Do unlawfully residing migrants have a right to housing under the European Social Charter?

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List of Abbreviations

ECHR – European Convention on Human Rights
ECSR – European Committee of Social Rights
ESC – European Social Charter
ICESCR – International Covenant on Economic, Social and Cultural Rights
RESC – Revised European Social Charter
UDHR – Universal Declaration of Human Rights
1. Introduction

The European Social Charter (the Charter),\(^1\) in its original form of 1961 (ESC),\(^2\) and in its revised form of 1996 (RESC),\(^3\) contains a comprehensive list of social and economic rights and represents the socio-economic complement to the European Convention on Human Rights (ECHR; the Convention).\(^4\) One of the rights protected by the Charter is the right to housing - the right which has been frequently identified as one of the minimum social rights which should be granted to everyone due to its significant importance for the protection of human dignity and the enjoyment of other civil, political, economic and social rights.\(^5\) In addition, the right to housing plays a crucial role in securing social inclusion and in abolishing socio-economic inequalities.\(^6\) The right to housing is guaranteed by various international and regional instruments, mostly as a part of other rights.\(^7\) Within the structure of the Charter, there are

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7. With regard to the international instruments, see, inter alia: firstly, the Universal Declaration of Human Rights of 1948 (UDHR). Under the UDHR, the right to housing is guaranteed as a part of the right to the adequate standard of living contained in Article 25§1. However, the UDHR is not a legally binding document. See http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

Secondly, similarly as the UDHR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by all of the Council of Europe’s member states with the exception of Andorra (see https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty), protects the right to housing as a part of the right to the adequate standard of living under Article 11§1 which reads as follows: “The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent.” See http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx.
several articles containing limited rights to housing, however, a direct general provision on the right to housing is included only in the RESC. In contrast to the universal language in which the Charter is framed, its limited personal scope restricts the access to the enjoyment of the rights protected by the Charter to certain groups of persons. The main supervisory body of the Charter, the European Committee of Social Rights (ECSR; the Committee), which assesses, from a legal standpoint, whether the Contracting Parties’ laws, regulations and practices are in compliance with the Charter, has tried to interpret this restriction in its case-law in an inclusive way with the goal of establishing the minimum floor of basic social rights applicable to all.

In order to answer whether the irregular migrants are one of the groups of persons entitled to the right to housing under the European Social Charter, it is thus crucial to look at the

Both documents are, in principle, applicable to all persons regardless of nationality or legal status. See Ryszard Cholewinski, Study on obstacles to effective access of irregular migrants to minimum social rights (1st edn, Council of Europe Publishing 2005) p.31.

With regard to the regional instruments, see, inter alia, ECHR. According to Article 1 (obligation to respect human rights) of the Convention, the rights and freedoms of the Convention are applicable to everyone within the jurisdiction of the High Contracting Parties. While the main focus of the Convention is protection of civil and political rights, in addition, the Convention regulates many social rights (see Matti Mikkola (2010) p.82). The right to housing is protected indirectly via Articles 2 (the right to life), 3 (prohibition of torture), and 8 (the right to respect for private and family life) of the Convention. However, the European Court of Human Rights, the judicial body responsible for guaranteeing the rights enshrined in the Convention, has to a large extent refrained from interpreting the provisions of the Convention in a way that would set positive obligations on the states in respect of housing situation (see Matti Mikkola (2010) p.341).

Article 16 of both the ESC and the RESC addresses housing in the context of securing the right of families to social, legal and economic protection; Article 19 §4c of both the ESC and RESC grants an equal treatment of migrant workers and their families in respect of accommodation; moreover, the RESC ensures limited rights to housing in respect of the persons with disabilities (Article 15 of the RESC) and the elderly persons (Article 23 of the RESC); Article 30 of the RESC refers to effective access to housing as a part of the right to protection against poverty and social exclusion. Other articles of the Charter not explicitly referring to housing, but nevertheless with relevance for the protection of the right to housing of irregular migrants will be discussed further on in this essay.

See Article 31 of the RESC. For the purpose of this essay, the right(s) to housing is (are) to be understood in the broadest sense (see footnote 8) and not in the strict sense of the right to housing within the scope of Article 31 of the RESC.

See Appendix to the ESC, and Appendix to the RESC.


