newsletter

HOUSING RIGHTS WATCH

www.housingrightswatch.org

Issue 8
May 2015

FEANTSA

This newsletter is available at www.housingrightswatch.org and www.feantsa.org

Editorial

Dear readers,

In this issue of Housing Rights Watch's newsletter, you'll find an insightful article on the impact of the European Committee of Social Rights' decision on FEANTSA's Collective Complaint vs The Netherlands (no. 86/2012) from Joris Sprakel, who has worked with this issue for many years. At the time of writing, the Council of Ministers had not yet passed a resolution on the decision, a bureaucratic delay that the Dutch government used to postpone making comments on the decision and its eventual impact on national law and policy. The Council of Ministers did approve the resolution (https://goo.gl/ogaM1C), but the Dutch government's reaction has caused more confusion than clarity on the issue. This decision, its impact on local authorities, and the questions it raises regarding the right to shelter for all persons within the territory of a State party to the Social Charter, will continue to resonate over the next months. Watch www.housingrightswatch.org for information and further insight and analysis.

Marc Uhry synthesizes the above decision by the European Committee of Social Rights and the Court of Justice of the European Union's (CJEU) recent decision on Dano (http://goo.gl/4L4S1p). These cases raise the issue of just who is responsible for providing emergency assistance, when the duty for provision has been devolved in so many countries to regional and local level without sufficient resources. While it is the State that signs international human rights treaties, local authorities are in fact bound as well. Uhry's article brings international jurisprudence to bear on this tension at local and regional level which results from a lack of sufficient resources and "immigrant-specific" policies.

Sonia Olea and Paula Caballero examine the oppressive new law in Spain that criminalises homelessness and represses public demonstrations. The legislation gives the state a powerful tool to control what the government fears is a growing movement of people, united under the umbrella of the PAH (Platform of People Affected by the Mortgage Crisis), who are willing to take to the streets to defend the rights of people whose housing rights are violated or at risk.

Finally, you will find a case law update providing an overview of important decisions in 2014 and early 2015. Please turn to page 15 for an announcement for the HRW conference in June in Paris, during which we invite you to join us to debate the above topics, and others.

This is our final edition of the Housing Rights Watch newsletter in this format. We are moving with the times and therefore adapting our format to fit the needs and wishes of our readers and contributors. When you go to www.housingrightswatch.org you'll find new articles on a monthly basis (in English and French), more frequent case law updates, and every four months, an electronic 'round up' will drop into your inbox to remind to click through to articles that you might have missed.

As always, we appreciate your comments, suggestions, and contributions to future newsletters. Please send them to: samara.jones@feantsa.org

Please follow us on social media too:

www.facebook.com/HousingRightsWatch

www.twitter.com/righttohousing

To cc or not to cc – The effect of collective complaints in practice

By JORIS SPRAKEL[1]

On November 10, 2014 the Decisions on the Merits were published for two Collective Complaints against The Netherlands. The first complaint was submitted by FEANTSA and deals with access criteria and availability of shelter for homeless people in the Netherlands.[2] The second complaint was submitted by the Conference of European Churches and deals with access to shelter and basic amenities (water, food, clothing) for undocumented migrants.[3] In both complaints the European Committee on Social Rights also issued an Immediate Measure for the first time in its history.

Access to emergency shelter in The Netherlands is problematic. This has to do with two factors that are based in law and policy. Because the Netherlands was faced with a large influx of migrants in the 1990s a law was implemented to limit access to government services for undocumented migrants. As a result, undocumented migrants are not eligible for emergency shelter. For persons who do not have a permit to remain in The Netherlands, problem the problem occurs in policy. There are 43 municipalities responsible for emergency shelter, which means there are also 43 different policies on access to emergency shelter. And rather than being inclusive, these policies are exclusionary.

Municipalities have indicated in their policies criteria on which eligibility for emergency shelter is based. These criteria look at rights of residence (nationality or lawful stay), age (over 23 years old), local connection, psychological profile (mental health problems, addiction, etc.), and social network (can you manage within your network of friends, family, etc.). Application of these criteria means that in practice it is easy to be excluded from receiving the help you need. Nationality proves problematic for (undocumented) migrants, including destitute EU citizens. Age proves problematic for adolescents. Local connection criteria are difficult to prove for migrants as well as anyone who has not resided in the area long enough (the minimum is two years). And if you do not exhibt psychological problems you are not eligible because the criteria are cumulative.

In itself it can be useful for government agencies to include in their policies the eligibility criteria. This should, however, not result in exclusion. And that is exactly what is happening in the Netherlands. The criteria are applied in an exclusionary manner. If you do not fulfill the criteria you are not eligible for shelter. Both the municipalities and the courts apply the criteria in the same way. The courts do not seem to want to intervene with the margin of appreciation that the municipalities have in creating and applying their local policies. This results in situations where everyone can see that a person needs help, but help is not provided because the person does not meet the criteria. This is a direct violation of the European Social Charter where 'need' is considered to be the decisive factor in the determination whether to help a person or not.

How the strict application of policy creates unwelcome exclusion can be seen in the following example. In May 2014 a woman came into my office. She was in her late twenties and some 20 weeks pregnant. She had recently been forced to leave her house by her ex-partner, who was also responsible for prostituting her. The woman had already tried to obtain an income and shelter for over a month. She had been denied both benefits and shelter. The municipality concerned had looked at all the options, but could not match her to the criteria. They concluded that the law and policy did not leave any options available. The woman was walking on the streets during daytime, and could, if she was lucky, obtain a bed in the night shelter. There she had to share a communal room with a male population most of whom were smokers and many were addicted to alcohol and drugs.

