

8 THE RIGHT TO HOUSING AND THE RIGHT TO A SECOND CHANCE

How Dutch Landlords and Local Authorities Facilitate and Frustrate the Successful Reintegration of Ex-Offenders

Stefan van Tongeren & Michel Vols

8.1 INTRODUCTION

Having a roof over one's head is an important aspect of a person's well-being. Housing has even been recognised by Maslow as one of the most basic human needs, similar to food and water.¹ Consequently, housing is an essential element of the reintegration process of ex-offenders;² without stable housing the ex-delinquent is likely to revert to his criminal habits.³

All delinquents have a right to a second chance after they are released from detention. This resocialisation principle is a fundamental doctrine in Dutch law.⁴ In the Netherlands, about 40,000 prisoners return to society every year.⁵ Many of these ex-offenders are temporarily housed in emergency shelters before they find more adequate and permanent accommodation. Although the housing of ex-offenders usually goes without any serious problems, the arrival of an ex-offender in the community sometimes provokes heated protests, especially in cases concerning (paedophile) sex offenders.⁶ These protests can

1 A.H. Maslow, 'A Theory of Human Motivation', *Psychological Review*, Vol. 50, 1943, pp. 370-396.

2 See, for example, S.J. Bahr, C. Davis & C. Ward, 'The Process of Offender Reintegration: Perceptions of What Helps Prisoners Reenter Society', *Criminology and Criminal Justice*, Vol. 13, No. 4, 2013, pp. 446-449.

3 See, for example, C.G. Roman & J. Travis, *Taking Stock: Housing, Homelessness, and Prisoner Reentry*, New York, Urban Institute Justice Policy Center, 2004.

4 For instance, Article 2(2) of the Dutch Penitentiary Principles Act (*Penitentiaire beginselenwet*) provides that '[w]hile maintaining the character of the custodial sentence or detention order, the carrying out thereof shall be aimed at preparing the person involved as much as possible for reintegration in the community'. See also, for example, T. Molleman & A.A. van den Hurk, 'Een kwestie van evenwichtskunst: Over de doelen en taken van het gevangeniswezen', *Delikt & Delinkwent*, Vol. 55, No. 4, 2012 and M.M. Boone, 'Vrije wil en verantwoordelijkheid in de strafuitvoering', *Justitiële Verkenningen*, No. 1, 2013, pp. 106-121.

5 Dienst Justitiële Inrichtingen, *DJI in getal 2011-2015*, Den Haag, 2016, p. 35.

6 Between 2008 and 2015, there have been 21 cases in which residents protested against the arrival or presence of a sex offender in the community: M.C.A. Liem, *Herintreding Zedendelinquenten*, Den Haag, Campus Den Haag, 2015, p. 8.

include petitions,⁷ demonstrations,⁸ the handing out of warning flyers,⁹ (serious) threats and sometimes even physical violence.¹⁰

It is the responsibility of local authorities to secure the quality of life in the municipality by maintaining public order.¹¹ Most local authorities will try to convince the ex-offender that it is in everybody's interest, including his/her own, to move to another community where his/her presence is less likely to create unease among residents. Research has shown, however, that more often than not the ex-delinquent refuses to cooperate.¹² In such cases the local authority lacks the necessary powers to prevent the ex-offender from settling in the community or to force him/her to move to another municipality.¹³

In the Netherlands, most returning ex-offenders looking for permanent accommodation depend on social housing provided by housing associations. Due to the lack of legal instruments local authorities assign these housing associations with an increasingly important role in the organisation of the housing of ex-offenders. It is, for instance, standard policy of the Association of Dutch Municipalities (*Vereniging van Nederlandse Gemeenten*) that local authorities should work together with housing associations to provide returning ex-offenders with adequate housing.¹⁴

Given the above, this paper presents a first and explorative overview of legal issues concerning the housing of ex-offenders by Dutch housing associations. Using doctrinal legal research methods we describe to what extent local authorities and housing associations not only facilitate but also frustrate the housing of ex-delinquents. Not only do we assess relevant literature and legal policy documents, but we aim to analyse the 'law in action' as well.¹⁵ Colombi Ciacchi has characterised judicial decisions as 'the most classical sources

7 For example, District Court Alkmaar 8 October 2009, ECLI:NL:RBALK:2009:BK1181. Throughout this paper, we refer to all case law using the European Case Law Identifier (ECLI). ECLI is used in the European Union as a uniform identifier for case law produced by European and national courts. It is composed of five elements: the acronym 'ECLI', the country code, the code of the court that decided on the case, the year in which the judgement was rendered and a unique identifier number. See also the official website of the European Union on European Union law (eur-lex.europa.eu).

8 For example, District Court Den Haag 6 October 2015, ECLI:NL:RBDHA:2014:12142.

9 For example, District Court Utrecht 15 December 2010, ECLI:NL:RBUTR:2010:BO7295 and District Court Utrecht 24 March 2010, ECLI:NL:RBUTR:2010:BL8577.

10 For example, District Court Noord-Holland 21 January 2013, ECLI:NL:RBNHO:2013:BZ0111.

11 Article 172 of the Dutch Municipalities Act states that '[t]he mayor is charged with maintaining public order'. See also J. Brouwer, 'Wat is openbare orde? Bevoegdheden van burgemeester niet onbegrensd', *Nederlands Juristenblad*, Vol. 2016, No. 30, 2016, pp. 2162-2169.

