (*beroep*) with the Amsterdam Regional Court (*rechtbank*).

15. On 8 May 2015 the Amsterdam Regional Court accepted the applicant's appeal and quashed the Mayor and Aldermen's decision of 11 July 2014. Proceeding to decide on the matter itself, the Regional Court considered that the ECSR's decisions of 1 July 2014, in which the ECSR had found violations of Articles 13 and 31 of the Charter, could not be overlooked notwithstanding the fact that they were not binding for the State Parties to the Charter. Accordingly, the Regional Court considered that the denial of shelter, food and clothing to irregular migrants touched upon the right to respect for human dignity in such a way as to preclude a person's enjoyment of private life within the meaning of Article 8 of the Convention. It concluded that the State was under a positive obligation to provide the applicant with shelter, food and clothing and that that provision should not be made conditional on the applicant's cooperation in the organisation of his departure from the Netherlands. It was noted, however, that the municipality of Amsterdam, simultaneously with other municipalities in major cities of the Netherlands, had established the Bed, Bath and Bread Scheme (see paragraph 5 above), providing, as of 17 December 2014, basic accommodation to irregular migrants including night shelter with shower facilities, breakfast and dinner. As far as the applicant had argued that the Bed, Bath and Bread Scheme was insufficient, he had failed to substantiate that argument with any *prima facie* evidence.

16. Moreover, the applicant had obtained a residence permit on 30 March 2015 as a consequence of which he was already entitled to State-sponsored social benefits. The applicant's argument that his right to emergency social assistance should nevertheless be acknowledged retroactively and that he should be granted living allowances (*leefgeld*) by way of compensation was dismissed. The Regional Court held that although such a right to emergency social benefits should be acknowledged retroactively, that is from 29 November 2013, there was no legal basis on which to conclude that this right included a right to living allowances. It was open to the applicant to claim compensation for damage in separate proceedings.

17. Both the applicant and the Mayor and Aldermen lodged a further appeal (*hoger beroep*) with the Central Appeals Tribunal.

18. On 26 November 2015 the Central Appeals Tribunal dismissed the applicant's appeal but accepted the Mayor and Aldermen's appeal and quashed the Regional Court's judgment. The Central Appeals Tribunal found that the Mayor and Aldermen's rejection of the applicant's request for shelter under the Social Support Act was justified as the applicant had the possibility of receiving shelter at a centre where his liberty would be restricted. Unlike the Regional Court, it agreed with the Mayor and

Aldermen that irregular migrants may be denied access to such a centre if they refuse to cooperate in the organisation of their return to their country of origin, unless there existed exceptional circumstances. Such exceptional circumstances could exist when the person concerned had demonstrated that he or she was unable to foresee the consequences of his or her actions or omissions due to his or her psychiatric state of mind. It was, however, incumbent upon the irregular migrant to claim that such exceptional circumstances pertained.

19. No further appeal lay against this decision.

*2. Proceedings lodged against the Deputy Minister of Security and Justice*

20. In the meantime, on 24 March 2014, the applicant had also requested the Deputy Minister of Security and Justice to grant him, either in cooperation with the municipality of Amsterdam or independently, State-sponsored care and accommodation, in particular to offer him shelter as well as (allowances for) food and clothing.

21. On 25 March 2014 the Deputy Minister rejected the applicant's request, considering that he could apply for admission in a centre run by the Repatriation and Departure Service where his liberty would be restricted and where he would have to cooperate in the organisation of his departure from the Netherlands. The applicant was reminded of the fact that he was already under a statutory obligation to leave the Netherlands pursuant to section 61 § 1 of the Aliens Act 2000 as his asylum request had been rejected.

22. The applicant filed an objection against this decision, which was dismissed by the Deputy Minister on 16 June 2014.

23. An appeal lodged by the applicant was declared inadmissible by the Regional Court of The Hague on 8 September 2015, which considered that the applicant no longer had any interest in challenging the impugned decision in view of the provisional measure issued by the Central Appeals Tribunal on 17 December 2014, pursuant to which the municipality of Amsterdam had been ordered to provide night shelter, breakfast and dinner to irregular migrants (see paragraph 5 above).

24. Although possible, the applicant did not lodge a further appeal with the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) against the decision of the Regional Court.

