



DECISION ON THE MERITS

20 October 2009

**Defence for Children International (DCI)
v. the Netherlands**

Complaint No. 47/2008

The European Committee of Social Rights, committee of independent experts established under Article 25 of the European Social Charter ("the Committee"), during its 239th session attended by:

Ms Polonca KONČAR, President
Mrs Andrzej SWIATKOWSKI, Vice-President
Colm O'CONNOR, Vice-President
Jean-Michel BELORGEY, General Rapporteur
Ms Csilla KOLLONAY LEHOCZKY
Mr Lauri LEPPIK
Ms Monika SCHLACHTER
Birgitta NYSTRÖM
Lyudmila HARUTYUNYAN
Mrs Ruchan ISIK
Petros STANGOS
Alexandru ATHANASIU
Luis JIMENA-QUESADA
Ms Jarna PETMAN

Assisted by Mr Régis BRILLAT, Executive Secretary,

Having deliberated on 20 October 2009,

On the basis of the report presented by Mr. Andrzej SWIATKOWSKI,

Delivers the following decision adopted on this date:

PROCEDURE

1. The complaint lodged by Defence for Children International (“DCI”) was registered on 4 February 2008. It alleges that the situation in the Netherlands violates Article 31 of the Revised European Social Charter (“the Revised Charter”) taken alone or in conjunction with Article E in that children not lawfully present in the Netherlands are excluded by law and practice from the right to housing. It further submits that this alleged violation entails a violation of Articles 11, 13, 16, 17 and 30 taken alone or in conjunction with Article E.

2. The Committee declared the complaint admissible on 23 September 2008.

3. In accordance with Article 7§1 and §2 of the Protocol providing for a system of collective complaints (“the Protocol”) and with the Committee’s decision on the admissibility of the complaint, on 29 September 2008 the Executive Secretary communicated the text of the admissibility decision to the Dutch Government (“the Government”), DCI, the Contracting Parties to the Protocol and the states that have made a declaration in accordance with Article D§2 of the Revised Charter and to the European Trade Union Confederation (ETUC), BusinessEurope (former UNICE) and the International Organisation of Employers (IOE).

4. In accordance with Rule 31§1 of the Committee’s Rules, the Committee set a deadline of 21 November 2008 for presentation of the Government’s submissions on the merits. These were registered on 20 November 2008.

5. In accordance with Rule 31§2 of the Committee’s Rules, the President of the Committee invited DCI to respond to these submissions by 6 February 2009. DCI’s response was registered on 5 February 2009 and forwarded to the Government on 12 February 2009. In its response, DCI made a request for a public hearing pursuant to Rule 33 of the Committee’s Rules. By its letter of 22 September 2009, the Committee informed DCI and the Government of its decision not to organise a hearing in the present case.

SUBMISSIONS OF THE PARTIES

A – The complainant organisation

6. DCI asks the Committee to find that Dutch legislation and practice which deny children unlawfully present in its territory access to adequate housing, are in violation of Article 31 taken alone or in conjunction with Article E of the Revised Charter. DCI states that housing is a prerequisite for the preservation of human dignity and therefore that legislation or practice which denies entitlement to housing to foreign nationals, even if they are on the territory unlawfully, should be considered contrary to the Revised Charter. In addition, DCI refers to the United Nations Convention on the Rights of the Child, which the Netherlands has ratified, in that it guarantees protection to all children within the jurisdiction of a State Party, regardless of their legal status.

7. DCI further holds that due to the fact that housing is a basic and essential commodity for the well being of a child, the finding of a violation of the right to housing implies a violation of Articles 11, 13, 16, 17 and 30 taken alone or in conjunction with Article E of the Revised Charter. It therefore asks the Committee to also find such violations.

B – The Government

8. The Government asks the Committee to reject DCI's complaint as unfounded as the children whose rights are allegedly violated by the contested Dutch legislation and practice fall outside the scope *ratione personae* of the Revised Charter since they do not meet the conditions laid down in paragraph 1 of the Appendix, namely, they are not lawfully residing in the country. The Government further argues that to rely on provisions of the United Nations Convention on the Rights of the Child to extend the scope *ratione personae* of the Revised Charter would amount to a *de facto* replacement of the system of one treaty by that of another.

9. Subsidiarily the Government considers that the complaint is unfounded since law and practice in the Netherlands allow for the provision of accommodation as exceptions exist to the principle that unlawfully present children cannot enjoy entitlements to public provision.