12 M.M. Boone, H.G. van de Bunt & D. Siegel, *Gevangene van het verleden. Crisissituaties na de terugkeer van zedendelinquenten in de samenleving*, Amsterdam, Reed Business, 2014, p. 79.

13 C.E. Huls & J.G. Brouwer, *De terugkeer van zedendelinquenten in de wijk*, Amsterdam, Reed Business, 2013.

14 Vereniging van Nederlandse Gemeenten & Dutch Ministry of Safety and Justice, *Richting aan re-integratie. Convenant Re-integratie van (ex-)gedetineerden*, 2015, available at: <www.rijksoverheid.nl/documenten/rapporten/2015/01/20/richting-aan-reintegratie-in-de-praktijk> (accessed 20 February 2017).

15 R. Pound, 'Law in Books and Law in Action', *American Law Review*, Vol. 44, 1910, pp. 12-36.

of law in action'.¹⁶ Therefore, we systematically collected and analysed all relevant case law published in the database of the Dutch judiciary, www.rechtspraak.nl, up to March 2017, using the following (translated) search terms: 'sex offender + tenant', 'refusing + tenant', 'offender + tenant' and 'screening + tenant'. This resulted in six cases concerning landlords' refusals to enter into a tenancy agreement with ex-offenders or concerning evictions of ex-offenders.

Whilst centred on Dutch law, the analysis is also relevant for other jurisdictions facing similar issues. Research shows that in many societies the housing of ex-offenders is problematic due to housing shortages and fear of recidivism.¹⁷ In most jurisdictions eviction is used to fight anti-social behaviour and 'quality of life offences' in residential areas.¹⁸ It is, however, interesting to notice that in some jurisdictions the screening of people including ex-offenders can also be observed.¹⁹

This paper is organised as follows. The first section briefly describes the relationship between ex-offenders' right to housing and their reintegration into society. The second section discusses the extent to which Dutch housing associations are able to reject applicants based on a criminal record, particularly if their arrival is likely to provoke protests in the community. This section also considers the screening and excluding of prospective tenants. In the third section we analyse the possibilities of housing associations to evict tenants with a criminal record when their presence threatens the quality of life in the community. The final section concludes the paper.

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- 16 A.L.B. Colombi Ciacchi, 'Strengthening the Comparative Method in European Legal Research: Three Suggestions', in C. Godt (Ed.), *Cross Border Research and Transnational Teaching under the Treaty of Lisbon: Hanse Law School in Perspective*, Nijmegen, Wolf Legal Publisher, 2013, pp. 25-37.
- 17 See, for example, J.S. Levenson, 'Hidden Challenges: Sex Offenders Legislated Into Homelessness', *Journal of Social Work*, 2016; J. Fontaine & J. Biess, *Housing as a Platform for Formerly Incarcerated Persons*, Washington, DC, Urban Institute, 2012; Levenson *et al.*, 'Public Perceptions About Sex Offenders and Community Protection Policies', *Analyses of Social Issues and Public Policy*, Vol. 7, No. 1, 2007, pp. 137-161; C.A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, New York, Human Rights Watch, 2004, pp. 548-554.
- 18 J. Flint (Ed.), *Housing, Urban Governance and Anti-Social Behaviour: Perspectives, Policy and Practice*, Bristol, Policy Press, 2006; C. Hunter, J. Nixon & M. Slatter, 'Neighbours Behaving Badly: Anti-social Behaviour, Property Rights and Exclusion in England and Australia', *Macquarie Law Journal*, Vol. 5, 2005, p. 149; Y. Yau, 'On the Anti-social Behaviour Control in Hong Kong's Public Housing', *Housing Studies*, Vol. 26, No. 5, 2011, pp. 701-722; M. Vols, 'Neighbors from Hell: Problem-solving and Housing Laws in the Netherlands', *The Arizona Summit Law Review*, Vol. 7, No. 3, 2014, p. 507; M. Vols, M. Kiehl & J. Sidoli del Ceno, 'Human Rights and Protection against Eviction in Anti-social Behaviour Cases in the Netherlands and Germany', *European Journal of Comparative Law and Governance*, Vol. 2, No. 2, 2015, pp. 156-181; M. Vols & S. Fick, 'Using Eviction to Combat Housing-related Crime and Anti-social Behaviour in South Africa and the Netherlands', *South African Law Journal*, Vol. 134, No. 2, 2017, pp. 327-360.
- 19 See, for example, Carey, *supra* note 17; H.L. Cain, 'Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-first Century', *Golden Gate University Law Review*, Vol. 33, No. 2, 2003; L.R. Silva, 'Criminal Histories in Public Housing', *Wisconsin Law Review*, Vol. 5, No. 4, 2015, pp. 375-397; D. Thacher, 'The Rise of Criminal Background Screening in Rental Housing', *Law & Social Inquiry*, Vol. 33, No. 1, 2008, pp. 5-30.