See the case-law of the European Social Charter, accessible at: http://hudoc.esc.coe.int/eng#.

As to terminology, the Rapporteur Ed van Thijn of the Council of Europe’s Committee on Migration, Refugees and Population noted in his report that the term “irregular migrant” is preferred to other terms such as “illegal migrant” or migrant “without papers” due to its neutral connotation. Furthermore, “/i/t is wide enough to cover all those in an irregular situation, whether tolerated or not tolerated by the authorities, whether they entered the country legally or illegally, whether they work or do not work, whether they are independent or dependent (children, aged), whether they are failed asylum seekers or persons who have failed to apply for asylum”. See Council of Europe: Parliamentary Assembly, Human Rights of Irregular Migrants, 4 May 2004, para 14 <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11204&Language=EN> accessed 30 May 2015. The term “irregular migrant” thus denotes a broad category of persons, encompassing also “unlawfully residing migrants” and for the purpose of this essay, the terms are used interchangeably. Moreover, when referring to the
formulation and the interpretation of the personal scope of the Charter. Therefore, this essay will first examine the textual interpretation of the personal scope of the Charter. Secondly, it will review the approach to the interpretation of the personal scope of the Charter as adopted and developed by the ECSR in its case-law, with a specific focus on the case-law concerning the right to housing of irregular migrants. Lastly, the findings will be presented in a short conclusion.

2. Personal Scope of the ESC and the RESC

The personal scope of the ESC and the RESC is defined by an identical provision in both charters in paragraph one of the Appendix which stipulates that:

Without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the 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.

If we adopt a textual interpretation of this provision, the rights contained in the Charter shall be guaranteed on an equal footing only to foreigners who satisfy the following two provisions:

1. they are nationals of one of the Contracting Parties to the ESC or to the RESC
2. a. they are lawfully resident (i.e., they reside and are authorised to reside in the territory of the state); and/or
2. b. they work regularly (i.e., they work and are authorised to work in the territory of the state).\textsuperscript{14}

\textsuperscript{14} Matti Mikkola, \textit{Social human rights of Europe} (1st edn, Legisactio 2010) p.72.
By definition, unlawfully residing migrants are not authorised to reside in the territory of the state, and, in consequence, based on the literal understanding of the wording of the Appendix, fall outside the personal scope of protection of the Charter. It thus follows that unlawfully residing migrants are not entitled to the right(s) to housing guaranteed by the ESC and the RESC.

However, the ECSR’s approach to the interpretation of the personal scope of the Charter has differed from the one described and is examined below.

3. Interpretation of the Personal Scope of the ESC and the RESC by the ECSR

The ECSR monitors the implementation of the Charter on the basis of two mechanisms – namely, on the basis of the reporting system and on the basis of the collective complaints procedure, and the findings of the ECSR are then issued in “conclusions” and “decisions on the merits”, respectively.15 Thus, in its supervisory function, the ECSR has created a wide body of the Charter-related case-law and has established itself as the “maximum interpretative organ of the ESC, its protocols and the RESC”.16

In its Statement of Interpretation in its Conclusions 2004, the ECSR recalled that the restriction of the personal scope of the ESC and the RESC in the Appendix is not absolute; rather, State

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15 While the RESC “improves, expands and deepens” the protection of the rights contained in the original Charter, the monitoring mechanism remains the same for both treaties. See Susana Sanz Caballero (2009) p. 157; 161. Under the reporting system, the States Parties are required to submit a report to the ECSR concerning the application of the rights of the Charter they have accepted. See Urfan Khaliq and Robin Churchill (2009) p.430. Unlike the reporting system, which applies to all the States Parties, the acceptance to be bound by the collective complaints system is optional. See Robin Churchill and Urfan Khaliq (2004) p.423. Under this system, certain types of organisations can lodge a collective complaint with the ECSR concerning non-compliance of a state’s law or practice with one of the provisions of the Charter; violations of individual’s rights cannot be considered unless it can be shown that such alleged violation is an example of a general pattern of non-compliance affecting others in the same position in the same way as the individual concerned. See Robin Churchill and Urfan Khaliq (2004) p.424; 431.