RELEVANT DOMESTIC AND INTERNATIONAL LAW

A – Domestic law

10. In their submissions the parties refer in particular to the "linkage principle" as set out in the Benefit Entitlement (Residence Status) Act (*Koppelingswet*) of 1 July 1998, which was incorporated in the Aliens Act 2000 and reads as follows:

- **Section 10, Aliens Act 2000 (*Vreemdelingenwet 2000* of 23 November 2000)**
 - "1. An alien who is not lawfully resident may not claim entitlement to benefits in kind, facilities and social security benefits issued by decision of an administrative authority. The previous sentence shall apply *mutatis mutandis* to exemptions or licences designated in an Act of Parliament or Order in Council.
 - 2. The first subsection may be derogated from if the entitlement relates to education, the provision of care that is medically necessary, the prevention of situations that would jeopardise public health or the provision of legal assistance to the alien.
 - 3. The granting of entitlement does not confer a right to lawful residence."

11. The Committee also deems that the following Sections of the Aliens Act 2000 are of relevance to the present case:

- **Section 43, Aliens Act 2000 (*Vreemdelingenwet 2000*)**
 - "1. The consequences whereby an application for the issue of a residence permit for a fixed period (...) or a residence permit for an indefinite period (...) is rejected, shall by operation of law, be that:
 - a) the alien is no longer lawfully resident (...);
 - b) the alien should leave the Netherlands of his own volition within the time limit prescribed in section 60, failing which the alien may be expelled;
 - (c) the benefits in kind provided for by or pursuant to the Act on the Central Reception Organisation for Asylum-Seekers or another statutory provision that regulates benefits in kind of

this nature will terminate in the manner provided for by or pursuant to that Act or statutory provision and within the time limit prescribed for this purpose;

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

e) the aliens supervision officers are authorised, after the expiry of the time limit referred to in c), to compel the vacation of property in order to terminate the accommodation or the stay in the residential premises provided as a benefit in kind as referred to in c).”

– Section 60, Aliens Act 2000 (*Vreemdelingenwet 2000*)

“1. After the lawful residence of an alien has ended, he should leave the Netherlands of his own volition within four weeks.

2. Notwithstanding subsection 1, an alien should leave the Netherlands immediately if the review period referred to in section 67 elapses without being used and during this period the operation of the decision under which the application is rejected or the residence permit is cancelled or not renewed is suspended.

3. Notwithstanding subsection 1, an alien:

a) whose lawful residence has ended on the grounds of section 8 (i) or

b) who was not lawfully resident immediately prior to his arrival in the Netherlands, shall immediately leave the Netherlands.

4. Our Minister may, notwithstanding subsection 1, shorten departure period to less than four weeks:

a) in the interests of the expulsion;

b) in the interests of public policy (*ordre public*) or national security.

12. Exclusion of aliens not lawfully residing in the Netherlands from entitlement to specific benefits or facilities which would enable them to exercise a right to housing, is laid down in the following:

– Article 8, Social Support Act (*Wet maatschappelijke ondersteuning – WMO of 29 June 2006*)

“1. Foreign nationals shall only be eligible for the granting of individual measures if they are lawfully resident within the meaning of Article 8.a to e and 1 of the Aliens Act 2000.

2. Notwithstanding the provisions of paragraph 1, in cases stipulated by or pursuant to order in Council, and, if necessary, by derogation of Article 10 of the Aliens Act 2000, such categories of foreign nationals not lawfully resident in the Netherlands as are designated by or pursuant to the order may be wholly or partially eligible for individual measures to be designated in the order. Eligibility for an individual measure shall not entitle a foreign national to lawful residency.”

B – International standards

– United Nations Convention on the Rights of the Child of 20 November 1989

Article 3

“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. (...)”

Article 27

“1. States Parties recognize 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 program's, particularly with regard to nutrition, clothing and housing."

13. In its Concluding observations on the Netherlands (document CRC/C/NLD/CO/3) of 27 March 2009, the Committee on the Rights of the Child made the following recommendation to the State:

"§ 29. The Committee recommends that the State party take all appropriate measures to ensure that the principle of the best interests of the child, in accordance with article 3 of the Convention, is adequately integrated into all legal provisions and applied in judicial and administrative decisions and in projects, programmes and services which have an impact on children."

14. In the report concerning his visit to the Netherlands (document CommDH(2009)2), the Commissioner for Human Rights of the Council of Europe noted that:

"§ 61 Children coming to the Netherlands with their family are generally included in the asylum procedure of their parents. There is no organisation making sure that the decision is in the best interest of the child in contrast to other areas of Dutch law such as family law, where the Council for Child Protection (Raad voor de Kinderbescherming) is involved. (...)"