1 Joris Sprakel, LL.M, works as a lawyer at Fischer Advocaten in the Netherlands and as lecturer in Human Rights Law at the Hague University of Applied Sciences. He is the author of the collective complaint of FEANTSA v. the Netherlands, and has co-authored the collective complaint of DCI v The Netherlands and CEC v. The Netherlands

2 FEANTSA v. The Netherlands, Collective Complaint No. 86/2012 (to be found at http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp)

3 CEC v. The Netherlands, Collective Complaint No. 90/2012

At 32 weeks into the pregnancy the first court hearing was conducted in this case. The court also concluded that the law and policy did not leave any room for maneuver. There was however willingness to look at the situation again. This resulted in two more hearings during which the municipality persisted the impossibilities in law and policy. The woman could not be in a regular shelter because she did not have psychological problems and did not have an addiction. A place in a women's shelter was deemed unnecessary as she was not under threat by her ex-partner. A place in a family shelter was not possible for her yet, as her child had not been born. The court was able to break the deadlock by using discretion. The judge said to the municipality: "You and I know that we cannot let this woman live on the streets until she gives birth." After the court issued an interim measure, the municipality found housing for the woman within a week.

There are countless cases in which undocumented migrants are denied shelter because of their residence status, or lack thereof. The courts in The Netherlands are in support of the law that excludes undocumented migrants from government services. The law is deemed to be generally not in breach of human rights because it has a legitimate aim (limiting extension of unlawful residence). In a number of cases the courts have granted shelter to persons in need. Not on the basis of the European Social Charter, but rather on the right to private and family life as protected in Article 8 ECHR. The application of this "escape" is very narrow indeed as only persons with a severe medical condition and/or "desperate" situation are considered eligible on this ground. One such ground for desperate situations is (recognized) statelessness. Risk of sexual exploitation is not, neither is limited access to food and medication.

So what have the collective complaints accomplished? At the national level the responses are mixed. The government is maintaining the position that the decisions are not legally binding on the state and that the governments will wait until the resolutions are adopted by the Committee of Ministers (foreseen for spring 2015). Whatever the outcome of this resolution, it will not change the legal assessment of the Committee. It will still come down to the application of the decision by the courts. Parliamentarians from different factions have taken an interest in the outcome of the cases. This process is supported by the lobbying of the NGOs involved in the case and media interest in the topic. Without such attention it will be difficult to really achieve change.

At the municipal level the decisions have been welcomed by almost all political parties. This is due to the fact that it is the municipalities who will be confronted with the (public order) problems if people are left to live in the streets. In a number of municipalities the municipal council has adopted resolutions urging the authorities to create shelter for those currently left out of the system. In the municipality of Eindhoven a policy has been adopted to include support services. The Association of Dutch Municipalities meanwhile is negotiating with the national government for money to provide shelter in accordance with the decisions. So far, no additional funds have been awarded.

Despite these apparently positive trends, the decisions have not brought a solution for all. The courts have not yet applied the decision, either directly or indirectly. There are indications that the courts will be able to apply the decisions indirectly via the ECHR - which is what happened following the decision of the collective complaint of DCI v. the Netherlands.[4] At least until the government created (Spartan style) family shelters in which (undocumented) children could be sheltered with their parents. It is likely a similar solution will be found here for the undocumented migrants. For the other categories, including EU citizens during the first three months of their stay, time will have to tell.

4 DCI v. The Netherlands, Collective Complaint No. 47/2008

Migrants and emergency welfare: explanation of recent European and international case law

By MARC UHRY, *Coordinator for European Affairs, Fondation Abbé Pierre*

As so often happens when it comes to immigration, the streets of France again began to buzz with vague rumours when the Court of Justice of the European Union (CJEU) recently returned its ruling in the *Dano versus Germany* case[1]. "Prevention of social tourism" did the rounds of the media, without proper explanation of the content and scope of this decision. At the same time, other decisions of international courts were sending out conflicting messages as regards the social rights that can be claimed by migrants, including persons in irregular situations. Not one of these recent decisions has succeeded in bringing about any change of case law tack, nor do they form any kind of contradictory whole. They set out the basic rights of migrants with regard to welfare and the room for manoeuvre available to the authorities that claim to regulate access.

The Dano affair concerned the application by a family of European workers, none of whom have ever worked in Germany, a family already receiving several forms of basic welfare, to also receive an optional benefit, known as "basic insurance"[2], paid out to job-seekers. The CJEU upheld the lawfulness of the German authorities in refusing entitlement to this "*non-contributory cash assistance*" on the grounds that none of these European nationals was employed. It might be helpful to point out that a European regulation on the coordination of social security systems[3] makes distinction, for each country, of the list of forms of unconditional benefits to which European nationals are entitled and the optional forms of support, the benefit requested; in this case, falling within the latter category.

The free movement of European citizens is, in fact, limited by the Free Movement of Citizens Directive 2004/38/EC by the fact of their representing an "*undue burden on the [welfare system of the] host Member State*". The Dano decisions sheds light on the definition of that concept.

The question that thus arises is the extent of the scope of that decision. Are, for instance, the mechanisms designed to tackle social emergencies affected? Consequently, if restrictions can be placed on European citizens, then what about the nationals of a third country whose right of residence is even more fragile?