8.2 THE RIGHT TO HOUSING AND THE REINTEGRATION OF EX-OFFENDERS

As mentioned above, housing is identified in Maslow's hierarchy of needs as a basic physiological requirement, essential to the survival of a human being. The importance of adequate housing for a person's well-being was first recognised in 1948 by the General Assembly of the United Nations. Article 25, paragraph 1 of the Universal Declaration of Human Rights holds that housing is an important aspect of the right to an adequate standard of living. The right to housing nevertheless remains an internationally contested legal concept.²⁰ The United States of America, for instance, consider housing to be a 'privilege' instead of a 'right'.²¹ Despite this discussion, many international treaties recognise the right to adequate housing or certain elements of it.²²

At least three separate rights can be derived from the right to housing: the right to have access to adequate housing,²³ to the undisturbed use and enjoyment of one's residence (the 'right to quiet enjoyment')²⁴ and to have legal protection against forced eviction (the 'right to stay put').²⁵ Especially the right to have access and the right to stay put are key elements in the reintegration process of ex-offenders. Many international studies show that homeless ex-delinquents are likely to revert to criminal habits, whereas a stable living situation results in a significant reduction of the recidivism risk.²⁶ A lack of housing also influences other areas of life affecting the reintegration of an ex-offender.²⁷ For instance, ex-offenders who

20 J.M. Hohmann, *The Right to Housing: Law, Concepts, Possibilities*, Oxford, Hart Publishing, 2013.

21 Carey, *supra* note 17, p 555.

22 Such as Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women and Article 2(1) of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms. According to the United Nations Committee on Economic, Social and Cultural Rights the right to housing exists of at least seven aspects Member States should take into account: UN Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, 13 December 1991, E/1992/23. See also: UN Office of the High Commissioner for Human Rights, *Fact Sheet No. 21, The Human Right to Adequate Housing*, 2009, Fact Sheet No. 21/Rev.1.

23 Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing*, Fact Sheet No. 21/Rev.1, Switzerland, United Nations Office at Geneva, Reprinted, 2014.

24 D. Bluth & S. Pallavicini, 'Quiet Enjoyment: Potentially Serious Implications for Lessors', *Law Society Journal* 1999, 37(8), pp. 48-52.

25 C. Hartman, 'The Right to Stay Put', in C. Geisler & F. Popper (Eds.), *Land Reform, American Style*, Totowa NJ, Rowman & Allanheld, 1984, pp. 302-318.

26 E. Baldry *et al.*, 'Ex-prisoners, Homelessness and the State in Australia', *The Australian and New Zealand Journal of Criminology*, Vol. 39, No. 1, 2006, pp. 20-33; S. Metraux & D.P. Cullhane, 'Homeless Shelter Use and Incarceration Following Prison Release', *Criminology & Public Policy*, Vol. 3, No. 2, 2004, pp. 139-160; B. McCarthy & J. Hagan, 'Homelessness: A Criminogenic Situation?', *British Journal of Criminology*, Vol. 31, No. 4, 1991, pp. 393-410; R.J. Sampson & J.H. Laub, *Crime in the Making: Pathways and Turning Points through Life*, Cambridge, MA, Harvard University Press, 1993; C.G. Roman & J. Travis, 'Where Will I Sleep Tomorrow? Housing, Homelessness, and the Returning Prisoner', *Housing Policy Debate*, Vol. 17, No. 2, 2006, pp. 389-418.

27 E. Baldry *et al.*, *Ex-prisoners and Accommodation. What Bearing Do Different Forms of Housing Have on Social Reintegration?*, Australian Housing and Urban Research Institute, 2003.

do not have access to permanent housing are less likely to find a job and experience greater difficulties resisting the urge to use drugs.²⁸

Despite the necessity of adequate housing, many ex-offenders leave the detention centre without having a place to go to. In the Netherlands, 48% of the delinquents who did not have access to any kind of housing when they first entered the detention remain homeless upon their return into society.²⁹ This large number raises the question to what extent these returning ex-offenders are actually able to exercise their right to housing and their right to a second chance.

8.3 THE RIGHT TO HOUSING: THE RIGHT TO HAVE ACCESS

The fundamental principle of Dutch landlord and tenant law is the freedom of contract: Parties are free to enter into an agreement and to decide the content of this agreement.³⁰ A landlord is, in principle, free to rent his accommodation to the most qualified applicant and to reject applicants he deems unsuitable, for instance, because of their poor credit history or criminal convictions. All tenancy agreements are based on this principle, including agreements with housing associations.

However, housing associations have a somewhat unique position in Dutch law. As private, non-profit-making organisations they are responsible for building, maintaining and providing social housing. About 75% of the 3 million rented homes in the Netherlands are owned by housing associations.³¹ They are independent organisations, but do have to comply with specific requirements mentioned in the Dutch Housing Act (*Woningwet*).

The main objective of the housing associations is to house persons who are seeking a home, but have insufficient income or are otherwise experiencing difficulties finding adequate housing.³² Ex-offenders generally have a low socioeconomic status, making them part of the target group of housing associations. It is therefore interesting to assess whether Dutch housing associations are allowed to reject applicants based on their criminal record.

28 M. Nelson, P. Deess & C. Allen, *The First Month Out: Post-Incarceration Experiences in New York City*, New York, Vera Institute of Justice, 1999; C.G. Roman & J. Travis, *supra* note 3.

29 Beerthuizen *et al.*, *Vierde meting van de monitor nazorg ex-gedetineerden*, WODC, 2015, pp. 27-28.

30 A.M. Kloosterman, H.J. Rossel & J.P. van Stempvoort, *Hoofdlijnen in het huurrecht*, Deventer, Kluwer, 2008.

31 J. Lijzenga & D. Boertien, *De rol van woningcorporaties op de woningmarkt een WoON 2015-verkenning*, Arnhem, Companen, 2016.