15. In its General Comment No. 6 on Treatment of Unaccompanied and Separated Children outside their Country of origin (document CRC/GC/2005/6), with regard to the right to an adequate standard of living, the Committee on the Rights of the Child stated that:

"§44. States should ensure that separated and unaccompanied children have a standard of living adequate for their physical, mental, spiritual and moral development. As provided in Article 27§2 of the Convention, States shall provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing."

16. In a report on the Dutch asylum policy after the entry into force of the Aliens Act 2000 ("Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy", 9 April 2003), Human Rights Watch warned:

"The Dutch Government should make clear to all officials that the Convention on the Rights of the Child and other relevant international and regional instruments mandating minimum standards for the treatment of all children are applicable to migrant children regardless of their legal status."

17. In its third report on the Netherlands (document CRI(2008)3) adopted on 29 June 2007, the European Commission against Racism and Intolerance (ECRI) made the following recommendation as to the living conditions in particular of unaccompanied children :

"§ 46. ECRI strongly encourages the Dutch authorities in their plans to review their policies on unaccompanied children and stresses that detention of children should be strictly limited to cases where it is absolutely necessary and in the best interest of the child."

18. In the report concerning his visit to the Netherlands (document CommDH(2009)2), the Commissioner for Human Rights of the Council of Europe highlighted that:

"§ 62 Until January 2008, the Dutch authorities were widely criticised for detaining about 240 children and their families, for an average time of 59 days and a maximum of 244 days. In response to this criticism and a parliamentary motion, on 29 January 2008, the Dutch government publicised its new policy regarding administrative detention of children and their families. The aim is to reduce the detention period for children by introducing a maximum of two weeks detention prior to expulsion, the creation of more alternative accommodation for children and their families, and the improvement of detention conditions. Furthermore, the government announced that it would add 12 weeks to the 28-day period given to asylum seekers and migrants to leave the country voluntarily after their application has been rejected."

(...) § 66 NGOs report that the new policy for asylum-seeking children in administrative detention has not yet led to (...) a significant decrease in unaccompanied migrant minors in detention,

estimating in June 2007 that some 40 unaccompanied minors were at the time detained in juvenile detention centres (Children's Rights in the Netherlands, the third report of the Dutch Coalition for Children's Rights on the implementation of the Convention on the Rights of the Child, July 2008, p. 48). In a letter to Parliament, the Ministry of Justice explained that they see detention of unaccompanied minors as a measure of public order since the risk to let these children free is sufficiently higher than for children with parents, referring also to the danger of being trafficked. Nevertheless, the Government started a pilot project, providing semi-closed secure shelter facilities to unaccompanied minors considered to be at risk of trafficking. The Dutch authorities informed the Commissioner that they always seek alternatives to detention when faced with an unaccompanied minor and that in 2007, about 150 unaccompanied minors were placed in detention."

– Article 11, International Covenant on Economic, Social and Cultural Rights of 16 December 1966

"1. The States Parties to the present Covenant recognize 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 State Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

– Article 3, European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950

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

– Article 1, Charter of Fundamental Rights of the European Union of 7 December 2000

"Human dignity is inviolable. It must be respected and protected."

– Recommendation No. R (2000) 3 of the Committee of Ministers to member states on the right to the satisfaction of basic material needs of persons in situation of extreme hardship adopted on 19 January 2000

(...) "Principle 2: The right to the satisfaction of basic human material needs should contain as a minimum the right to food, clothing, shelter and basic medical care.

(...) Principle 4: The exercise of this right should be open to all citizens and foreigners, whatever the latter's position under national rules on the status of foreigners, and in the manner determined by national authorities." (...)

– Resolution of the Parliamentary Assembly of the Council of Europe, Res 1483(2006) of 26 January 2006 on the policy of return of failed asylum seekers in the Netherlands

"7. (...) Where forced return is inevitable, it should be implemented in a humane and transparent manner in compliance with human rights and with respect for the safety and dignity of the person concerned.

11. (...) the Assembly fears that, under the revised policy of the Netherlands, detention, of potentially unlimited duration, could be resorted to as a punitive measure to sanction those who do not co-operate, or who cannot prove that they are co-operating, towards facilitating their own return. It regrets that this policy does not foresee any clear exemptions from detention for specific categories of failed asylum seekers such as children (...)

14. (...) the Assembly believes that the revised policy of the Netherlands should be modified in so far as it allows, in some cases, for certain persons to be protected from expulsion where it is impossible to return them, whilst simultaneously depriving them of all access to housing (...). This is a particularly worrying development, especially regarding children in the light of the rights laid down in the Convention on the Rights of the Child. (...)