## C. Relevant domestic law

25. The admission, residence and expulsion of aliens are regulated by the Aliens Act 2000. Section 5 § 1 of the said act reads as follows:

"An alien who has been refused entry into the Netherlands shall leave the Netherlands immediately, duly observing such directions as may have been given to him for this purpose by a border control officer."

26. Section 10 of the Aliens Act 2000 provides as follows:

"1. An alien who is not lawfully resident may not claim entitlement to benefits in kind, facilities and social security benefits issued by decision of an administrative authority. The previous sentence shall apply *mutatis mutandis* to exemptions or licenses designated in an Act of Parliament or Order in Council.

2. The first subsection may be derogated from if the entitlement relates to education, the provision of care that is medically necessary, the prevention of situations that would jeopardise public health or the provision of legal assistance to the alien.

3. The granting of entitlement does not confer a right to lawful residence."

27. Section 45 of the said Act provides the following on the legal consequences of a rejection of an application for a residence permit in the Netherlands:

"1. The consequences of a decision whereby an application for the issue of a residence permit for a fixed period [...] or a residence permit for an indefinite period [...] is rejected shall, by operation of law, be that:

(a) the alien is no longer lawfully resident [...];

(b) the alien should leave the Netherlands of his own volition within the time limit prescribed in section 62, failing which the alien may be expelled;

(c) the benefits in kind provided for by or pursuant to the Act on the Central Agency for the Reception of Asylum-Seekers or another statutory provision that regulates benefits in kind of this nature will terminate in the manner provided for by or pursuant to that Act or statutory provision and within the time limit prescribed for this purpose;

(d) the aliens' supervision officers are authorised, after the expiry of the time limit within which the alien must leave the Netherlands of his own volition, to enter every place, including a dwelling, without the consent of the occupant, in order to expel the alien;

(e) the aliens' supervision officers are authorised, after the expiry of the time limit referred to in (c), 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 as referred to in (c).

2. Subsection 1 shall apply *mutatis mutandis* if:

...

(b) A residence permit has been cancelled or not renewed.

3. The consequences referred to in subsection 1 shall not take effect as long as the application for review lodged by the alien suspends the operation of the decision.

4. [The] Minister may order that, notwithstanding subsection 1, opening words and (c), the benefits in kind provided for by or pursuant to the Act on the Central Reception Organisation for Asylum-Seekers or another statutory provision that

regulates benefits in kind of this nature will not terminate for certain categories of alien. The order shall be repealed no later than one year after its notification.

5. An alien to whom an order as referred in subsection 4 is applicable shall be deemed to be lawfully resident as referred to in section 8 (j)."

28. Under the Act on the Central Agency for the Reception of Asylum-Seekers (*Wet Centraal Orgaan Opvang Asielzoekers*) and related regulations, including the Regulation on Provisions for Asylum-Seekers and Other Categories of Aliens (*Regeling verstrekkingen asielzoekers en andere categorieën vreemdelingen*), the Central Agency – an autonomous administrative authority – is responsible for the provision of reception facilities which comprise housing, basic subsistence means and health care to asylum-seekers.

29. If no residence permit is granted to an asylum-seeker, he or she will remain entitled to benefit from the reception facilities for asylum-seekers for a grace period of four weeks after the date of the final decision taken on his/her request. The rejected asylum-seeker is given this grace period to leave the Netherlands voluntarily – if need be assisted by the International Organisation for Migration – as he/she is no longer lawfully staying in the Netherlands and under a legal obligation to leave. After the expiry of this period, access to reception facilities is automatically terminated without a specific decision. Nevertheless, an alien in such a situation may apply to the Central Agency for continued reception facilities. If highly exceptional circumstances so require, the Central Agency can take a decision to that effect. A negative decision can be appealed to the Regional Court and, subsequently, to the Administrative Jurisdiction Division. Both before the Regional Court and the Administrative Jurisdiction Division it is possible to apply for a provisional measure pending the outcome of the appeal proceedings.

30. Rejected asylum-seekers and other migrants in an irregular situation are entitled to health care in cases of medical emergency (as well as legal aid and education for minors). Rejected applicants for a residence permit with physical and/or psychological problems severe enough to make them unfit for travel may furthermore apply for the deferral of their departure from the Netherlands under section 64 of the Aliens Act 2000. The expulsion is then suspended for the duration of the severe medical condition and the migrant concerned is granted a right to accommodation.