32 See, for example, P. Koning & M. van Leuvensteijn, *De woningcorporaties uit de verdwijndriehoek*, Den Haag, CPB, 2010, pp. 9-13.

8.3.1 *Law in Action I: Case Law Analysis*

The freedom of contract on the basis of which housing associations are able to deny prospective tenants with a criminal record is at odds with the objective to provide social housing to people with a low socioeconomic status. Courts have to strike a fair balance between these two factors when assessing the decision to deny an ex-offender. By analysing the available case law, we examine the legal conditions under which Dutch courts allow housing associations to do so.

Our case law search on the website of the Dutch judiciary resulted in three important judicial decisions regarding the rejection of ex-offenders by housing associations.³³ In all three cases the (possible) arrival of the ex-offender was likely to cause controversy within the community. Although these cases are very similar, we believe the judgement of 1 July 2015 is the most comprehensive and the most illustrative decision.³⁴ We provide this judicial decision with an in-depth analysis.

The case revolves around a prospective tenant who has repeatedly been convicted of sexual abuse of minors. Due to the amount of publicity his trial received he experiences great difficulty in finding adequate housing and is even forced to live on the streets for some time. In 2014, the ex-offender applies for a house offered by a housing association and located in a child-friendly neighbourhood. Given the criminal history of the ex-offender and the fact that his case is so well known to the public, the housing association is concerned that his arrival will cause tensions among residents. It refuses to rent the accommodation to the ex-offender, who disagrees with this decision and files a lawsuit. The ex-offender argues that he has been wrongfully denied access to housing and claims compensation for immaterial damages.

The court considers that in order to decide whether or not to rent a home to an ex-offender, a housing association should carefully weigh all relevant interests, including the interest of the ex-offender to have access to adequate housing and the interests of community residents to live in a safe and secure neighbourhood. The housing association also needs to take into consideration all other relevant circumstances, such as the criminal background of the ex-offender and the possible unease his arrival could create in the community. Although the housing association may take into account the feelings of discomfort expressed by the residents, it is not allowed to let those feelings play a leading role in the decision-making.

If the housing association concludes that the interests of the residents weigh heavier than those of the ex-offender, it may refuse to rent the accommodation to him/her. How-

33 District Court Rotterdam 4 April 2016, ECLI:NL:RBROT:2016:2733; District Court Midden-Nederland 1 July 2015, ECLI:NL:RBMNE:2015:4865; District Court Den Haag 12 August 2013, ECLI:NL:RBDHA:2013:10154.

34 District Court Midden-Nederland 1 July 2015, ECLI:NL:RBMNE:2015:4865.

ever, it then has the duty to offer the ex-delinquent alternative housing. This follows directly from the legal obligation to provide affordable housing to people with a low socioeconomic status. According to the court, it particularly applies to cases in which the arrival of an ex-offender causes unease in the neighbourhood. The obligation ends when the ex-delinquent refuses to cooperate. Only then is the housing association allowed to deny the ex-offender access to social housing without offering alternative accommodation.

It follows from this case and the other two very similar judgements that housing associations are in principle free to reject prospective tenants who have a criminal record, as long as the interests of all parties involved are taken into account. In case of a rejection it is also expected from the housing association that it provides alternative housing, unless the ex-offender refuses to cooperate. According to the available case law, Dutch housing associations have a duty to actively provide housing to ex-offenders, but the responsibility ultimately lies with the ex-delinquent him- or herself.

8.3.2 Law in Action II: Screening of Prospective Tenants

The previous subsection examined the legal conditions under which a housing association may deny housing to a prospective tenant with a criminal record. It appeared that housing associations have, in principle, an active but clearly defined duty to provide (alternative) housing. Even though there is not much case law available regarding the frustration of ex-offenders' right to have access to adequate housing, it might be that these judgements are only the tip of the iceberg. Apart from the fact that not all ex-offenders will go to court and, even if they did, that not all case law is being published on the website of the Dutch judiciary, parliamentary documents show that prospective tenants are also more structurally excluded from housing.³⁵

For some years now, people in the Netherlands seeking a home are being screened by local authorities and housing associations, which assess whether the applicant has an income and whether he/she has been involved in criminal or anti-social activities. If the prospective tenant does not meet the criteria, he/she is excluded from housing.³⁶ Contrary to the case law discussed above, local authorities and housing associations who screen prospective tenants may deny them access to housing on the basis of personal information shared with them by third parties such as the police. There is, in principle, almost no balancing of interests; if the prospective tenant does not comply with the set criteria, he/she is not allowed to move into the area.

³⁵ *Kamerstukken II* 2015/16, 34 314, nr. 6; *Kamerstukken I* 2015/16, 34 314, nr. C, pp. 1-2.

³⁶ See M. Vols, 'Over nabuurschap en buurhaat in het recht', *Nederlands Juristenblad*, Vol. 2015, No. 42, 2015, pp. 2926-2934.

The screening of prospective tenants in the Netherlands used to be based on semi-legal covenants signed by local authorities, police and housing associations. Recent government data show that at least in 19 municipalities, housing associations worked together with the other agencies to screen prospective tenants.³⁷ Table 1 shows that hundreds of rental premises could only be rented to tenants who were screened based on a covenant.