Parties can extend the Charter’s application to persons other than those covered by the Appendix.\textsuperscript{17} The Committee further stated that the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties - in particular the European Convention of Human Rights - or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.\textsuperscript{18}

However, according to the ECSR, “these obligations do not in principle fall within the ambit of its supervisory functions”, but that does not rule out “that the implementation of certain provisions of the Charter could in specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter.”\textsuperscript{19}

Thus, based on the Appendix itself, the ECSR allows for the extension of the Charter’s personal scope with regard to “certain provisions” and in “specific situations” to third country nationals. In particular, such interpretation is justified by reference to the scope of other human rights conventions ratified by the States Parties and the States Parties’ domestic rules.

The Committee’s approach to the interpretation of the Charter has been further developed in the course of considering collective complaints,\textsuperscript{20} and it is the most evidently expressed in the International Federation of Human Rights Leagues (FIDH) against France.\textsuperscript{21} In this collective complaint, the ECSR adopts a teleological interpretation of the Charter on the basis of the 1969

\textsuperscript{18} ibid.
\textsuperscript{19} ibid.
Vienna Convention on the Law of Treaties, the latter requiring that “the ordinary meaning” is to be given “to the terms of the treaty in their context and in the light of its object and purpose”. Moreover, the Committee emphasises that the Charter is envisaged as a “living instrument” inspired by and dedicated to the values of “dignity, autonomy, equality and solidarity” and therefore, it is important to view the rights enshrined in the Charter as complementary to those guaranteed by the ECHR, especially in the light of the recognition that all human rights are “universal, indivisible, interdependent and interrelated”. It follows that the interpretation of the Charter must give “life and meaning to fundamental social rights” and in consequence, restrictions on the rights of the Charter must be read restrictively, so as to “preserve intact the essence of the right” and to achieve “the overall purpose of the Charter”.

The ECSR applied this general approach in FIDH v. France in the following way. The case concerned the French legislation, denying medical assistance to illegal migrants who were unable to establish a minimum “three months’ continuous residence”, which allegedly breached the right to medical assistance as laid down in Article 13 of the RESC (the right to social and medical assistance) and, with regard to children, in Article 17 of the RESC (the right of children and young persons to social, legal and economic protection). The Committee held that “legislation

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23 *FIDH v. France*, para 27.
26 In this case, the provisions of Article 13 §§ 1 and 4 of the RESC were considered:

“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 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.”
27 Article 17 of the RESC:

“With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:
1. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
2. to protect children and young persons against negligence, violence or exploitation;
3. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family’s support;
or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”28 In reaching this conclusion, the Committee states that the restriction of the personal scope of the Charter impacts different social rights in different ways, but in any case, this restriction needs to be interpreted narrowly so as to preserve the primary purpose of the Charter. In the present case, the ECSR explains that the restriction of the personal scope of the right to medical assistance affects “a right of fundamental importance” which is closely connected to “the right to life itself” and to human dignity, and as such, it has particularly severe effects upon children.29 The Committee moreover recognises “health care” as a “prerequisite for the preservation of human dignity”, and describes the latter as a “fundamental value and indeed the core of positive European human rights law” under both the Charter and the Convention.30

Despite (implicitly) recognising the extension of the personal scope of Articles 13 and 17 of the RESC to illegal migrants, on the facts of the case, the Committee, by a very narrow majority (by 7 to 6 votes), found a violation of the right to medical assistance only in the case of children of illegal migrants (i.e., violation of Article 17 of the RESC),31 but not in the case of adult illegal migrants (this was decided by 9 votes to 4 votes).32

Nevertheless, by adopting a heavily teleologically- and human rights-oriented interpretation of the Charter,33 the Committee sent a clear message that restriction contained in the paragraph one of the Appendix could not lead to illegal migrants being excluded from the protection of the Charter when a fundamental right closely connected to human dignity was at stake. The ECSR has followed this approach in its case-law on the right to housing of irregular migrants to which we now turn.

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2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.”