National and European jurisprudence has answered this question: schools, the emergency health services and emergency shelters are part of a raft of fundamental rights preceding all consideration as regards residence. An approach of this kind is not easy to apply if some individuals join emergency systems that their right of residence will prevent them from leaving, the systems reaching saturation point and the rights of future applicants becoming difficult to guarantee. Nonetheless, with regard to basic rights, it is also difficult to claim to adjust the exercise of rights to available resources. It would indeed be hard to imagine that access to a school or to the right to vote should be made conditional upon available budgets. There is a tension that is difficult to resolve, but one that the ruling in the Dano case does not explain: an emergency mechanism is not the issue.

Conversely, other international case laws tend to reinforce the unconditional nature of acceptance into the emergency, health and social services. The European Committee of Social Rights delivered two decisions on 8 November last, according to two procedures against the Netherlands[4], led by the Conference of Churches[5] and by the European Federation of National Organizations Working with the Homeless (*Fédération européenne des Associations nationales travaillant avec les Sans-abri* – FEANTSA)[6].

1 C.333-13, 11 Nov.2014

2 Defined by Book II of the Social Code (Sozialgesetzbuch, Zweites Buch), which makes provision for exclusions from receipt of this form of assistance, rendering it to all intents and purposes a discretional allowance.

3 Regulation (EC) No. 883/2004

4 For a detailed analysis of these decisions, see the much-documented legal article by Carole Nivard, Revue Française des Droits de l'Homme, 27 Nov. 2014.

5 Collective Complaint No. 90/2013

6 Collective Complaint No. 86/2012

Taken as a whole, the social rights recognized by the European Social Charter do not protect persons in irregular situations. The Signatory States did not wish to make these rights universal. Nevertheless, Article 13.4 makes specific provision for emergency assistance for non-residents, without regard for their employment situation. In terms of accommodation, two legal precedents against France and the Netherlands[7] made it clear that, even if the provisions of the Charter applied to foreign nationals in regular situations only, "*that does not release the States from their responsibility to prevent the homelessness of persons in irregular situations in their jurisdictions, in particular of minors*" (Art.31.2).

The applicability of basic social rights, that is, those that underly respect for human dignity, for foreigners, including those in irregular situations, has been reaffirmed by these two decisions[8], so much so indeed that the decision of the Committee is preceded, even before an appraisal of the merits of the case, by a call for "*immediate measures*", urging the government of the Netherlands to "take all possible action to protect, from any serious and irreversible harm, all persons at imminent risk of destitution ... such that their essential needs (housing, clothing, food) are satisfied".

The Committee took the view that the failure of the State to ensure a system of emergency welfare and to guarantee minimum living conditions could not be whitewashed by arguments on migration policy, the powers of local authorities and the economic situation. The refusal of accommodation is a disproportionate means of regulating migration flows[9]. Furthermore, even if the policies are somehow decentralised, the States are still bound by the undertakings that they assumed in the treaties and must respect the rights[10]. The State must ensure that emergency assistance is actually provided to all persons who need it.[11] As for the argument of the difficulty in meeting demand in a period of crisis, the Committee hit the ball back saying that "*the economic crisis should not have as a consequence the reduction of the protection of rights recognized by the Charter; the States Parties are thus bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.*"[12]

Solutions that leave human dignity out of the equation also happen to represent a violation of international law: "*emergency shelters must always meet the safety requirements established by the Committee and must be adapted to the needs of those belonging to these groups*" (FEANTSA versus the Netherlands, § 135). Everyone must be taken in, and in conditions respecting the dignity of the person: *"Shelters must meet health, safety and hygiene standards and, in particular, be equipped with basic amenities such as access to water and heating and sufficient lighting. Another basic requirement is the security of the immediate surroundings."*

In international law, emergency accommodation increasingly seems to be acquiring the status of a basic right, conditioning human dignity and, consequently, obliging the Member States, without classification other than the fact of a person's belonging to the human community. This appraisal is also supported by the line taken by the European Court of Human Rights (ECHR). In a recent judgment, *Tarakhel versus Switzerland*, 4 Nov. 2014, the Court refused the extradition of a family of new entrants from Switzerland to Italy, as is however provided in the Dublin Regulation, by virtue of the "first Member State reached" rule, under which the application for regularization would normally have to be formulated. In point of fact the Court found that, concerning a family with children, Italy did not provide any sufficient guarantee of accommodation and that, in the case in point, this would constitute inhuman and degrading treatment. Accommodation is thus considered as a minimum requirement, affecting the exercise of the universal right to dignity, at least for families with children, regardless of their right of residence - and whatever the migration flow treaties in force.

There is a raft of basic universal welfare rights, and not only forms of assistance that do not affect respect for human dignity, that are open to distinction. It is therefore not possible to restrict emergency assistance – including emergency accommodation – on the grounds of the situation regarding residence, migration policies or decentralized new-entrant integration policies.

7 FIDH versus France, Comp. No. 14/2003., DEI versus the Netherlands, Comp. No. 47/2008

8 FEANTSA versus the Netherlands, §§ 61 and 142; CEC versus the Netherlands, §§75 and 130.

9 CEC versus the Netherlands, §§ 121-123 and FEANTSA versus the Netherlands, §§ 181-183

10 Constant Jurisprudence, CEDR versus Greece, Complaint No. 15/2003, §29

11 CEC versus the Netherlands, § 119 and FEANTSA versus the Netherlands, §§ 120-125

12 FEANTSA versus the Netherlands, § 128.

Spain
new Public Safety Act – sweeping social protest and homeless people off the streets

By SONIA OLEA *(Caritas, Spain)* and PAULA CABALLERO *(Policy Assistant, FEANTSA)*

Spain's Public Safety Act for "citizen security", passed on Friday 20 March 2015, in fact violates human rights: The new law not only discourages and represses peaceful protest for the right to housing, but also criminalizes homelessness, making life for very vulnerable people even more difficult.

