

the validity of those provisions in light of Article 78(1) TFEU and Article 18 of the EU Charter (paras 111-112).

## Comment

This case is a significant recognition that individuals denied refugee status on grounds which extend beyond those provided in the Geneva Convention continue to benefit from the rights eligible to them as refugees under that Convention, and remain entitled to the benefits of EU law applicable to all within the territory of a Member State. As such, the Court's opinion puts clear limits on the ability of Member States to utilise the expansive national security grounds provided in Directive 2011/95 as a basis for denying individuals the international protection they are entitled to.

While this interpretation of Article 14(4)-(6) was perhaps the only interpretation available to the Court which enabled the internal coherence of Directive 2011/95 and its compliance with the Geneva Convention (see Advocate General's Opinion paras 94-95), it can be seen as problematic in importing new form(s) of refugee status in the region. The Court's reasoning necessarily implies that, if they are to invoke Article 14(4)-(6) of Directive 2011/95, Member States must retain different refugee 'statuses', with different rights attached, dependant on whether the individual in question falls within the scope of Article 14(4)-(5) of the Directive and if they have a legal basis to remain in the country: one a 'full' European refugee status including all the rights set out in Directive 2011/95, the other a 'lesser' refugee status which entitles the individual to the core set of rights set out in the Geneva Convention, protection against expulsion and *refoulement*, the protections of the EU Charter, and any further rights accruing under the Geneva Convention if they have regular status in the host State. It may be questioned whether these different statuses will be practically implemented by States, given the individual case-by-case basis on which the extent of eligible rights must be determined.

This opinion is also notable in that the Court appears to take a more robust stance on the prohibition against *refoulement* for those denied a residence permit under Article 24(1) of Directive 2011/95. This may be contrasted with the position of the Court in C-373/13, *H. T. v Land Baden-Württemberg*, where although the Court considered *refoulement* under Article 24(1) unlikely to take place in practice, did leave open the possibility

that *refoulement* may be utilised as a measure of 'last resort' (para 71). As correctly noted by the Advocate General however, in slightly more forceful terms than that employed by the Court in this opinion, *refoulement* under Article 21(2) of the Directive 'now represents only a theoretical possibility for Member States as its practical implementation is now prohibited in the name of the protection of fundamental rights' (Advocate General's Opinion, para 61).

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# European Court of Human Rights

***Withdrawal of housing benefit due to irregular stay of co-resident is no discrimination, Yeshtla v the Netherlands, Application no. 37115/11, 15 January 2019***

## Introduction

The case concerned a complaint brought by a naturalised Dutch national of Ethiopian origin about the termination of her means-tested housing benefit (*huurtoeslag*). The authorities found that she was not entitled to such benefits for the years 2006 and 2007 because her son, who had been living with her since their reunion in 2002, did not have a residence permit. The Dutch courts' rejected all her appeals. She argued that the decision had breached her rights under Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination).

## The Facts

The applicant, Emabet Yeshtla, is a naturalised Dutch national of Ethiopian origin who was born in 1968. Ms Yeshtla fled Ethiopia for the Netherlands in 1996, and was granted Dutch nationality in 2001. Her son was reunited with her in 2002 when he was 16 years old. In 2005 and 2007 Ms Yeshtla, who was in receipt of general welfare benefits, applied for means-tested housing benefits (*huurtoeslag*). Both applications were accepted.

However, in 2009 the tax authorities who provide these benefits informed her that, under the relevant legislation, there was no entitlement to means-tested housing benefit in the case of a co-resident who was not lawfully staying in the Netherlands. According to the immigration authorities, her son had not been residing lawfully in the Netherlands in 2006 and 2007 and she had therefore been unjustly receiving housing benefit which she should repay. Her appeal against this decision was rejected by the domestic court. She filed a further appeal in 2010 with the Administrative Jurisdiction Division of the Council of State (the highest Dutch administrative court). She argued that the decision discriminated between lawfully resident tenants who had a co-resident with a residence permit and those who had co-residents without a valid residence permit. The Division found that there were no exceptional circumstances in her case to hold that the loss of her entitlement to housing benefits was disproportionate and thus contrary to Article 14 taken together with Article 8 of the European Convention.