28 FIDH v. France, para 32.
29 ibid, para 30.
30 ibid, para 31.
31 ibid, paras 36–37.
32 The Committee concluded that the restriction of the personal scope of Article 13§4 of the RESC did not violate the rights of the adult illegal migrants since they were not deprived of the entitlement to medical assistance altogether. See FIDH v. France, para 34.
3.1 Irregular Migrants and the Right to Housing under the ESC and the RESC - the ECSR's Approach

3.1.1. Defence for Children International v. the Netherlands³⁴

In DCI v. the Netherlands, the complainant organisation alleged that Dutch legislation and practice, which denied access to adequate housing to children unlawfully present in the territory of the state, constituted a violation of a number of articles of the RESC, most importantly, a violation of Article 31 (the right to housing)³⁵ and Article 17 (the right of children and young persons to social, legal and economic protection) taken alone or in conjunction with Article E (non-discrimination)³⁶ of the same Charter.³⁷

With regard to the general interpretation of the personal scope of the Charter, the Committee reiterates that the Charter as a “human rights protection mechanism” aims to be an effective guarantor of the rights it contains, thus producing practical, rather than theoretical, results.³⁸ Consequently, the importance of interpreting the Charter “in the light of current conditions”,³⁹ and “in the light of relevant international instruments”⁴⁰ is being called for, pointing at the

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³⁵ Article 31 of the RESC: “With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.”

³⁶ Article E of the RESC: “The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.”

³⁷ DCI v. the Netherlands, para 1.


dynamic nature of the Charter as a “living instrument”, the meaning of which may evolve over time. Moreover, the Charter needs to be interpreted “in harmony with other rules of international law of which it forms part”. Repeating its position from FIDH v. France on interpreting restrictions of the rights in a restrictive way, the ECSR adds another condition - namely, restrictions of the rights “should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake.”

Applying this general approach to DCI v. the Netherlands, the Committee constructs its arguments in the present case in the light of the United Nations Convention on the Rights of the Child (CRC). The Committee sees itself “entirely justified” in doing so due to the fact that the CRC is “one of the most ratified treaties” in the world and it has been ratified by all member states of the Council of Europe. Of particular importance for the ECSR’s argumentation in DCI v. the Netherlands are Article 3 of the CRC and Article 27 of the CRC, and Committee explicitly considers itself bound by “the best interests of the child principle” as stipulated by the Committee on the Rights of the Child in its General Comment number 5.

41 See FIDH v. France, para 27.
43 DCI v. the Netherlands, para 35.
44 ibid, para 37.
46 Article 3 of the CRC:
1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
(...)
47 Article 27 of the CRC:
1. States Parties recognise the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions necessary for the child’s development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.
Unlike in FIDH v. France, the Committee acknowledges the right of the states under international law to “control the entry, residence and expulsion” of foreigners from their territories,
 however, this right nevertheless needs to be restricted by the states’ “human rights obligations”.
 Consequently, unlawfully present children must not be denied “basic care” or must not live in “intolerable conditions”.

In DCI v. the Netherlands, the Committee was of opinion that excluding unlawfully residing children from the personal scope of Article 31§1of the RESC (the right to adequate housing) would not automatically lead them into being denied basic care or into living life in intolerable conditions. What is more, obliging a State Party to provide unlawfully present children with lasting housing as required by Article 31§1of the RESC
 would facilitate a prolongation of the unlawful situation, a circumstance contrary to States’ immigration policy objectives.
 As a result, the Committee refused to extend the personal scope of Article 31§1 of the RESC to unlawfully present children.

On the other hand, the Committee concluded that unlawfully present children do fall under the scope of Article 31§2 of the RESC (prevention and reduction of homelessness - the right to shelter).
 In reaching this conclusion, reasoning along the same lines as with respect to the right to medical assistance in FIDH v. France, the Committee states that the “right to shelter” is closely connected to “the right of life” and is thus essential for respect of “human dignity”. Moreover, referring to their vulnerability, the ECSR states it is of particular importance that the

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49 DCI v. the Netherlands, para 41.
50 ibid, para 44.
51 ibid.
52 Under Article 31§ of the RESC “temporary supply of shelter cannot be considered as adequate and individuals should be provided with adequate housing within a reasonable period of time”. See para 35 of European Roma Rights Centre (ERRC) v. Italy (decision on the merits), Collective Complaint No. 27/2004, Council of Europe: European Committee of Social Rights, 7 December 2005 <https://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC27Merits_en.pdf> accessed 30 May 2015. Accordingly, denial of adequate housing does not equal denial of temporary shelter which could in turn result in denial of basic care or in intolerable living conditions.
53 DCI v. the Netherlands, para 44.
54 ibid, para 45.
right to shelter is being granted to children, irrespective of their residence status, since they would be left outrightly helpless otherwise.\textsuperscript{56}