Four years of austerity have increased poverty, deepened inequality and caused serious deterioration of economic and social rights in Spain (CESR, 2014[1]). As factsheet by the CESR charts the impact of rising unemployment and undersupplied social housing on the right to housing. There has been a significant increase in the number of homeless people in Spain. Legislative efforts to assist those homeowners who can no longer afford their housing costs to avoid foreclosure have been weak and incoherent and the supply of social rental housing (only 2% of housing stock in Spain) is starkly insufficient (CECODHAS, 2012). Such a situation is not sustainable and poses a significant threat to the right to adequate housing for the most disadvantaged groups (CESR, 2014)[2].

Human Rights Watch also published submission for Spain's Universal Periodic Review submission before the UN in 2014, pointing to issues with Spain's compliance with its international human rights obligations. For example, since the economic crisis began in 2007, banks have foreclosed on over 500,000 properties under a procedure that leaves individuals and families saddled with significant debt and no realistic pathway towards discharging their debt. Immigrants, women heads of households, women victims of economic abuse, and children are among the vulnerable groups affected by the crisis. Irresponsible lending, unfair terms in mortgage contracts (such as exorbitant default interest rates), unscrupulous behaviour by intermediaries such as real estate agencies, and the lack of oversight during the boom economic years contributed to the current situation (Human Rights Watch, 2015[3]).

The government of Prime Minister Mariano Rajoy has taken steps to address the mortgage crisis, including measures to protect temporarily certain groups against evictions; amend legal proceedings to ensure the right to contest unfair contractual obligations; and provide guidelines for debt relief and, in some circumstances, debt cancellation. The government created a Social Housing Fund, stocked by roughly 6,000 properties that banks have voluntarily turned over, to offer evicted families places to live at affordable rents (UPR, 2015). However, the criteria for benefitting from these measures are narrowly drawn, excluding many needy families and individuals. Some of the criteria are arbitrary and do not comply with international law[4]. Official data demonstrate that the measures to alleviate debt and provide affordable housing through the Social Housing Fund have benefited only a fraction of those in need. (UPR, 2015)[5]

1 Source: http://housingrightswatch.org/sites/default/files/FACTSHEET_Spain_2015_web.pdf

2 Source: http://housingrightswatch.org/sites/default/files/FACTSHEET_Spain_2015_web.pdf

3 Source: Spain: UPR Submission 2014 http://www.hrw.org/news/2014/12/19/spain-upr-submission-2014 This submission highlights key areas of concern regarding Spain's compliance with its international human rights obligations

4 For example, a two-parent household with a child 3 years or younger can benefit from the moratorium on evictions, while the two-parent family with a child 4 years or older cannot. Under international law, all persons under 18 are considered children and entitled to the rights and protections laid out in the Convention on the Rights of the Child, including the right to shelter.

5 Source: Spain: UPR Submission 2014 http://www.hrw.org/news/2014/12/19/spain-upr-submission-2014 This submission highlights key areas of concern regarding Spain's compliance with its international human rights obligations

The inability of authorities to respond to the needs of society and accept critics and proposals to address the situation resulted in massive demonstrations and protests. In May 2011, a new wave of mobilizations gathered citizens in the streets to demand political participation and discuss the changes they want in society. This developed into non-partisan, extra-institutional and horizontal movements, which for three years has continued to work to provide a platform for citizenship and solidarity (Cuarto Poder, 2014). Now, in a new attempt to ignore the claims of society, the government has adopted two significant legislative reforms - of the Public Safety Act and the Criminal Code –designed to discourage, repress and criminalize peaceful protest and the exercise of human rights[6].

Spanish evictions generated a social movement that resulted in the Platform of People Affected by Mortgages (Plataforma de Afectados por la Hipoteca, PAH). The PAH originally emerged in Barcelona in 2009, with the aim of modifying mortgage legislation to allow mortgage debt forgiveness after eviction. In addition to driving a campaign for retroactive non-recourse debt, the PAH aimed to achieve the self-organisation of those affected[7].

The PAH is a political movement (but not linked to a political party) in which people directly affected by the mortgage crisis and those indirectly affected by it, fight together against this problem. In order to empower people and promote legal changes, the PAH takes actions in many different fields (political, legal, communicative, emotional, etc.). They also propose solutions in order to enact our right to housing[8].

The PAH uses several strategies -to fight for the right to housing: **The Stop Evictions campaign** (to prevent families from being evicted from the only place they have to live, their homes), **Obra Social campaign** (the freeing up of empty houses held by financial institutions in order to relocate families that have been evicted or have lost their home to the bank and have nowhere to go), **the People's Legislative Initiative (ILP)** campaign (it was a legislative proposal advanced by the PAH with the collaboration of various social movements and other organizations in order to change Spain's foreclosure law) and the **Escrache campaign** (meant to persuade politicians and other people in positions of power to take into account the public's petitions). In the lack of an effective response of the Government, the PAH is today the most important referent for the right to housing in Spain. All of the PAH's strategies have been criminalised in the new Public Safety Act for "citizen security" and are now considered as illegal or even as terrorism.