15. The Assembly, therefore, calls on the Government of the Netherlands and on other Council of Europe member states having similar policies to: (...)

15.14. ensure an appropriate level of access to housing (...) for all failed asylum seekers up to the time of their departure from the country;" (...)

- Recommendation of the Commissioner for Human Rights of the Council of Europe on the implementation of the right to housing, 30 June 2009, document CommDH(2009)5

Section 3.3.2 – Reduction of homelessness

(...) “The requirement of dignity in housing means that even temporary shelters must fulfil the demands for safety, health and hygiene, including basic amenities, i.e. clean water, sufficient lighting and heating. The basic requirements of temporary housing include also security of the immediate surroundings. Nevertheless, temporary housing need not be subject to the same requirements of privacy, family life and suitability as are required from more permanent forms of standard housing, once the minimum requirements are met.”(...)

THE LAW

PRELIMINARY ISSUES

A – As to the role of the Committee

19. Relying on the Committee’s decision on the merits in *FIDH v. France* (Complaint No. 14/2003, decision of 8 September 2004, §§ 26-32), DCI argues that, as medical assistance, housing also is a prerequisite for the preservation of human dignity and therefore legislation or practice which denies entitlement to housing to foreign nationals, even if they are on the territory unlawfully, should be considered contrary to the Revised Charter.

20. The Government considers that the Committee’s decision (*FIDH v. France*, Complaint No. 14/2003, decision of 8 September 2004, § 32) relied upon by DCI was not upheld by the Committee of Ministers since, with Resolution ResCHS(2005)6, the Committee of Ministers did not address a recommendation to the respondent Government.

21. The Committee recalls that it is clear from the wording of the Protocol providing for a system of collective complaints that only the European Committee of Social Rights can rule on whether or not a situation is in conformity with the Charter: this is the case with any treaty establishing a judicial or quasi-judicial body to assess Parties' compliance with that treaty. The explanatory report to the Protocol explicitly states that the Committee of Ministers cannot reverse the legal assessment made by the Committee. It may only decide whether or not to additionally make a recommendation to the state concerned. Admittedly, when using this power to decide which follow up should be given to the Committee’s finding of a violation of the Charter, the Committee of Ministers may take account of any social and economic policy considerations, but it may not question the Committee’s legal assessment (*Confédération Française de l’Encadrement (CFE CGC) v. France*, Complaint No 16/2003, decision on the merits of 12 October 2004, §§ 20-21).

22. As a consequence, the Committee’s decision in *FIDH* represents today’s interpretation of the Revised Charter.

B – As to the rights of the child under the Revised Charter

23. DCI invites the Committee to interpret the rights provided in the Revised Charter in the light of the United Nations Convention on the Rights of the Child which protects all persons under the age of 18 within the jurisdiction of a contracting party, regardless of residence status.

24. The Government states that the Committee cannot extend its competence by applying or interpreting the provisions of a treaty other than the one to which it owes its existence.

25. The Committee points out that the European Social Charter guarantees each child – that is persons aged under 18 – a significant number of fundamental rights. The Charter firstly treats children as individual rights' holders since human dignity inherent in each child fully entitles her/him to all fundamental rights granted to adults. Additionally, the specific situation of children, which combines vulnerability, limited autonomy and potential adulthood, requires States to grant them specific rights, such as those enshrined in the following provisions of the Charter:

- right to shelter Article 31§2),
- right to health (Articles 8, 11, 7, 19§2),
- right to education (Articles 9, 10, 15, 17, 19§§11-12),
- protection of the family and right to family reunion (Articles 16, 27, 19§6),
- protection against danger and abuse (Articles 7§1, 17),
- prohibition of child labour under the age of 15 (Article 7§1 and §3),
- specific working conditions between 15 and 18 (Article 7).

26. Because of this comprehensive approach, coupled with the effective nature of the rights it embodies, the European Social Charter is the most significant treaty at the European level for children's human rights. It complements the European Convention on Human Rights in this area and reflects the United Nations Convention on the Rights of the Child, on which its new Article 17 is based (see *FIDH v France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 36 and *World Organisation against Torture (OMCT) v. Greece*, Complaint No. 17/2003, decision on the merits of 7 December 2004, § 31).