Regarding the applicability of Article 17 of the RESC to unlawfully present children, the Committee repeats its decision from FIDH v. France, namely, that children come within the scope of this article regardless of their residence status.\textsuperscript{57} In DCI v the Netherlands, the ECSR recognises the provision of shelter for children and young persons under Article 17§1.c as identical to the provision contained in Article 31§2 of the RESC.\textsuperscript{58} Consequently, on the facts of the case, since there was a violation of Article 31§2 of the RESC, the Committee concluded there was also a violation of Article 17§1.c of the RESC.

3.1.2. Defence for Children International (DCI) v. Belgium\textsuperscript{59}

In another collective complaint concerning the right to housing of unlawfully present children, DCI argued that in Belgium, unaccompanied foreign minors unlawfully present or seeking asylum and illegally resident accompanied foreign minors were denied access to accommodation in reception centres in practice, despite being entitled to it by the Belgian law and that such situation allegedly resulted in a breach of several articles of the RESC.\textsuperscript{60}

With regard to the general interpretation of the personal scope of the Charter, in addition to explanations contained in earlier case-law, the Committee singles out \textit{jus cogens} (encompassing, \textit{inter alia}, the right to life and physical integrity) as the most important part of “applicable rules of international law” which takes “precedence over all other international norms and from which no derogation is permitted”.\textsuperscript{61} Moreover, the ECSR explicitly refers to the UDHR as providing

\begin{footnotesize}
\begin{enumerate}
\item[56] DCI v. the Netherlands, para 47.
\item[57] ibid, para 66.
\item[58] ibid, para 71.
\item[60] Allegedly, the children in question were denied the right to “full development, social, health, legal and economic protection, social and medical assistance and protection against poverty”, in breach of articles 7§10, 11, 13, 16, 17 and 30, of the RESC read alone or in conjunction with Article E. See DCI v. Belgium, para 1.
\end{enumerate}
\end{footnotesize}
the level of protection that the RESC aims to achieve in complementarity with the ECHR at the European level.\textsuperscript{62}

As in DCI v. the Netherlands, the Committee in the present collective complaint draws upon the CRC for the same reasons as in the former collective complaint.\textsuperscript{63} Importantly, the ECSR makes it clearer than in previous case-law that the extension of the personal scope of the RESC’s provisions to persons not literally included in the personal scope of the Charter as defined in the Appendix is “entirely exceptional”,\textsuperscript{64} and that such persons can be covered solely by those provisions [of the Charter] whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons concerned by the provision in question from serious threats to the enjoyment of those rights.\textsuperscript{65}

Specifically acknowledging “vulnerability” and “limited authority” of unlawfully present children, the Committee states that they are particularly at risk of having their fundamental rights violated.

Children cannot be blamed for their place of residence and thus the irregularity of their status must not deprive them of “the most basic protection” by the state.\textsuperscript{66}

In the light of the above observations and building upon its previous case-law, the Committee concludes that unlawfully present children fall under the scope of, inter alia, Article 17\textsuperscript{67} and Article 16\textsuperscript{68} of the RESC\textsuperscript{69} which both entitle them to the right to housing (more specifically, to

\textsuperscript{62} DCI v. Belgium, para 30.
\textsuperscript{63} ibid, para 31.
\textsuperscript{64} ibid, para 35.
\textsuperscript{65} ibid, para 36.
\textsuperscript{66} ibid, para 37.
\textsuperscript{67} ibid, para 39.
\textsuperscript{68} ibid, para 136.
\textsuperscript{69} Article 16 of the RESC: “With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.”

With regard to Article 16 of the RESC, the ECSR states that in so far as the provisions of this article concern the right of families to a decent housing and their right not to be deprived of shelter, foreign families unlawfully present in the country cannot be excluded from the personal scope of Article 16 of the RESC. See DCI v. Belgium, para 136.
accommodation in reception centres in this particular case). In contrast, the unlawfully present children do not fall within the scope of Article 30 (the right to protection against poverty and social exclusion) of the RESC since its provisions are not “closely related to the requirement to secure the most fundamental human rights”.