Table 8.1 Municipalities in which prospective tenants are or were being screened based on a covenant

Municipality	Period	Number of accommodations
Amsterdam (Dichtersbuurt)	Since 2012	396
Arnhem	2010--2014	About 245
Barendrecht	Since 2013	513
Borger-Odoorn	Since 2007	Less than 80
Capelle aan den IJssel	Since 2012	892
Culemborg	Since 2014	1,130
Dordrecht	Since 2016	About 1,500
's Hertogenbosch (Hambaken)	Since 2009	916
's Hertogenbosch (Barten Zuid)	Since 2005	496
Hoogeveen	Since 2007	Variable
Midden Drenthe	Since 2015	44
Nijmegen	Since 2004	335
Nissewaard	Since 2012	3,550
Ridderkerk	Since 2013	2,523
Rotterdam	Since 2009	200 streets
Utrecht (Geuzenwijk)	1997--2011	900
Utrecht (Zwanenvechtplein)	2011--2014	400
Utrechtse Heuvelrug	Since 2013	70
Zaltbommel	Since 2012	338
Zoetermeer	Since 2015	327
Zwolle	Since 2013	About 400

Investigative journalists of the well-respected Dutch television programme Zembla found out that nearly 100 tenants were refused a rental premise because of a negative screening result.³⁸ Table 2 shows, however, that not all local authorities provided data. Consequently,

³⁷ *Kamerstukken II* 2015/16, 34 314, nr. 6.

³⁸ See <www.zembla.vara.nl> (accessed 24 March 2017).

we expect the actual number of tenants that were refused a rental premise because of previous nuisance or criminal behaviour to be much higher.

Table 8.2 The number of people refused a rental premise because of a negative screening result

Municipality	Number of people refused
Rotterdam	44
Den Bosch	> 21
Nissewaard (previously Spijkenisse)	14
Utrechtse Heuvelrug	8
Zoetermeer	2
Ridderkerk	2
Barendrecht	1
Amsterdam	1
Capelle aan den IJssel	0
Culemborg	Unknown
Hoogeveen	Unknown
Borger-Odoorn	Unknown
Total	93

Recently, the government ruled that screening practises based on covenants are no longer allowed.³⁹ According to the Minister for Housing (hereafter the Minister) prospective tenants who are rejected on the basis of such a screening procedure may file a lawsuit against the housing association. As far as we know there has been only one such case.⁴⁰

Although selecting tenants on the basis of covenants is now illegal, applicants are still being screened and excluded from housing. Since 2006, the Urban Areas Special Measures Act entitles local authorities to screen prospective tenants in certain areas. The act aims to improve the quality of life in those areas by preventing (further) economic decline and criminal and anti-social behaviour.⁴¹ Although the screening on the basis of the act is not intended to specifically ban ex-offenders from the neighbourhood, it might restrict their right to have access to housing.

³⁹ *Kamerstukken II* 2015/16, 34 314, nr. 6.

⁴⁰ The court concluded, however, that the housing association had not acted unlawfully, since the decision to reject the prospective tenant was based on a concrete and reasonable weighing of interests: District Court Rotterdam 4 April 2016, ECLI:NL:RBROT:2016:2733.

⁴¹ *Kamerstukken II* 2004/05, 30 091, nr. 3.

The Urban Areas Special Measures Act allows the municipal council to request the Minister to appoint a certain area in which applicants have to obtain a housing permit before they are able to rent a house.⁴² In order to obtain this permit prospective tenants who have been living in the municipality for less than 6 years need to meet certain income criteria.⁴³ The decision whether or not to issue the housing permit is made by the board of mayor and councillors.⁴⁴

The scope of the Urban Areas Special Measures Act was extended in 2016. Due to this extension the local authority is now also entitled to demand from the prospective tenant a Certificate of Good Conduct (CGC); in addition, a screening based on police registers is now possible.⁴⁵ If the board of mayor and councillors has reason to suspect that the housing of the prospective tenant in the area could lead to an increase of anti-social or criminal behaviour in the community, the board will in principle not issue the housing permit.

The current Extended Urban Areas Special Measures Act makes it possible to screen and exclude prospective tenants on the basis of income and criminal and anti-social behaviour. This banning of people from certain areas is controversial. The Netherlands Institute for Human Rights (*Commissie Gelijke Behandeling*) stated that the screening practices constitute indirect discrimination and violate the right to equal treatment.⁴⁶ The Dutch Council of State even advised the Minister to withdraw the bill extending the Urban Areas Special Measures Act.⁴⁷ Some politicians and academics also reacted critically on the screening practices.⁴⁸ However, although the European Court of Human Rights (ECHR) considered the Urban Areas Special Measures Act to restrict the right to freedom of establishment, it found no violation of this human right.⁴⁹

The screening of prospective tenants on the basis of the Extended Urban Areas Special Measures Act raises the question whether it threatens the right of ex-offenders to a second chance. It follows from the Explanatory Memorandum on the Extended Urban Areas Special Measures Act that the access of ex-offenders to adequate housing needs to be taken

42 Article 5 of the Urban Areas Special Measures Act.

43 Article 8 of the Urban Areas Special Measures Act.

44 Article 10b of the Extended Urban Areas Special Measures Act.

45 Articles 5(3) and 10b of the Extended Urban Areas Special Measures Act.

46 *Commissie Gelijke Behandeling, Advies Commissie Gelijke Behandeling inzake huisvestingsbeleid van de Gemeente Rotterdam*, Advice 2005-3, Commissie Gelijke Behandeling, Utrecht, 2005.