27. Moreover, the Committee reiterates that the rights in the Charter must take a practical and effective, rather than a theoretical, form (see *inter alia*, *International Movement ATD Fourth World ("ATD") v. France*, Complaint No. 33/2006, decision on the merits of 5 December 2007, § 59 and *International Commission of Jurists v. Portugal*, Complaint No. 1/1998, decision on the merits of 9 September 1999, § 32). It therefore interprets the rights and freedoms set out in the Charter in the light of current conditions (*Marangopoulos Foundation for Human Rights v. Greece*, Complaint No. 30/2005, decision on the merits of 6 December 2006, § 194) and in the light of relevant international instruments that served as inspiration for its authors or in conjunction with which it needs to be applied (*European Federation of National Organisations working with the Homeless (FEANTSA)*, Complaint No. 39/2006, decision on the merits of 5 December 2007, § 64).

28. The United Nations Convention on the Rights of the Child is one of the most ratified treaties world-wide and it has been ratified by all member states of the Council of Europe. It is therefore entirely justified that the Committee should have

regard to the United Nations Convention on the Rights of the Child as it is interpreted by the UN Committee on the Rights of the Child (see *OMCT v. Ireland*, Complaint No 18/2003, decision on the merits of 7 December 2004, §61) when ruling on the alleged violation of any right of the child which is established by the Charter.

29. In particular, when ruling on situations where the interpretation of the Charter concerns the rights of a child, the Committee considers itself bound by the internationally recognised requirement to apply the best interests of the child principle. It is indeed mindful that in General Comment No. 5 (document CRC/GC/2003/5, §§ 45-47), the Committee on the Rights of the Child stated that “Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children”.

C – As to the interpretation of paragraph 1 of the Appendix concerning the scope of the Revised Charter in terms of persons protected

Paragraph 1 of the Appendix – Scope of the Revised Charter in terms of persons protected

- 1 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 Parties.

Submissions of the parties

30. The Government states that the Netherlands ratified the Revised Charter and its Protocol providing for a system of collective complaints on the understanding that its law and practice with regard to aliens unlawfully present in its territory did not come within the scope of the Revised Charter. It based this understanding on the terms of paragraph 1 of the Appendix which limit such scope of application to “foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”.

31. Moreover, the Government alleges that aliens policy is pre-eminently an issue dealt with at the level of national states. It would therefore run counter to this principle if States were obliged to recognise a right to housing or other economic, social and cultural rights for those who reside in their territory unlawfully, thereby facilitating a prolongation of the unlawful situation. The Government further observes that this is not changed when the persons concerned are minors. Making a categorical exception for minors to the denial of certain rights would frustrate the right of the State to control immigration.

32. DCI replies that holding children accountable for their whereabouts is contrary to the position of children in today's world. Children are recognised as extremely vulnerable persons, who, for a large part of their existence are dependent on others, usually their parents, for their survival. This dependence on others entails that they have very limited (or no) influence on their place of residence. DCI therefore argues that if the choice of the adult turns out to be less favourable it should not result in substandard living conditions for the child. Relying on the Committee's decision on the merits in *FIDH v France*, DCI argues that, as medical assistance, housing also is a prerequisite for the preservation of human dignity and therefore legislation or practice which denies entitlement to housing to foreign nationals, even if they are on the territory unlawfully, should be considered contrary to the Revised Charter.

33. DCI further clarifies that the complaint is not intended to create an entitlement to a residence permit for either the child or the parents. It acknowledges that the Government has a choice in such respect. It considers that the Government may therefore either deport the child together with the parents or it should provide the necessary protection as long as the child is within the Netherlands' jurisdiction.

Assessment of the Committee

34. The Committee recalls that the Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality, solidarity (*FIDH v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 27) and other generally recognised values. It must be interpreted so as to give life and meaning to fundamental social rights (*FIDH v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 29).

35. The Committee interprets the Charter in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, among which its Article 31§3(c), which indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". Indeed, the Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including in the instant case those relating to the provision of adequate shelter to any person in need, regardless whether s/he is on the State's territory legally or not.

36. The Committee considers that a teleological approach should be adopted when interpreting the Charter, i.e. it is necessary to seek the interpretation of the treaty that is the most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties (*OMCT v. Ireland*, Complaint No. 18/2003, decision on the merits of 7 December 2004, § 60). It follows *inter alia* that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter (*FIDH v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004, §§ 27-29).

37. Moreover, as stated in its decision on the merits in *FIDH v France* (Complaint No. 14/2003, decision on the merits of 8 September 2004, § 30), the Committee

reiterates that the restriction in paragraph 1 of the Appendix attaches to a wide variety of social rights and impacts on them differently. It further holds that such restriction should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake.