3.1.3. European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands

The right to housing of adult irregular migrants (as opposed to children) under the RESC was addressed for the first time in the collective complaint FEANTSA v. the Netherlands within a broader category of homeless persons, either regularly or irregularly present. Allegedly, the legislation and practice concerning the housing of this category of persons was in violation of several articles of the RESC.

Based on all the previous observations stated in the above-discussed cases as to the interpretation of the personal scope of the Charter, the Committee in FEANTSA v. the Netherlands reasons in the following way. Firstly, it recalls that Article 31§2 of the RESC

70 Article 30 (the right to protection against poverty and social exclusion) of the RESC contains a limited right to housing and it reads as follows:

“With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

a. to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

b. to review these measures with a view to their adaptation if necessary.”

71 DCI v. Belgium, para 145.


73 ibid, para 18.

74 Allegedly, the relevant legislation and practice in the Netherlands concerning the housing of the homeless violated Article 13, Article 16, Article 17, Article 19, Article 30 and Article 31 of the RESC, taken either alone or together with Article E (see FEANTSA v. the Netherlands, para 2). In FEANTSA v. the Netherlands, the Committee reiterates that “Article 16 and 31, though different in personal and material scope, partially overlap with respect to several aspects of the right to housing (see para 48). Since there was a large overlap between the allegations made under Article 16 and Article 31, the Committee considered those allegations jointly under Article 31 of the RESC. Similarly, as obligations of provision of shelter under Article 17 of the RESC are identical in substance to those under Article 31§2 and as questions raised in FEANTSA v. the Netherlands under these two articles overlapped in a significant manner, there was no need for a separate examination of the complaint with regard to Article 17 of the RESC (see paras 50–51).
“applies to persons present in an irregular manner, including children, for as long as they are within the jurisdiction of the state”. With regard to the right to social assistance under Article 13§4 of the RESC, and, specifically in this case, to emergency accommodation, the Committee reiterates that “emergency social assistance should be provided under the said provision to all foreign nationals without exception” since this right is vital for respect of human dignity. No condition regarding the length of the presence on the territory of the state party can be required for the enjoyment of emergency assistance, including, inter alia, accommodation, under Article 13§4 of the RESC. However, the individuals’ need must be “sufficiently urgent” and “serious”. While acknowledging the right of the state to pursue their immigration policy objectives, the Committee states that denial of emergency shelter under Article 13 of the RESC to migrants in an irregular situation who are without adequate resources restricts their rights in this case in a “disproportionate manner”. Moreover, the Committee reiterates that migrants in an irregular situation do not prima facie fall within the scope of Article 19§4c (the right of migrants to accommodation) of the RESC nor within the scope of Article 30 of the RESC.

In sum, in FEANTSA v. the Netherlands, adult irregular migrants were entitled to the right to housing under Articles 31§2 and 13§4 of the RESC.

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77 FEANTSA v. the Netherlands, para 185.
78 ibid, para 171.
80 ibid, para 180.
81 ibid, para 183.
83 ibid, para 211, referring to para 145–147 of DCI v. Belgium.
3.1.4. Conference of European Churches (CEC) v. the Netherlands\textsuperscript{84}

Last but not least, the right to housing with exclusive focus on adult irregular migrants was addressed in the collective complaint CEC v. the Netherlands, where the relevant legislation and practice denying those persons the right to necessary food, water, clothing and shelter allegedly breached Article 13§4 and Article 31§2 of the RESC.\textsuperscript{85}

In addition to its previous comments, the Committee adds that as far as harmonious interpretation of the Charter with other rules of international law is concerned, Article H of the RESC shall be taken into account.\textsuperscript{86} Moreover, importantly, although Article 11§1 of the ICESCR has been frequently inserted in the collective complaints concerning the right to housing under the section on the relevant international standards,\textsuperscript{87} in CEC v. the Netherlands, the ECSR explicitly refers to the ICESCR in its assessment, stating that the ICESCR as an international instrument guarantees “an adequate standard of living, that is food, clothing and housing” to everyone, regardless of the regularity of their residence.\textsuperscript{88}