47 *Kamerstukken II* 2015/16, 34 314, nr. 4.

48 See, for example, A. Duivesteijn, 'De Rotterdamwet deugt niet', *S&D*, No. 10, 2005; W. Doff, 'Rotterdam zet symboolpolitiek door', *Tijdschrift voor de Volkshuisvesting*, No. 5, 2013, pp. 6-16.

49 *Garib v. the Kingdom of the Netherlands*, ECHR, 23 February 2016, nr. 43494/09. See also M. Vols, 'Screening and Excluding People with Low Income and Nuisance Neighbours from Housing: Human Rights Proof?', in J. Sidoli, M. Vols & M. Kiehl (Eds.), *Regulating the City: Contemporary Urban Housing Law*, Den Haag, Eleven Publishing, 2016, pp. 127-143.

into consideration when allowing for prospective tenants to be screened.⁵⁰ The Minister will only appoint a certain area in which the local authority may screen prospective tenants if the local government can assure him/her that the region offers sufficient alternative housing possibilities. The local authority needs to make sure that this includes adequate housing for returning ex-offenders. If this is not the case, the Minister will deny the request to appoint the area.⁵¹ Apart from this, it is also important to note that as far as we know the Extended Urban Areas Special Measures Act is only being applied in parts of three municipalities.⁵² This means that in 2017 there are 385 Dutch municipalities left in which prospective tenants are not screened based on the Act. Due to the lack of available data the exact number of prospective tenants who have been excluded from housing on the basis of the Extended Urban Areas Special Measures Act remains unknown.

In spite of the assurance that there needs to be sufficient alternative housing in the region and notwithstanding the limited application of the Extended Urban Areas Special Measures Act, it remains unclear as to what extent prospective tenants are allowed to be excluded from social housing in these areas. Apart from the decision of the ECHR, that only assessed the 'old' Urban Areas Special Measures Act from 2006, there has yet to be a Dutch court to review the screening practices on the basis of the current Extended Urban Areas Special Measures Act. Therefore, it remains to be seen whether prospective tenants are offered protection against the screening and exclusion by local authorities. It is, however, interesting to observe the shift from landlord and tenant law towards (local) administrative law with regard to accepting and rejecting prospective tenants.

8.4 THE RIGHT TO HOUSING: THE RIGHT TO STAY PUT

As mentioned in Section 8.2 of this paper, the right to housing includes the right to stay put as well. In the Netherlands, this right is assured by, among others, Article 8 of the European Convention on Human Rights and the Dutch Civil Code (DCC).⁵³ Consequently, Dutch law offers tenants far-reaching protection against forced eviction.⁵⁴ A tenant can be evicted if the tenancy agreement has been terminated, which is possible in case of any breach of the agreement.⁵⁵ Under Dutch law, not behaving as a prudent tenant will qualify as such a breach. For example, not paying the rent, causing noise nuisance or selling drugs

50 *Kamerstukken II* 2015/16, 34 314, nr. 3.

51 Articles 6(2) and 7(1)(b) of the Extended Urban Areas Special Measures Act.

52 These are the municipalities of Rotterdam, Nijmegen and Cappelle aan den IJssel.

53 Vols, Kiehl & Sidoli del Ceno, *supra* note 18, pp. 156-181.

54 See, for example, Kloosterman, Rossel & Van Stempvoort, *supra* note 30, pp 219-221; M. Vols, P. Tassenaar & J. Jacobs, 'Anti-social Behaviour and European Protection against Eviction: An Analysis of Dutch Case Law Based on Statistics', *International Journal of Law in the Built Environment*, Vol. 7, No. 2, 2015, pp. 148-161.

55 Article 6:265 jo. 7:231 DCC.

in the premise will be characterised as such. The breach of the tenancy agreement, however, also needs to be sufficiently serious and the termination of the agreement should not have disproportionate consequences.⁵⁶ If the tenant does not agree with the termination of the tenancy agreement, it can only take place by judicial decision.⁵⁷ The court will then have to assess whether the tenant behaved as a prudent tenant. If the tenant puts forward a defence, the court will also have to assess the seriousness of the breach and the possible disproportionate consequences of the termination of the tenancy agreement. Once the agreement has been terminated, the court is authorised to issue an eviction order.

8.4.1 *Law in Action I: Empirical Data About Evictions in Dutch Landlord and Tenant Law*

Given the strict legal conditions under which a tenancy agreement can be terminated, Dutch courts do not lightly terminate agreements and issue eviction orders. Although Dutch law already calls for a balancing of the interests of both landlord and tenant, the European Court of Human Rights also requires national courts to take into account the proportionality and reasonableness of the (possible) loss of a home when a tenant requests so.⁵⁸ In deciding whether or not to issue an eviction order, courts also have to take into consideration the context of each individual case.⁵⁹

In this and the following subsection, we analyse whether having a criminal record or just simply living in the neighbourhood could constitute a breach of the tenancy agreement. Before we conduct a case law analysis, we examine the total number of evictions that take place in the Netherlands every year. Data of the umbrella organisation of Dutch housing associations show that Dutch courts issue between 20,000 and 25,000 eviction orders each year.⁶⁰ In about 25% of the cases the tenant refuses to comply with the eviction order and to leave the rental premise voluntarily. In such cases, the eviction order is executed and the tenant is forced to vacate the premise. Figure 8.1 shows the number of eviction orders and the number of executed eviction orders in the Netherlands.