38. It results from the above mentioned considerations (A, B and C) that with regard to each alleged violation in the instant case, the Committee will thus preliminarily have to determine whether the right invoked is applicable to the specific vulnerable category of persons concerned, i.e. children unlawfully present in the Netherlands. Additionally, it shall do so mindful of its obligation to respect the best interests of the child principle.

D – As to the scope *ratione materiae* of the complaint

39. In the light of the submissions made during the proceedings, the Committee observes that allegations concerning violation of rights other than that to housing for children unlawfully present in the Netherlands are presented as subsidiary and are not sufficiently developed. The Committee therefore considers that the complaint concerns the following issues:

- denial of access to housing of an adequate standard to children unlawfully present in the Netherlands (Article 31§1);
- failure to prevent or reduce homelessness by not providing shelter to children unlawfully present in the Netherlands as long as they are in the Netherlands' jurisdiction (Article 31§2).
- failure to take all appropriate and necessary measures designed to provide protection and special aid from the state to children unlawfully present in the Netherlands by denying them entitlement to shelter (Article 17§1.c);
- discrimination in access to housing against children unlawfully present in the Netherlands (Article E read in conjunction with Articles 31 and 17).

FIRST PART: THE ALLEGED VIOLATION OF THE RIGHT TO HOUSING

Article 31 – The right to housing

Part I: Everyone has the right to housing.

Part II: 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.

40. The Committee observes that DCI does not specify whether Article 31 in its entirety is specifically invoked in the present complaint. On the basis of the content of the submissions, the Committee considers that the alleged violations invoked by DCI, i.e. the denial of adequate housing as well as that of shelter to children unlawfully present in the Netherlands relate to Article 31§1 and Article 31§2 respectively.

I. ON THE ALLEGED VIOLATION OF ARTICLE 31§1 FOR DENIAL OF ACCESS TO HOUSING OF AN ADEQUATE STANDARD TO CHILDREN UNLAWFULLY PRESENT IN THE NETHERLANDS

As to the applicability of Article 31§1 to children unlawfully present in the Netherlands

41. Like the European Court of Human Rights (“the Court”), the Committee acknowledges that States have the right under international law to control the entry, residence and expulsion of aliens from their territories (see *mutatis mutandis* European Court of Human Rights, Moustaquim v. Belgium, judgment of 18 February 1991, Series A no. 193, p. 19, § 43 and European Court of Human Rights, Beldjoudi v. France, judgment of 26 March 1992, Series A no. 234-A, p. 27, § 74). The Netherlands is thus justified in treating children lawfully residing and children unlawfully present in its territory differently.

42. Like the Court, the Committee however highlights that States' interest in foiling attempts to circumvent immigration rules must not deprive foreign minors, especially if unaccompanied, of the protection their status warrants. The protection of fundamental rights and the constraints imposed by a State's immigration policy must therefore be reconciled (see *mutatis mutandis* European Court of Human Rights, Mubilanzila Mayeka and Kaniki Mitunga v Belgium, judgment of 12 October 2006 § 81).

43. The Committee recalls that under Article 31§1 (the right to adequate housing), it holds that temporary supply of shelter cannot be considered as adequate and individuals should be provided with adequate housing within a reasonable period of time (ERRC v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005, § 35 and ERRC v. Bulgaria, Complaint No. 31/2005, decision on the merits of 6 December 2006, § 34). Adequate housing under Article 31§1 means a dwelling which is safe from a sanitary and health point of view, i.e. it must possess all basic amenities, such as water, heating, waste disposal, sanitation facilities and electricity and must also be structurally secure, not overcrowded and with secure tenure supported by the law (see Conclusions 2003, Article 31§1, France and FEANTSA v. France, Complaint 39/2006, decision on the merits, 5 December 2007, § 76).

44. States' immigration policy objectives and their human rights obligations would not be reconciled if children, whatever their residence status, were denied basic care and their intolerable living conditions were ignored. As far as Article 31§1 of the Revised Charter is concerned, the Committee acknowledges that the denial of adequate housing, which includes a legal guarantee of security of tenancy, to children unlawfully present on its territory, does not automatically entail a denial of the basic care needed to avoid persons living in intolerable conditions. Moreover, to require that a Party provide such lasting housing would run counter the State's aliens policy objective of encouraging persons unlawfully on its territory to return to their country of origin.

45. Accordingly the Committee concludes that children unlawfully present on the territory of a State Party do not come within the personal scope of Article 31§1, which thus does not apply in the instant case.