31. A migrant, who is under the legal obligation to leave the Netherlands because his or her lawful residence or entitlement to State-sponsored care and accommodation has come to an end, can be offered accommodation in a centre where his or her liberty is restricted. Such accommodation is based on a so-called liberty-restricting measure (*vrijheidsbeperkende maatregel*) within the meaning of section 56 of the Aliens Act, which measure entails that the person concerned can move in and out of the centre freely but is prohibited from crossing the municipal boundaries where the centre is

located. That accommodation is offered for twelve weeks and its main focus is the migrant's departure from the Netherlands to the country of origin with the Repatriation and Departure Service's assistance: there has to be a realistic prospect of an effective return within twelve weeks and the migrant must be willing to cooperate by taking steps to effectuate his or her departure from the Netherlands.

32. A temporary residence permit may be issued to migrants who, through no fault of their own, cannot leave the Netherlands (*buitenschuldvergunning*) pursuant to section 3.48 § 2a of the Aliens Decree 2000 (*Vreemdelingenbesluit 2000*). Section B8/4.1 of the Aliens Act Implementation Guidelines 2000 (*Vreemdelingencirculaire 2000*) lays down the conditions with which an alien must comply in order to be eligible for such a residence permit. At the relevant time the conditions were that:

> "[T]he alien has:
>
> - done everything within his power to organise his departure independently;
>
> - no doubt exists about his nationality and identity; and
>
> - he cannot be blamed for his inability to leave the Netherlands.
>
> the alien has:
>
> - turned to the International Organisation for Migration in order to facilitate his departure; and
>
> - this organisation has indicated that it is not capable of organising the aliens' departure due to the fact that the alien submits that he is unable to have travel documents at his disposal[;]
>
> the alien has:
>
> - requested the Repatriation and Departure Service to mediate in obtaining the required documents of the authorities of the country to which departure is possible; and
>
> - the mediation has not led to the desired result; and
>
> the alien:
>
> - is residing in the Netherlands without a valid residence permit;
>
> - does not comply with other conditions for being granted a residence permit; and
>
> - has not also filed an application for a residence permit for the purpose of residence on other grounds."

33. From 1 January 2014 onwards, section 8 of the Social Support Act (*Wet Maatschappelijke Ondersteuning*; "WMO") has provided as follows:

> "1. An alien can only be eligible for individual assistance, women's shelter services or a payment as referred to in section 19a if he is lawfully resident within the meaning of section 8, subsection (a) to (e) inclusive and (l) of the Aliens Act 2000.
>
> 2. An alien can only be eligible for community shelter services if he is lawfully resident within the meaning of section 8, subsection (a) to (e) inclusive and (l) of the

Aliens Act 2000, except in cases referred to in article 24, paragraph 2 of Directive 2004/38/EC.

3. Notwithstanding subsections 1 and 2, in cases designated by order in council, if necessary notwithstanding section 10 of the Aliens Act 2000, categories of aliens residing unlawfully in the Netherlands specified by or pursuant to that order may be wholly or partially eligible for assistance specified by that order or for a payment as referred to in section 19a. Eligibility for assistance or a payment as referred to in section 19a does not confer any right to lawful residence on an alien.

4. The order referred to in subsection 3 may provide that the municipal executive is responsible for delivering the assistance designated by that order."

## D. The European Social Charter and the ECSR

34. Article 13 of the Charter, entitled "The right to social and medical assistance", provides as follows:

"Anyone without adequate resources has the right to social and medical assistance.

With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;

...

4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953."

35. Article 31 of the Charter, entitled "The right to housing", provides as follows:

"Everyone has the right to housing.

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

...

2. to prevent and reduce homelessness with a view to its gradual elimination;

...".

36. The first paragraph of the Appendix to the Social Charter reads:

"Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 include foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.

This interpretation would not prejudice the extension of similar facilities to other persons by any of the Contracting Parties."