The Committee concludes that since necessary food, water, shelter and clothing are “closely linked to the realisation of the most fundamental rights”, as well as to “human dignity”,\textsuperscript{89} Article 13§4 of the RESC applies to migrants in an irregular situation.\textsuperscript{90} Similarly, building upon its previous case-law (in particular, on DCI v. the Netherlands), the Committee reaches a

\textsuperscript{84} Conference of European Churches (CEC) v. the Netherlands (decision on the merits), Collective Complaint No. 90/2013, Council of Europe: European Committee of Social Rights, 1 July 2014
\textsuperscript{85} CEC v. the Netherlands, para 2.
\textsuperscript{86} ibid, para 69.
\textsuperscript{87} Article H (relations between Charter and domestic law or international agreements) of the RESC:
“The provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected.”
\textsuperscript{88} See DCI v. the Netherlands, para18; FEANTSA v. the Netherlands, para 30.
\textsuperscript{89} CEC v. the Netherlands, para 113. In addition, great importance was attached to the General Comment No. 4 (The right to adequate housing) and the General Comment No. 14 (The right to highest attainable standard of health; according to this comment, the right to access to basic shelter is one of the non-derogable core obligations under the ICESCR) of the United Nations Committee on Economic, Social and Cultural Rights. See CEC v. the Netherlands, paras 37–38; 114.
\textsuperscript{90} CEC v. the Netherlands, para 74.
\textsuperscript{90} ibid, para 75.
conclusion that the right to shelter under Article 31§2 of the RESC must apply also to adult migrants in an irregular situation, “even when they are requested to leave the country”.\textsuperscript{91}

In sum, in CEC v. the Netherlands, adult irregular migrants were entitled to the right to housing under Article 13§4 and Article 31§2 of the RESC, an outcome resembling the one in FEANTSA v. the Netherlands.

4. Conclusion

Despite the straight-forward wording of paragraph 1 of the Appendix to the ESC and the RESC which excludes unlawfully residing persons from the scope of the Charter’s protection, we may conclude that unlawfully residing migrants are entitled to the right to housing\textsuperscript{92} under certain provisions of the Charter and in specific situations. This result is the product of the ECSR’s strongly teleological and human-rights oriented approach to the interpretation of the Charter which has been adopted and applied in the Committee’s case-law and which was examined above. In striving to maintain the status of the Charter as the “living instrument” devoted to protection of “dignity” which the Charter aims to be, the Committee has looked beyond the letter of the law. In this manner, by identifying the right to housing as being closely connected to and even as being essential for the protection of human dignity and other fundamental human rights (such as the right to life and the right to health, for example), the Committee has been willing to extend the personal scope of the Charter’s provisions concerning the right to housing to unlawfully residing migrants where the denial of those rights would be seriously detrimental to the unlawfully residing persons’ human dignity and to their enjoyment of other fundamental rights. However, the Committee has also held that such an extension is rather exceptional. Thus, there is still a long way to go before the rights of the Charter will be available “on an equal footing” to “all”.

\textsuperscript{91} ibid, para 144.
\textsuperscript{92} The right to housing is to be understood in the broadest sense. See footnote 9.
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¹ The responsibility for the information and views set out in the reports lies entirely with the author.
² The Panel of Experts that assessed the submissions to the competition were the following: Annalisa Ciampi (University of Verona), Francesco Costamagna (University of Turin), Donata Gottardi (University of Verona) Giovanni Guiglia (University of Verona), Lorenza Mola (University of Turin), Claudio Panzera (Mediterranea University of Reggio Calabria), Neliana Rodean (University of Verona), Evelyne Schmid (University of Bern), Gregor T. Chatton (Swiss Federal Supreme Court), Jaume Saura Estapa (University of Barcelona), Mercedes Fernández (Universidad Pontificia Comillas), Joaquín Eguren (Universidad Pontificia Comillas), Cristina Cortázár (Universidad Pontificia Comillas), José Luis Rey (Universidad Pontificia Comillas), Anders Narvestad (University of Oslo), Azin Tadjdini (University of Oslo), Johan Leiss (University of Oslo), Marit Frogner (Labour Court of Norway), Benedita Mac Cruzie (University of Minho) and Tiago Fidalgo De Freitas (University of Lisbon).