II. ON THE ALLEGED VIOLATION OF ARTICLE 31§2 FOR FAILURE TO PREVENT OR REDUCE HOMELESSNESS BY NOT PROVIDING SHELTER TO CHILDREN UNLAWFULLY PRESENT IN THE NETHERLANDS AS LONG AS THEY ARE IN THE NETHERLANDS' JURISDICTION

As to the applicability of Article 31§2 to children unlawfully present in the Netherlands

46. The Committee recalls that Article 31§2 (prevention and reduction of homelessness) is specifically aimed at categories of vulnerable people. It obliges Parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of emergency and longer-term measures, such as the provision of immediate shelter and care for the homeless as well as measures to help such people overcome their difficulties and to prevent them from returning to a situation of homelessness (Conclusions 2003, Italy, Article 31 and FEANTSA v. France, Complaint 39/2006, decision on the merits, 5 December 2007, § 103).

47. The Committee considers that the right to shelter is closely connected to the right to life and is crucial for the respect of every person's human dignity. The Committee observes that if all children are vulnerable, growing up in the streets leaves a child in a situation of outright helplessness. It therefore considers that children would adversely be affected by a denial of the right to shelter.

48. The Committee thus holds that children, whatever their residence status, come within the personal scope of Article 31§2.

A – Submissions of the parties

1. The complainant organisation

49. DCI states that section 10 paragraph 1 of the Aliens Act 2000 which provides that an alien who is not lawfully resident in the Netherlands may not claim *inter alia* entitlement to benefits in kind entails that children without a legal residence status are excluded from the right to housing. This is confirmed by the fact that section 10 paragraph 2 of the Aliens Act 2000, may be derogated only if the entitlement relates to education, the provision of care that is medically necessary, the prevention of situations that would jeopardise public health or the provision of legal assistance to the alien.

50. DCI acknowledges that shelter up to twelve weeks is provided to children unlawfully present in the Netherlands if they cooperate with their return to their country of origin. However, DCI questions whether a minor may cooperate if the parent does not. Children whose parents do not cooperate are not eligible for this kind of shelter. DCI further is of the opinion that twelve weeks are usually not enough to return to one's country of origin. It states that children failing to leave within twelve weeks are removed from the shelter.

51. As to unlawfully present children and the possibility they may have of obtaining accommodation if they demonstrate that they are unable to leave the Netherlands through “no fault of their own”, DCI considers this extremely difficult to demonstrate in practice, particularly for children. Moreover, while proof is being sought such children have no right to housing under Dutch law.

52. Finally, as to unaccompanied minors whose asylum requests fail, DCI argues that in practice it is very difficult to fulfil the requirements to obtain the special residence permit for them. DCI maintains that unaccompanied minors often end up in some sort of “twilight zone” between legality and illegality being guaranteed solely that they will not be deported until the age of 18 unless there is adequate accommodation and support in their country of origin.

53. Ultimately, DCI maintains that no governmental policy concerning aliens should result in children becoming homelessness.

2. The respondent Government

54. The Government states that it has the exclusive right to determine who may or may not reside on the territory of the Netherlands. It further explains that the basic assumption underlying Dutch policy on aliens is that those who do not, or no longer, reside lawfully in the Netherlands, must leave the country, whether after the expiry of a set period or not. Responsibility for leaving the Netherlands rests primarily with the aliens themselves, who should do everything possible to fulfil that obligation. In this context, the linking of entitlements to residence status (“linkage principle”) as set out in section 10 of the Aliens Act 2000 is intended to make it impossible for illegal aliens to prolong their unlawful residence.

55. The Government clarifies that unlawfully resident families with children may qualify for a stay of up to twelve weeks in a special centre where their freedom is restricted. The centre was originally intended for failed asylum seekers with children, to prevent them having to be held in detention. The centre has also become available for unlawfully resident families who cooperate with a view to their return to the country of origin.

56. The Government also highlights that illegal immigrants who are unable to leave the Netherlands through “no fault of their own” may qualify for a residence permit on such ground.

57. Finally, the Government also points out that unaccompanied minor aliens who applied for an asylum residence permit which was refused are provided with accommodation until they reach the age of 18. The residence permit may nevertheless be revoked before the age of 18 if adequate care and protection become available in their country of origin.

B – Assessment of the Committee

58. The Committee notes that according to figures provided in the complaint and not contested by the Government, the number of children unlawfully present in the Netherlands - be they with their parents or unaccompanied - varies between 25.000 and 60.000. The Committee understands from the submissions during the proceedings that their unlawful presence may result from a failed asylum procedure, from a failed regular immigration procedure or pending the results of a regular immigration procedure.