37. On 1 July 2014 the ECSR adopted two decisions on the merits in the cases of *Conference of European Churches (CEC) v. the Netherlands* (complaint no. 90/2013) and in *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands* (complaint no. 86/2012). It found that the Netherlands had violated Article 13 §§ 1 and 4 of the Charter, which guarantees the right to social assistance, and Article 31 § 2 of the Charter, the right to housing, by failing to provide adequate access to emergency assistance (food, clothing and shelter) to adult migrants in an irregular situation. In *CEC v. the Netherlands* the ECSR held the following:

> "73. With regard to Article 13 § 4 in particular, the Committee recalls that emergency social assistance should be provided under the said provision to all foreign nationals without exception (Conclusions 2003, Portugal). Also migrants having exceeded their permitted period of residence within the jurisdiction of the State Party in question have a right to emergency social assistance (Conclusions 2009, Italy). The beneficiaries of the right to emergency social assistance thus include also foreign nationals who are present in a particular country in an irregular manner (Conclusions 2013, Malta).
>
> 74. The Committee observes in this connection that the complaint concerns the provision of the necessary food, water, shelter and clothing to adult migrants in an irregular situation. It considers the issues at hand to be closely linked to the realisation of the most fundamental rights of these persons, as well as to their human dignity.
>
> 75. Pursuant to the above, Article 13 § 4 applies to migrants in an irregular situation.
>
> ...
>
> 115. The Committee recalls that human dignity is the fundamental value and the core also of European human rights law (FIDH v. France, cited above, §31).
>
> 116. Even though the Convention and the relevant legal rules of the European Union on asylum are applicable only to foreigners staying in a regular manner within the jurisdiction of the States Parties, the Committee observes that both the Court and the Court of Justice in their recent case-law have acknowledged the importance of preserving human dignity in connection with the minimum protection provided to migrants (see paragraphs 28-29, 47-48).
>
> 117. The Committee observes in this connection that the scope of the Charter is broader and requires that necessary emergency social assistance be granted also to those who do not, or no longer, fulfil the criteria of entitlement to assistance specified in the above instruments, that is, also to migrants staying in the territory of the States Parties in an irregular manner, for instance pursuant to their expulsion. The Charter requires that emergency social assistance be granted without any conditions to nationals of those States Parties to the Charter who are not Member States of the Union. The Committee equally considers that the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion."

38. Following the abovementioned decisions of the ECSR, the Committee of Ministers, on 15 April 2015, adopted two substantially the same resolutions (Resolution nos. CM/ResChS(2015)5 and

CM/ResChS(2015)4). Taking note of the Netherlands' Government's submissions in which they had expressed their concern that the ECSR had not given a correct interpretation of the appendix to the Charter which excludes from the scope of the Charter all aliens who are not lawfully residing on the territory of a State Party, these resolutions read, in so far as relevant:

> "The Committee of Ministers,
>
> ...
>
> 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."

### E. Other relevant information

39. The information contained on the website of the Repatriation and Departure Service concerning possibilities for migrants in the Netherlands to return to Ethiopia, reads, in so far as relevant:

> "Voluntary return
>
> Voluntary return is possible. The diplomatic representation issues *laissez-passers* to aliens who wish to return to Ethiopia and who can demonstrate their identity and Ethiopian nationality. The establishment of the identity and nationality depends on the presence of a (copy of) passport or an original and validated birth certificate. The alien must sign the *laissez-passer*, otherwise it is not valid.
>
> Forced return
>
> Forced return is possible with an original passport. The diplomatic representation may issue replacing documents if the alien wishes to return."

## COMPLAINTS

40. The applicant complained under Article 2 of the Convention that his life had been at serious risk while he was staying at the Refuge Garage, due to violence from and between other residents, against which no adequate protection had been offered by the State.

41. The applicant further complained under Article 3 of the Convention about the denial of shelter and social assistance, in particular the inhumane conditions in the Refuge Garage where he had been forced to live as a consequence thereof. He further complained that he was required to

cooperate in his own deportation in order to receive social assistance as an irregular migrant, which he refused to do. In his view, this requirement amounted to treatment contrary to his human dignity.

42. Lastly the applicant complained under Article 6 that the Central Appeals Tribunal, in its decision of 26 November 2015, had failed to address his argument about the fact that he had been recognised by the State as a refugee, which, in his view, should have prompted the Netherlands authorities to grant him emergency social assistance retroactively.

## THE LAW

43. The applicant complained that having had to stay in the Refuge Garage had violated his rights under Articles 2 and 3 of the Convention. These Articles provide:

**Article 2**

" 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

**Article 3**

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

44. The Court finds that it is more appropriate to deal with the complaint under Article 2 in the context of its examination of the related complaint under Article 3, and will proceed on this basis.