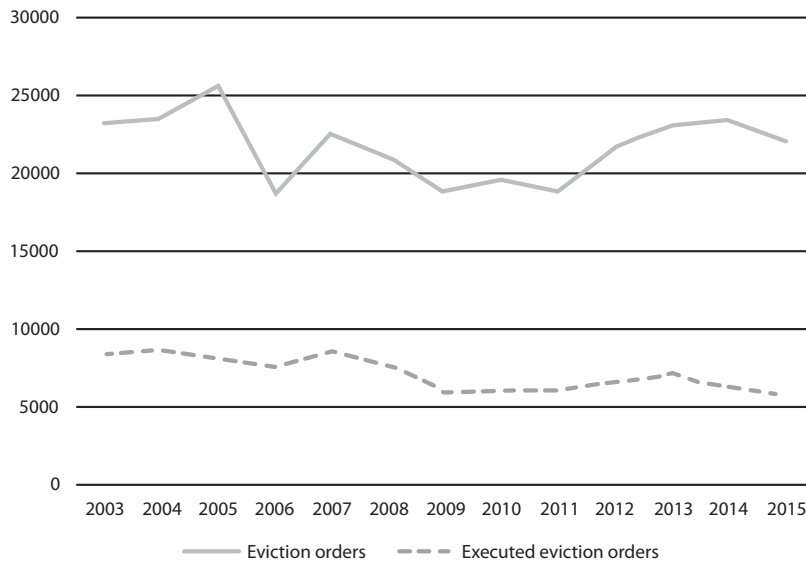
56 Article 6:265 DCC.

57 Article 6:265 jo. 7:231 DCC.

58 See *McCann v. United Kingdom*, ECHR, 13 May 2008, App. No. 19009/04.

59 M. Vols & N. Minkjan, 'Huurachterstand, huisuitzetting en rechterlijke besluitvorming', *Recht der Werkelijkheid*, Vol. 37, No. 2, 2016.

60 Aedes, *Corporatiemonitor 2015. Huisuitzettingen en huurachterstanden*, Den Haag, Aedes, 2016.

Figure 8.1 Number of eviction orders and forced evictions (source: Aedes; Vols & Minkjan 2016)⁶¹

The data also show that in about 84% of all cases, the eviction order was the result of rent arrears. Nuisance or harassment, illegal subleasing and the production of marihuana are other reasons for courts to conclude that the tenant did not behave as a prudent tenant should and to issue an eviction order.⁶² It follows from the available data that eviction is used to fight crime and nuisance in a relatively small percentage of all cases. However, the available data on evictions do not provide any insights as to how many ex-offenders were evicted because of their previous crime or because of (the problems caused by) their return to their rental premise. In order to gain a better understanding of this matter we conducted an in-depth analysis of relevant case law.

8.4.2 Law in Action II: Case Law Analysis

After conducting our systematic case law search on the website of the Dutch judiciary, we found three judicial decisions in which the presence of a tenant with a criminal record

⁶¹ Vols & Minkjan, *supra* note 59, p. 13.

⁶² Vols & Minkjan, *supra* note 59. See also I. van Laere & M. de Wit, *Dakloos na huisuitzetting*, Amsterdam, GGD Amsterdam, 2005.

caused unease among neighbours and in which the housing association demanded the termination of the tenancy agreement and the eviction of the tenant.⁶³ In this subsection, we briefly analyse all three cases.

The first case revolves around an ex-offender who has been convicted in 2007 of sexual abuse of a then 9-year-old girl living next door.⁶⁴ After being released from detention, the ex-offender returns to his home where he has lived with his wife since 1972. Although his victim has already moved out of the neighbourhood, the return of the ex-offender provokes protests in the community. The neighbours demand by means of a petition that the housing association remove the ex-offender and his wife from their home. The housing association offers the couple alternative housing, but they refuse to accept this offer. It then requests the court to terminate the tenancy agreement and to authorise the eviction of the ex-offender and his wife. The court, however, decides that the couple are allowed to stay in their home.

The court first states that the bare fact that the tenant has been convicted of sexually abusing a minor neighbour is insufficient to terminate the tenancy agreement. According to the court there is no legal rule in Dutch law that holds that committing a criminal offence permits the tenancy agreement to be terminated. In addition, the court takes into account the fact that the couple has behaved as prudent tenants for over 37 years.

The court subsequently holds that the refusal to accept alternative housing could under some circumstances lead to the conclusion that the ex-offender did not behave as a prudent tenant. This is especially the case when the ex-offender's victim lives next door or nearby. In this case, however, the victim no longer lived in the neighbourhood, so the ex-offender was allowed to refuse the offer made by the housing association.

Lastly, the court considers that tensions among residents caused by the presence of the ex-delinquent could lead to the conclusion that the ex-offender should cooperate with the relocation to another neighbourhood. In such a case the housing association has the duty to verify that the arrival of the ex-offender does not cause unease in the new community, otherwise he would have to relocate again.

The second judgement also concerns the return of a paedophile ex-offender to his home.⁶⁵ This case differs, however, from the first case in the sense that the ex-offender in this case lives next door to his victim. The victim and his family are confronted on a daily basis with the presence of the ex-offender, causing severe health problems for the mother of the victim. The housing association aims to end this highly unsatisfactory situation by offering the ex-offender alternative housing. However, the ex-offender regards the com-

63 District Court Noord-Holland 21 January 2013, ECLI:NL:RBNHO:2013:BZ0111; District Court Alkmaar 8 October 2009, ECLI:NL:RBALK:2009:BK1181; District Court Utrecht 16 September 2008, ECLI:NL:RBUTR:2008:BF0857.