### The Judgment

Before the ECtHR, relying on Article 8 (right to respect for private and family life), Ms Yeshtla complained about the termination of her housing benefit, arguing that a mother could not be expected to choose between evicting her son and losing such a tax credit. She also argued again that under Article 14 (prohibition of discrimination) taken together with Article 8 that the decision to terminate her housing benefit discriminates between lawfully resident tenants who had a co-resident with a residence permit and those who had co-residents without a valid residence permit. The Court noted that Ms Yeshtla's son had still been a minor when he had arrived in the Netherlands and had been reunited with her. Their relationship had therefore at the time constituted family life within the meaning of Article 8 of the European Convention.

However, the decision challenged by Ms Yeshtla had not determined her son's right to reside in the Netherlands. Nor had it aimed to end their cohabitation. Indeed, there was no indication that he had actually moved out. The decision had solely been taken on the basis of a statutory scheme set up to ensure proper enforcement of immigration controls and to prevent irregular aliens, like Ms Yeshtla's son at the time, from benefitting

indirectly from State-sponsored schemes intended for lawful residents with a modest income. In addition, Ms Yeshtla's general welfare benefits had not been affected. The Court therefore found that the withdrawal of Ms Yeshtla's means-tested housing benefit could not be regarded as an interference with her rights under Article 8 and rejected that part of the application as manifestly ill-founded.

Regarding Article 14 taken together with Article 8 the Dutch Council of the State had examined Ms Yeshtla's complaint of discrimination under the European Convention, extending its assessment to look at whether the decision to withdraw the housing benefits had been proportionate. According to the ECtHR the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The Dutch Council of State has used this margin of appreciation and considered that there was a reasonable and objective justification for this difference in treatment, namely the principle that entitlement to certain state-funded social benefits was limited to persons lawfully staying in the Netherlands. A co-resident without a residence permit should not be able to benefit indirectly from housing benefit. The Council of State accepted that there must be a "reasonable relationship of proportionality" between the means employed and the aim sought to be realised but found that there were no exceptional circumstances in the applicant's case, warranting a finding that the application of the main rule (loss of entitlement of housing benefits) would be disproportionate and thus in breach of Article 14. The ECtHR saw no reason to substitute its own assessment for that of the domestic courts. It followed that that complaint was also manifestly ill-founded and had to be rejected.

### Commentary

The Netherlands has a very detailed systematic legislation excluding aliens without a proper residence status from the entitlement of benefits. According to the provisions of the Dutch Benefit Entitlement (Residence Status) Act, in force as from 1 July 1998, and section 10 of the Aliens Act 2000 (*Vreemdelingenwet 2000*), the entitlement of aliens to any benefits in kind, facilities and social security benefits issued by decision of a public administrative authority is linked to the question whether they have legal residence in the Netherlands. This is referred to

as the linkage principle (*koppelingsbeginsel*). An alien who does not have legal residence in the Netherlands is not entitled to any benefits granted by decision of a public administrative authority. Derogation is only possible if the benefits relate to education for minors, the provision of essential medical care (i.e. prevention of life-threatening situations or loss of essential functions), the prevention of situations that would jeopardise public health or pose a risk to third parties (for instance prevention of infectious diseases, or care related to pregnancy and childbirth), or the provision of legal assistance to the alien concerned. Its aim is, on the one hand, to discourage irregular residence and, on the other, to prevent irregular residents from benefitting from social security facilities allowing them to become rooted in Dutch society and thereby making it increasingly difficult to expel them.