### *1. General principles*

45. Article 3 of the Convention enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman degrading treatment or punishment irrespective of the circumstances and of the victim's conduct (see, among many authorities, *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). The prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity (*Bouyid v. Belgium* [GC], no. 23380/09, § 81, ECHR 2015).

46. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions, and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the conduct of the person concerned. (see, among other authorities, *Chahal v. the United Kingdom*, 15 November 1996, § 79, *Reports of Judgments and Decisions* 1996-V; *Georgia v. Russia (I)* [GC], no. 13255/07, § 192, ECHR 2014 (extracts); and *Svinarenko and Slyadnev v. Russia* [GC], nos. 32541/08 and 43441/08, § 113, ECHR 2014 (extracts)).

47. The Court has held on numerous occasions that to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see for example *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).

48. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3 (see, among other authorities, *Vasyukov v. Russia*, no. 2974/05, § 59, 5 April 2011; *Gäfgen v. Germany* [GC], no. 22978/05, § 89, ECHR 2010; *Svinarenko and Slyadnev, cited above*, § 114; and *Georgia v. Russia (I)*, cited above, § 192).

49. The present case concerns the question whether the State had a positive obligation under Article 3 to provide the applicant – a rejected asylum-seeker at the material time – emergency social assistance. In that regard, the Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens (see, for example, *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, § 113, ECHR 2012; *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII; *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* 28 May 1985, § 67, Series A no. 94; and *Boujlifa v. France,* 21 October 1997, § 42, *Reports* 1997-VI). The corollary of a State's right to control immigration is the duty of aliens to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence (*Jeunesse v. the Netherlands* [GC], no. 12738/10, § 100, 3 October 2014).

50. Aliens who are subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State (see *N. v. the United Kingdom* [GC], no. 26565/05, § 42, 27 May 2008).

51. Moreover, Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home (see *Chapman v. the United Kingdom* [GC], no. 27238/95, § 99, ECHR 2001-I). Nor does Article 3 entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (see *Müslim v. Turkey*, no. 53566/99, § 85, 26 April 2005).

52. In the case of *M.S.S. v. Belgium and Greece* ([GC], no. 30696/09, ECHR 2011), the Court, attaching "considerable importance to the applicant's status as an asylum-seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection" (§ 251), considered, in so far as relevant:

> "252. ... the Court must determine whether a situation of extreme material poverty can raise an issue under Article 3.
>
> 253. The Court reiterates that it has not excluded the possibility 'that State responsibility [under Article 3] could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity' (see *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009)."

### *2. Application of the general principles to the present case*

53. The main thrust of the applicant's complaint pertains to Articles 13 and 31 of the Charter and the decisions adopted by the ECSR on 1 July 2014 (see paragraph 37) which, in his view, lead to the conclusion that the denial of shelter and social assistance diminished his human dignity in a manner incompatible with Article 3 of the Convention. The Court acknowledges the importance of the economic and social rights laid down in the Charter and the issues raised in the two decisions by the ECSR. However, it cannot accept the applicant's argument that the findings by the ECSR under the Charter should be considered to lead automatically to a violation of Article 3 of the Convention.

54. Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). Furthermore, inherent in the whole of the Convention 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 (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161). While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent

expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States (see *A.S. v. Switzerland*, no. 39350/13, § 31, 30 June 2015).

55. In the case at hand and during the period complained of, the applicant was not entitled to any social assistance in the Netherlands. Referring to *M.S.S. v. Belgium and Greece* (cited above), the applicant argued that the situation he found himself in was very similar to the situation in that case. However, there are crucial differences in that, unlike the applicant in *M.S.S* who was an asylum-seeker, the applicant in the present case was at the material time a failed asylum-seeker under a legal obligation to leave the territory of the Netherlands. Furthermore, even though the applicant's loss of entitlement to legal residence in the Netherlands after the rejection of his asylum claim did not automatically affect his vulnerability as a migrant, the situation in which he found himself remained significantly different from that of *M.S.S.*. In the latter case, the relevant facts which had culminated in a finding of violation of Article 3, were the long duration in which the applicant had lived in a state of the most extreme poverty (the lack of food, hygiene and a place to live), and of fear of being attacked and robbed together with the fact that there had been no prospect of improvement. Furthermore, that situation was linked to his status as an asylum-seeker and, consequently, the applicant's suffering could have been alleviated if the Greek authorities had promptly assessed his asylum application. By failing to do so the applicant was left in uncertainty.