64 District Court Alkmaar 8 October 2009, ECLI:NL:RBALK:2009:BK1181.

65 District Court Utrecht 16 September 2008, ECLI:NL:RBUTR:2008:BF0857.

pensation he is offered for his relocation as insufficient and refuses to cooperate. This leads the housing association to demand before the court the termination of the tenancy agreement and the eviction of the ex-offender. By refusing to cooperate in reaching a durable solution the ex-delinquent would not have behaved as a good tenant.

Again, the court holds that there is no legal rule from which it follows that a criminal offence is sufficient to accept that the ex-offender did not behave as a prudent tenant should. In addition, it finds that this also holds true in case a co-tenant is the victim of this criminal offence. The court recognises that in this specific case a highly unsatisfactory situation has arisen, in which the ex-offender returns to his home located in the same building as that of his victim. Since the ex-offender has brought about this situation himself it can be expected from him that he cooperates in ending it. The court holds that by refusing to accept alternative housing the ex-delinquent did not behave as a prudent tenant. The court rules that there has been a breach of the tenancy agreement.

The third case involves a tenant who has been convicted of sexual abuse of in total four minors.⁶⁶ When the local authority is notified about the convictions of the ex-offender, it organises a meeting with the community residents in order to inform them about the sexual offences the ex-offender has committed. This information leads to heated protests, including physical violence. The housing association, however, also receives information about provoking, threatening, intimidating and violent behaviour of the ex-offender. After about a year, it receives a letter from local residents requesting measures to be taken against the ex-offender, since it has become impossible to live with him in the same neighbourhood. The housing association requests before the court the termination of the tenancy agreement and the eviction of the ex-offender.

The court considers that the situation in the neighbourhood has become intolerable and that although there is no legal rule that holds that a criminal conviction is sufficient to terminate the tenancy agreement, the ex-offender does need to take into account the consequences of his criminal behaviour being known to his neighbours. In this case the ex-delinquent does the opposite: He even behaves aggressively towards the other residents. He, for instance, destroyed the garden gnomes of the neighbours' children with a baseball bat.

The court rules that the nuisance the ex-offender causes to his neighbours is so severe that the right of the other residents to a safe and secure neighbourhood should prevail over the ex-offender's right to stay put. The court therefore allows the tenancy agreement to be terminated and the ex-delinquent to be evicted.

The analysed case law shows that Dutch courts do not lightly judge that the behaviour of an ex-offender violates the obligation to behave as a prudent tenant. Having a criminal record or just simply living in the neighbourhood does not easily constitute such a breach

⁶⁶ District Court Noord-Holland 21 January 2013, ECLI:NL:RBNHO:2013:BZ0111.

of the tenancy agreement, not even when a (minor) co-tenant is the victim of the criminal behaviour. However, it is also clear that the right to stay put is not absolute in the Netherlands. The presence of an ex-offender could constitute reasonable ground to terminate the tenancy agreement when the ex-delinquent lives closely near his victim. The housing association then needs to offer the ex-offender alternative housing, similar to the situation in which an applicant is rejected as described in Section 8.3.1. Although the housing association has to provide the ex-delinquent with adequate housing as best as possible, it shares this responsibility with the ex-offender him- or herself.

8.5 CONCLUSION

With this paper we provided a first overview of the facilitation and frustration of the housing of ex-offenders by Dutch housing associations and local authorities. Having a roof over one's head is not only recognised as a basic human need, but it is also essential for ex-delinquents in order to enjoy their right to housing and to be able to successfully reintegrate into society. Without adequate housing, ex-offenders are likely to revert to criminal habits, whereas a stable living situation significantly reduces the recidivism risk.

We gathered and studied all relevant published case law in the Netherlands. A total of six judicial decisions were examined: three cases regarding the right to have access to housing and three cases concerning the right to stay put. This limited amount of case law suggests that although the housing of ex-offenders seems to be causing some legal problems, it is not frequently occurring. However, these few judicial decisions may only be the tip of the iceberg. As follows from the screening of applicants by local authorities and the possible restraint exercised by these prospective tenants to go to court, it might be that the ex-offenders' right to housing is restricted and maybe even violated on a larger scale.

The analysis above demonstrates that the decision on whether or not to accept a prospective tenant lies increasingly with the local authorities instead of the housing associations. However, in areas where local authorities do not screen prospective tenants the contrary can be observed: Local authorities are ever more relying on housing associations to provide returning ex-offenders with adequate housing. So not only can a shift from private to public law be recognised in regard to the accepting and excluding of people with a criminal record in certain areas, the opposite can also be observed, with housing associations taking over responsibility from local authorities in organising the housing of ex-offenders.

The rejection and exclusion of prospective tenants based on their criminal record offers a clear restriction of their right to housing, but it seems that it does not constitute a violation of this right. However, empirical research is needed in order to determine the actual pressure the right to housing is under. Further research is also necessary to fully compre-

hend the scale on which ex-offenders in the Netherlands and elsewhere are being excluded from (social) housing and whether these practices violate the right to housing. Hopefully, this paper will serve as a building block for further studies.

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