This linkage principle has also been extended to other situations in which a Dutch national or an alien with legal residence in the Netherlands and who on his/her own account would be entitled to such facilities are nevertheless denied such facilities on the sole ground that he/she cohabits with a partner or has a co-resident who has no legal residence. This extension applies to means-tested housing benefit, means-tested child care benefit and means-tested contribution towards the costs of health insurance.

It is this latter form of exclusion that plays a central role in the here described *Yeshtla* case.

As mentioned above according to the Dutch Council of State this kind of exclusion based on the lack of residence status of the partner or co-resident can be in breach with Article 14 taken together with Article 8 in exceptional circumstances. But until now the Council of State has accepted the existence of such circumstances in only *one* case. The *Yeshtla* decision of the ECtHR refers extensively to this case of the Council of State. In that case a Dutch male claimant had lost his entitlement to housing benefit, child care benefit and the contribution towards the costs of health insurance, to which he would have been entitled had he been considered as a single parent, due to the lack of a residence status of his wife. His wife had come to the Netherlands to study physiotherapy but had been unable to continue these studies due to intensive radiation treatment for thyroid cancer. She had also become pregnant and, during her pregnancy, these health problems aggravated so that, despite her efforts, she failed to pass the necessary

exams for continuing her study and thus also to obtain an extension of the residence permit granted to her. This serious and worrying health situation has therefore been a decisive factor which resulted in the partner being unable to ensure the continuation of legal residency in the Netherlands. The relevant benefits were ended when the child involved -who had Dutch nationality as well- was two months old.

The Council of State ruled that in view of the above-mentioned health situation of the partner and considering that a child is vulnerable at that age and, as regards primary care needs, is highly dependent on the parents, it could not in reason be expected from the Dutch claimant that he, in order to be able to claim as a single parent the allowances needed by him and his child, should ask his partner to leave the home. Indeed, it cannot be excluded that the partner should have taken the child for providing it with the necessary care, whereas it is plausible that she was not able to do so due to her health situation. In addition, in this the family life will be significantly disturbed whereby the interests of the very young Dutch child are being compromised which is not in accordance with the guarantees set out in Article 8 of the Convention and accepted by the ECtHR (*Domenech Pardo v Spain* (dec.), no. 55996/00, 3 May 2001; and *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 109, 3 October 2014).

Several related cases have been presented to the Dutch State Council until now, but the circumstances were judged not to be extraordinary enough in any of these cases to deem the exclusion disproportional. In the present case, the Dutch State Council did not find the fact that the mother is seriously ill – she is HIV infected and dependent on her son since she has no one else, which led to him being unable to leave her to let the right of housing benefit revive – a special enough circumstance.

The ECtHR adopts a very reserved attitude and fully agrees with the verdict of the Dutch judge, both in the light of Article 8 alone as well as in the light of Article 8 in conjunction with Article 14 EVRM. The argumentation that deviation from the linking principle is only required in very exceptional circumstances has been accepted by the ECtHR. In this respect, it is also important that the ECtHR accepts the State Council's tough point of view that housing benefit does not need to be seen as a subsistence minimum benefit (such as a welfare benefit), while in practice it is often impossible to pay rent with

just a welfare benefit for a single person.

Dire situations of real poverty occur, especially in situations in which children have one parent who does not have lawful residence, causing the whole family to lose their right to the allowances in question and the child-based budget.

The Court's ruling is very disappointing, because it fails to provide a clear framework to determine when we are dealing with 'very exceptional circumstances', leaving the judgment on this to the national governing body (in casu the Dutch tax authorities) and the national judge.

The ruling of the ECtHR in the Yeshtla case is not an isolated one. On 12 March 2019 the ECtHR delivered four more inadmissible decisions, following the same reasoning from the Yeshtla decision (without explicitly referring to it) in comparable cases (*Said v the Netherlands*, no. 34299/14, *Heerawi v the Netherlands*, no. 36558/14, *Aghmadi and Yaghubi v the Netherlands* no 70475/14 and 70530/14 and *Dorani and Khawati v the Netherlands* no 71815/14 and 71827/14).

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