56. Turning back to the present case, and emphasising once more that the applicant was a failed asylum-seeker at the material time, the uncertainty he found himself in was inherently different from *M.S.S.* in that it was not linked to the Netherlands authorities' assessment of his asylum request. His asylum statement had already been examined and his asylum application refused, of which the applicant has not complained before the Court. Furthermore, it cannot be said that the Netherlands' authorities have shown ignorance or inaction towards the applicant's situation. After the applicant's asylum proceedings had come to an end, the applicant was afforded a four week grace period to organise his voluntary return to his country of origin during which period he retained his entitlement to State-sponsored care and accommodation. Moreover, after he had overstayed this grace period, the applicant had the possibility of applying for reception facilities at a centre where his liberty would be restricted (see paragraph 31 above). The fact that admission to this centre was subject to the condition that he would cooperate in organising his departure to his country of origin cannot, as such, be regarded as incompatible with Article 3 of the Convention.

57. The Court also takes into account the fact that if it had been impossible for the applicant to return to his country of origin – either voluntarily or involuntarily – for reasons which cannot be attributed to him, he had the possibility of applying for a residence permit for persons who, through no fault of their own, are unable to leave the Netherlands (see paragraph 32 above). Nothing in the case file shows, however, that he has ever applied for such a residence permit. Nor has he ever contended at any stage during the domestic proceedings that he could not leave the Netherlands through no fault of his own.

58. The Court further observes that according to the general information provided by the Repatriation and Departure Service, returns to Ethiopia – voluntary or not – are possible, albeit with the alien's cooperation if he or she is not in the possession of an original passport (see paragraph 39 above). The applicant submitted that he was released from immigration detention in July 2013 because an effective removal to his country of origin proved impossible, however without explaining why this was so. As the applicant was an undocumented migrant at the material time (see paragraph 6 above), his cooperation – in the form of expressing a willingness to return to Ethiopia and signing the request for a *laissez-passer* – was required in order to obtain a *laissez-passer*. However, in the applicant's own admission, he did not wish to cooperate with the domestic authorities in organising his departure to Ethiopia.

59. The Court reiterates that there is no right to social assistance as such under the Convention and to the extent that Article 3 requires States to take action in situations of the most extreme poverty – also when it concerns irregular migrants – the Court notes that the Netherlands authorities have already addressed this in practical terms. In the first place, the applicant had the possibility of applying for a "no-fault residence permit" and/or to seek admission to a centre where his liberty would be restricted. It is furthermore possible for irregular migrants to seek a deferral of removal for medical reasons and to receive free medical treatment in case of emergency (see paragraph 30 above). In addition, the Netherlands have most recently set up a special scheme providing basic needs for irregular migrants living in their territory in an irregular manner (see paragraph 5 above). It is true that that scheme was only operational as from 17 December 2014, one year after the applicant had taken shelter in the Refuge Garage. However, it is inevitable that the design and practical implementation of such a scheme by local authorities of different municipalities take time. Moreover, the scheme was brought about as a result of a series of elements at the domestic level, including the applicant's pursuit of domestic remedies in connection with his Article 3 claim. In these circumstances it cannot be said that the Netherlands authorities have fallen short of their obligations under Article 3 by having remained inactive or indifferent.

60. Considering the above, the Court finds that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

### B. Other complaint

61. The applicant further complained under Article 6 that the Central Appeals Tribunal, in its decision of 26 November 2015, had failed to address his argument that he had been recognised by the State as a refugee, which in his opinion, should have prompted the Netherlands authorities to grant him emergency social assistance retroactively.

62. The Court considers, assuming that the right claimed by the applicant does exist under domestic law and thus falls within the scope of Article 6 § 1, that this provision obliges domestic courts to give reasons for their judgments and decisions without, however, going so far as requiring a detailed answer to every argument (*Borovská and Forrai v. Slovakia*, no. 48554/10, § 57, 25 November 2014; *Ruiz Torija v. Spain*, no. 18390/91, § 29, 9 December 1994). In the light of all the material in its possession, the Court finds no appearance of a violation of the rights guaranteed by Article 6 § 1 of the Convention.

63. It follows that this complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 28 July 2016.

Stephen Phillips
Registrar

Luis López Guerra
President