The new law attacks the right to housing by not only prohibiting its defence and the fight against evictions, but also by stigmatising and sanctioning homeless people. The Public Safety Act passed at the end of March 2015 is designed to control citizen behaviour through very high financial penalties (between 100 and 60,000 Euros). There are several sections that affect homeless people or people who spend a great part of their lives on the street. Imposing financial penalties on those who have no or very little income, can be clearly interpreted as a criminalization of poverty.

Examples

Article 37.13 of the new Spanish Public Safety Act sanctions persons who spoil or damage public or private property by ruining its image. The article introduces a vague legal concept: The term *"deslucimiento"* means creating shabbiness, dullness, gracelessness or discrediting. Several human rights organizations are concerned that the presence of a homeless person sleeping on a bench or sitting in a corner can be interpreted as dimin-

6 Source: The video of the association *Cuarto Poder* denounces the legal reform, that criminalises social protests: https://www.youtube.com/watch?v=Z3llLPGhzN0#t=10

7 http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU%282015%29510021_EN.pdf

8 The PAH has three basic and non-negotiable demands: 1) Cancellation of mortgage debt upon handover of the property to the bank; 2) Immediate stop to all evictions where it is the family home and sole property; 3) Transform empty houses held by financial institutions into social housing.

ishing the esthetical value of the place, bench or corner or causing a reaction of disgust to others and will therefore be considered a transgression of article 37.13 which carries a possible sanction of 100 to 600 Euro.

In many cities and towns in Spain hundreds of migrants survive through their street vending activities. **Article 37.7** of the new Spanish Public Safety Act penalizes the occupation of public and private property and of public space. According to this article, unauthorized hawking can be sanctioned. **Article 37.11** of the Public Safety Act will punish those who lose their national identity papers three times in one year. A sanction of 10 Euros might be symbolic for people with stable revenues, but this sum is significant and or even impossible for homeless people, for whom keeping their documentation in order is very complicated as they don't have a home to organize their belongings.

Sanctions on prostitution or drug consumption on the streets are two other examples of how state policies of criminalization routinely penalize people for their involuntary status. **Article 36.11** contemplates offering sexual services as a serious infraction. Entities such as the Platform of the Third Sector and the Spanish Network Against Trafficking warn about the proven ineffectiveness of sanctioning prostitution. **Article 36.17** penalizes people who are using drugs on the street. The possibility of suspending the sanction for using of drugs, if the person proves to be in rehabilitation treatment has been eliminated. The majority of the political parties in Spain as well as social organizations working with people with addictions consider this a step back have and a terrible mistake.

Local authorities have already started to adapt their regulations to the new Public Safety Act[9]. It is important to recall that, as administrative offenses, and since two years, if we disagree with the sanction, and after payment of a fine, also we have to pay a justice tax. This makes it very difficult for many people to access justice. Several platforms and associations in Spain such as Caritas, reject the penalization of vulnerable people through economic sanctions (up to 30,000 Euro). Criminalization of homelessness is discriminatory and constitutes cruel, inhuman, and degrading treatment (UN human Rights Committee, 2013)[10].

9 The draft of the new ordinance of coexistence in public space in Madrid, for example, considers begging "*at the entrances and exits of schools, social care, hospitals, commercial and business establishments" an* infringement of the law. Today begging is sanctioned in Barcelona, Seville, Malaga, Granada and Valladolid. On the other hand, the new Municipal Ordinance of Seville aimed to punish people who "are looking for food in the garbage" with a sanction of up to 750 euros has been cancelled based on the social impact of the measure. The Municipal Ordinance of Valladolid and the Superior Court of Castilla and Leon established in 2013 that the prohibition to exercise begging on the street violates the right to freedom of individuals.

10 Source: http://www.nlchp.org/documents/Cruel_Inhuman_and_Degrading

Case law update

The right to housing has been recognised as one of the most important fundamental human rights and we seek the realisation of the right of every person to live in dignity and to have a secure, adequate and affordable place to live (read more at our web page www.housingrightswatch.org). In order to promote the right to housing for all, HRW facilitates exchange and mutual learning of new jurisprudence, judicial analysis and new normative outcomes. In following lines you can find a re-cap of some of the important decisions from 2014.

CONSUMER RIGHTS

For this jurisprudence update we have started considering consumer rights, as part of the tools that can help ensuring and defending the right to housing. Since the beginning of the economic crisis thousands of families have signed unfair and misleading mortgage credit contracts that lead to foreclosures, evictions and a high increase in homelessness among Europe.

In January 2014, the European Council adopted a directive aimed at creating a single market for mortgage credits in the EU, with a high degree of consumer protection (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010). This directive seeks to establish a high level of protection whilst addressing irresponsible lending and borrowing which, in the context of the financial crisis, has contributed to increased numbers of unaffordable loans, defaults and foreclosures throughout the EU (Press release 5564/14 of the European Council on 28 January 2014 "Council adopts directive on mortgage credits").

According to the Council, EU rules on misleading advertising and on unfair terms in consumer contracts do not take account of the specificities of mortgage credit. Pre-contractual information for mortgage loans is the subject of a voluntary code of conduct, though its implementation has been inconsistent. The directive therefore establishes conditions to ensure a high degree of professionalism amongst creditors and credit intermediaries. It sets out principles for marketing and advertising, and obligations for pre-contractual information, as well as requirements for information concerning credit intermediaries and for information on the borrowing rate (Press release 5564/14 of the European Council on 28 January 2014 "Council adopts directive on mortgage credits").

Member States will have until January 2016 to transpose the directive into their national laws, regulations and administrative provisions. During 2014, both the European Court of Human Rights and the European Court of Justice have delivered several decisions safeguarding applicants from violations of consumer rights in regards to the unfair terms in the consumer contracts of their mortgage loans (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts).

Through the cases you can find in this section, the Court of Justice of the European Union started bringing those requirements into force.

Constructora Principado SA v. José Ignacio Menéndez Álvarez (Spain)
Case no. C226/12 (Court of Justice of the European Union)

Decided on 16 January 2014

Relevant Articles: Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. Article 3 of the European Union law Directive on individual negotiation of contract terms and article 5 of the European Union law Directive on plain, intelligible language of contract terms.

After purchasing a dwelling to Constructora Principado, Mr Menéndez Álvarez had to pay the municipal tax on the increase in value of urban land. According to national jurisdiction, these costs are to be assumed by the construction company. Mr Menéndez Álvarez therefore brought an action against the company for repayment of those sums. The claim was based on the ground that clause 13 of the contract, under which the purchaser had to pay those sums, should be considered unfair (by virtue of Article 10a of General Law 26/1984, as amended by Law 7/1998) in that it was not negotiated.

Article 3 of the European Union law Directive on individual negotiation of contract terms provides that a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Article 5 of the Directive provides: 'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail ...'

Sánchez Morcillo and Abril García v. Banco Bilbao (Spain)
Case no. C-169/14 (Court of Justice of the European Union)

Decided on 7 April 2014

Relevant Articles: Article 47 of the Charter of Fundamental Rights of the European Union (right to an effective remedy and to a fair trial) and Article 6(1) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

Sanchez Morcillo and Abril Garcia failed to make the monthly repayments of their loan with Banco Bilbao (secured by a mortgage on their property). On 15 April 2011 Banco Bilbao demanded payment of the entire loan together with ordinary interest and default interest and the enforced sale of the property mortgaged in its favour.

According to the Court's settled case-law, the system of protection introduced by the directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge (judgments in *Barclays Bank*, C280/13, EU:C:2014:279, paragraph 32, and *Aziz*, C415/11, EU:C:2013:164, paragraph 44). As regards that weaker position, Article 6(1) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts provides that unfair terms are not binding on the consumer. That is a mandatory provision which aims to replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them (judgment in *Banco Español de Crédito*, C618/10, EU:C:2012:349, paragraph 40 and case-law cited).

In accordance with Article 7(1) of the directive, 'Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.'

FOREIGN CURRENCY MORTGAGES

Together with non-negotiated clauses, offering foreign currency mortgage loans, without correctly explaining the risks involved has also been declared an unfair practice among banks.

As early as 31 March 2011 the European Commission sent a proposal (based on Article 114 TFEU) to the Council on a Directive of the European Parliament and of the Council on credit agreements for consumers relating to residential immovable property and amending Directives. The European Central Bank issued its positive opinion on 5 July 2011 (Opinion of the European Central Bank of 5 July 2011 on a proposal for a directive of the European Parliament and of the Council on credit agreements relating to residential property (CON/2011/58) 2011/C 240/04), agreeing to the fact that irresponsible lending in Union mortgage markets concerns loans denominated in a foreign currency that consumers take out in that currency to take advantage of the interest rate offered, without having an adequate understanding of the currency risk involved (See recital 4 of the Proposal for a directive of the European parliament and of the council on credit agreements relating to residential property 2011/0062).

In its Financial Stability Review, the ECB pointed out in 2010 that the recent financial crisis underlined the potential systemic risks associated with the prevalence of foreign currency lending in some Member States, and highlighted the need to monitor and to address the issue, to prevent a further increase in the stock of foreign currency loans (ECB Financial Stability Review, June 2010, p. 167.). The ECB noted that high levels of foreign currency loans to unhedged borrowers may constitute an important vulnerability in certain Member States; as such lending converts direct exchange rate exposure of the banking system into credit risk and exposes the economy to significant macro-financial risks. One year after, the Hungarian Government relieved families from Swiss franc-denominated mortgages on the expense of the foreign banks that sold them.

In 2011, following a sharp increase in the exchange rate between the Hungarian Forint and the Swiss Franc, the Hungarian Government relieved families of Swiss franc-denominated mortgages with a repayment-scheme at the expense of foreign banks. Poland, Croatia and Romania are considering similar steps to cope with the rising franc. Other States did not respond to the need of their citizens and did not take similar measures. In Spain, for example, thousands of families continue to be evicted and are falling into poverty. Even though, the terms of their loan contracts (that were declared unfair) still continue to cause their monthly mortgage costs to rise.

Árpád Kásler, Hajnalka Káslerné Rábai v. OTP Jelzálogbank Zrt (Hungary)
Case no. C 26/13 (Court of Justice of the European Union)

Decided on 30 April 2014

Relevant Articles: Article 4(2) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

The request has been made in proceedings between Mr Kásler and Ms Káslerné Rábai ('the borrowers') and OTP Jelzálogbank Zrt ('Jelzálogbank') concerning the allegedly unfair contractual term relating to the exchange rate applicable to repayments of a loan denominated in a foreign currency.

In its judgment, the court of second instance held that Jelzálogbank did not provide any mercantile financial services relating to the buying or selling of foreign currency, so that it is not entitled to apply an exchange rate for the repayment of the loan different from that used on the date of advance of the sum borrowed, and no payment can be required for a notional provision of services. That court also held that Clause III/2 was not drafted in plain intelligible language because it was impossible to determine the basis for the difference in the method of calculating the amount of the sum lent and the amount of the loan repayment instalments.

On those grounds, the Court (Fourth Chamber) decided that Article 4(2) of Directive 93/13 must be interpreted as meaning that, the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.

Monika Kušionová v. SMART Capital a.s. (Slovenia)
Case no. C-34/13 (Court of Justice of the European Union)

Decided on 10 September 2014

Relevant Articles: Article 7 of the Charter of Fundamental Rights of the European Union (the right to respect for his or her private and family life, home and communications) and article 38 (consumer protection)

On 26 February 2009, Mrs Kušionová concluded a consumer credit agreement with SMART Capital for an amount of EUR 10 000. The loan was secured by a charge on the family home in which the applicant in the main proceedings lives. The latter brought an action for annulment of the credit agreement and the charge agreement against SMART Capital, claiming that the contractual terms binding her to that undertaking were unfair. That court of first instance partially annulled the credit agreement, holding that some of the contractual terms were unfair. The charge agreement, for its part, was annulled in its entirety.

Both parties brought an appeal against that judgment before the Krajský súd v Prešove (Regional Court, Prešov). Since the contractual terms which the referring court is required to review may be classified as unfair for the purposes of Directive 93/13 and since one of those terms is of statutory origin, that court considers that the outcome of the dispute before it depends on the interpretation of EU law.

The court ruled that Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the recovery of a debt that is based on potentially unfair contractual terms by the extrajudicial enforcement of a charge on immovable property provided as security by the consumer, in so far as that legislation does not make it excessively difficult or impossible in practice to protect the rights conferred on consumers by that directive, which is a matter for the national court to determine.

RIGHT TO FAMILY LIFE AND FREEDOM FROM TORTURE

Peoples' home can be considered the foundation for other activities and rights, such as caring for one's health, having a family life or even looking for a job. Access to housing can be therefore considered as being a precondition for the exercise of most other fundamental rights.

Without a home, carrying out a normal family life is a challenge. Perpetuating homelessness goes against the right to respect for people's family life and/or home (article 8 of the European Convention on Human Rights). Pushing someone into homelessness can even be considered a violation of the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment, as it deprives individuals of safe, legal, and dignified opportunities to perform necessary human functions such as eating or sleeping. In this section we compile some interesting decisions from the European Court of Human Rights in 2014.

Mohamed RAJI and others against Spain
Application no. 3537/13 (European Court of Human Rights)

Decided on 16 December 2014

Relevant Articles: Article 3 of the European Convention on Human Rights (against torture, and «inhuman or degrading treatment or punishment») and Article 8 of the Convention (right to respect for their family life and/or their home)

On 14 February 2013 the Mohamed Raji and his family lodged an application with the European Court of Human Rights. The applicants complained under Article 3 of the Convention that their eviction amounted to inhuman or degrading treatment. They argued that this was particularly true in relation to their eight-year-old daughter. Invoking Article 8 of the Convention the applicants complained that their eviction from their home after decades of tolerance on the part of the administration towards the construction of houses in the area would amount to a violation of their home and private and family life.

Case of Pelipenko v. Russia

Application no. 69037/10 (European Court of Human Rights)

Decided on 16 January 2014

Relevant Articles: Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 8 of the European Convention on Human Rights (right to family life and/or home).

This is another interesting case, where leading someone to homelessness was interpreted as the cause of several problems Pelipenko's family had to suffer, such as great amounts of stress and losing all their belongings. The Court found that the applicants' eviction from their home, which was effected in the absence of any legal basis and in violation of the final court judgment, ran counter to the guarantees afforded by Article 8 of the Convention.

The applicants claimed the current market price of a flat of the same size and in the same district of Anapa which they had occupied prior to their eviction. The applicants further claimed the cost of construction, maintenance and repair works carried out by them in their former accommodation upon the authorisation of the former owner of the house and the housing maintenance authorities. Finally, the applicants claimed the aggregated costs of stress relief medication and personal belongings damaged or lost during the applicants' eviction.

Case of Buceaş and Buciaș v. Romania

Application no. 32185/04 (European Court of Human Rights)

Decided on 1 July 2014

Relevant Articles: Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Every natural or legal person is entitled to the peaceful enjoyment of his possessions….)

Through this decision, the European Court of Human Rights underlined the need to bring the right to the peaceful enjoyment of his possessions to the fore, annulling and unlawful sale. Mr. Buceaş (the applicants' father) lost his house: As he did not reimburse the loan on the appointed day, his immovable property was sold at auction. The applicants alleged under Article 1 of Protocol No. 1 to the Convention that they had been deprived of their possessions with no legitimate aim by the arbitrary dismissal of their action for the annulment of the sale of their immovable property. The house was sold again, and the applicants alleged that the sale of their immovable property to a third party was an act of bad faith: Despite the fact that they had been aware of the proceedings by which the applicants' father had contested the lawfulness of the sale of his property at public auction, they had sold the estate in order to make its return to its initial owners impossible in case of a favourable decision. The court found a violation of Article 1 of Protocol No. 1 finally decided that the respondent State is to pay Euro 73.300 to the applicants in respect to pecuniary and non-pecuniary damage.

Case of Ghasabyan And Others v. Armenia
Application no. 23566/05 (European Court of Human Rights)

Decided on 13 November 2014

Relevant Articles: Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

In this case, the European Court of Human Rights accepted that the eviction of Ghasabayan and his family was not revocable, as it had been carried out in the public interest. Nevertheless it could not be considered legal, as it was not subject to the conditions provided for by law and by the general principles of international law. On 1 August 2002 the Armenian Government adopted Decree no. 1151-N, approving the expropriation zones of the real estate situated within the administrative boundaries of the Kentron District of Yerevan to be taken for State needs for town-planning purposes. The Armenian State only compensated economically the owner of the flat, even though all the other family members were also evicted from their home.

On 15 March 2005 the owner of the flat and the family living with him lodged an appeal. The family of the owner alleged that they unsuccessfully sought to be recognised as parties to the proceedings, despite the fact that they enjoyed a right of use in respect of the flat in question and the fact that their eviction was ordered by the District Court.

FURTHER DISCUSSIONS

As you could see reading this Newsletter, the *Dano vs Germany* case will be an issue of discussion among scholars and lawyers, as it poses a contradiction with the European Committee for Social Rights. The European Court of Justice denied the access to social benefits, including the contribution to accommodation and heating costs.

On the other side -looking at more positive decisions- the use of 'local connection' criteria as further restricting access to community shelter in The Netherlands has been condemned by the European Committee of Social Rights. The Committee also found that The Netherlands disproportionately denies the right to emergency shelters assistance to migrants (both on regular and irregular situations) by using restrictive criteria to target 'vulnerable groups', where in fact, all people in the jurisdiction of the state have rights to emergency shelter (FEANTSA press release 10/11/2014 "Landmark Decision Condemns Dutch Government for Violations on Housing Rights") .

Elisabeta Dano, Florin Dano v. Jobcenter Leipzig (Germany)
Case no. 333/13 (Court of Justice of the European Union)

Decided on 11 November 2014

Relevant Articles: Regulation (EC) No 883/2004 — Directive 2004/38/EC — Right of residence for more than three months — Articles 7(1)(b) and 24 — Condition requiring sufficient resources

Link to HRW data base here

European Federation of National Organisations working with the Homeless (FEANTSA) v The Netherlands
Collective Complaint no. 86/2012 (European Committee for Social Rights)

Decision on the merits adopted on 2 July 2014 (published on 10 November 2014)

Relevant Articles: Article 31.2 (right to housing – "to prevent and reduce homelessness with a view to its gradual elimination"), Article 30 (right to protection against poverty and social exclusion) and Article 13.1 and 13.4 (right to social and medical assistance), Article 19.4(c) (right of migrant workers and their families to protection and assistance) of the Revised European Social Charter.

CONFERENCE

Housing Rights: the impact of strategic litigation and advocacy

Comparing Europe and North America

Thursday 18 june 2015

9:00 to 17:00

École Nationale Supérieure d'Architecture
de Paris-Belleville
60 boulevard de la Villette – 75019 PARIS

Metro line 2 : Belleville or Colonel Fabien

HOUSING RIGHTS WATCH

Fondation Abbé Pierre pour le logement des défavorisés

Program

9:00 **Registration**

9:15 **Welcome** from IAN BROSSAT, Deputy Mayor of Paris, responsible for housing and emergency shelter

9:30 **Does challenging measures that criminalise homelessness work? What lessons from the USA and Canada for lawyers and NGOs in Europe?**
> STEPHEN GAETZ, Canadian Observatory on Homelessness, York University, Toronto, Canada
> MELANIE REDMAN, Coalition to End Youth Homelessness, Director of National Initiatives - Eva's Initiaitives, Toronto, Canada
> MARIA FOSCARINIS, National Law Center on Homelessness and Poverty, Washington, USA

Can strategic litigation really make a difference? The Impact of Collective Complaint n°86/2012 against The Netherlands
> PIM FISCHER & JORIS SPRAKEL, Fischer Associates, The Netherlands

Popularity contest? Why do some lawyers and judges like certain European Convention of Human Rights articles more than others? Examples from France and England
> ALAIN COUDERC, Lawyer, Lyon Bar, Lyon, France
> ADRIAN BERRY, Barrister, Garden Court Chambers, London, England

12:30 **Lunch**

14:00-17:00 **The Holy Grail: Searching for a way to bring the right to housing into the scope of EU law...**
> NICOLAS BERNARD, Saint-Louis University, Brussels, Belgium

The European Social Charter: case law on housing rights arising from the decisions of the European Committee of Social Rights
> REGIS BRILLAT, Executive Secretary, European Committee of Social Rights, Council of Europe, Strasbourg, France

Proposals for holding governments to account and turning housing rights into real solutions for homeless people
> MARC UHRY, Abbé Pierre Foundation, France
> LEILANI FARHA, UN Special Rapporteur on the Right to Adequate Housing, United Nations

> REGISTER ONLINE HERE

Contact : Samara JONES / samara.jones@feantsa.org

In French and English with simultaneous translation

This publication is supported by the European Union Programme for Employment and Social Solidarity - PROGRESS (2007-2013).

This programme is implemented by the European Commission. It was established to financially support the implementation of the objectives of the European Union in the employment, social affairs and equal opportunities area, and thereby contribute to the achievement of the Europe 2020 Strategy goals in these fields.
The seven-year Programme targets all stakeholders who can help shape the development of appropriate and effective employment and social legislation and policies, across the EU-27, EFTA-EEA and EU candidate and pre-candidate countries.

For more information see: http://ec.europa.eu/progress

The information contained in this publication does not necessarily reflect the position or opinion of the European Commission

FEANTSA works with the European Commission, the contracting authority for the four-year partnership agreement under which this publication has received funding.

Housing Rights Watch is supported by Fondation Abbé Pierre.

This publication has been printed on 100% recycled paper stock using bio vegetable based inks. Design: www.beelzepub.com