59. The Aliens Act 2000, which entered into force in 2001, stipulates the conditions for foreign nationals to enter the Netherlands, the issue of residence permits and removal for both the asylum and non-asylum (immigration) categories. The Committee observes that the Act unequivocally links entitlement to benefits other than education, necessary medical care and legal aid, to residence status. Thus, children unlawfully present in the Netherlands are not, as a general rule, guaranteed a right to shelter. Exceptions exist where children cooperate with the authorities with regard to their return to their country of origin and under other specific circumstances. However, the Committee notes that there is no legal requirement to provide shelter to children unlawfully present in the Netherlands for as long as they are in its jurisdiction. Moreover, according to section 43 of the Aliens Act 2000, after the expiry of the time limit fixed in the Act on the Central Reception Organisation for the Asylum-Seekers or another statutory provision that regulates benefits in kind, the aliens supervision officers are authorised to compel the vacation of property in order to terminate the accommodation or the stay in the residential premises provided as a benefit in kind.

60. Additionally, the Committee notes from observations and recommendations of July 2003 by the United Nations High Commissioner for Refugees (“UNHCR”) on the implementation of the Aliens Act 2000, that after its entry into force more than 60% of all asylum applications were rejected in the accelerated procedures according to figures provided by the Ministry of Justice (TK 2002-2003, 19 637, no 731). UNHCR highlights that material support is terminated immediately following a negative first instance decision in accelerated procedures. Such material support includes shelter.

61. The Committee reiterates that Article 31§2 of the Revised Charter is directed at the prevention of homelessness with its adverse consequences on individuals’ personal security and well being (Conclusions 2005, Norway, Article 31 and ERRC v. Italy, Complaint 27/2004, decision on the merits of 7 December 2005, § 18). Where the vulnerable category of persons concerned are children unlawfully present in the territory of a State as in the instant case, preventing homelessness requires States to provide shelter as long as the children are in its jurisdiction. Furthermore, the Committee is of the view that alternatives to detention should be sought in order to respect the best interests of the child.

62. As to living conditions in a shelter, under Article 31§2 the Committee holds that they should be such as to enable living in keeping with human dignity (FEANTSA v. France, Complaint No 39/2006, decision on the merits of 5 December 2007, §§ 108-109). In this regard the Committee refers to the Recommendation of the Commissioner for Human Rights of the Council of Europe on the implementation of the right to housing (June 2009) where he claims that “the starting point to reduce

homelessness should be (...) to guarantee that all people, regardless of circumstance, are able to benefit from housing that corresponds with human dignity, the minimum being temporary shelter. The requirement of dignity in housing means that even temporary shelters must fulfil the demands for safety, health and hygiene, including basic amenities, i.e. clean water, sufficient lighting and heating. The basic requirements of temporary housing include also security of the immediate surroundings. Nevertheless, temporary housing need not be subject to the same requirements of privacy, family life and suitability as are required from more permanent forms of standard housing, once the minimum requirements are met. The housing of people in reception camps and temporary shelters which do not satisfy the standards of human dignity is in violation of the aforementioned requirements.”

63. Finally, the Committee recalls that under Article 31§2 States Parties must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and must make alternative accommodation available (see Conclusions 2003, France, Italy, Slovenia and Sweden, Article 31§2, as well as *ERRC v. Italy*, Complaint No 27/2004, decision on the merits of 7 December 2005, § 41, *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006, § 52, *ATD v. France*, Complaint 33/2006, decision on the merits of 5 December 2007, § 77 and *FEANTSA v. France*, Complaint No 39/2006, decision on the merits of 5 December 2007, § 81). Accordingly, the Committee holds that, since in the case of unlawfully present persons no alternative accommodation may be required by States, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity.

64. On the basis of the above, the Committee concludes that States Parties are required, under Article 31§2 of the Revised Charter, to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children.

65. As this is not the case, the Committee holds that the situation in the Netherlands constitutes a violation of Article 31§2.

SECOND PART: ON THE ALLEGED VIOLATION OF ARTICLE 17 FOR FAILURE TO TAKE ALL APPROPRIATE AND NECESSARY MEASURES DESIGNED TO PROVIDE PROTECTION AND SPECIAL AID FROM THE STATE TO CHILDREN UNLAWFULLY PRESENT IN THE NETHERLANDS BY DENYING THEM ENTITLEMENT TO SHELTER

Article 17 – The right of children and young persons to social, legal and economic protection

Part I: Children and young persons have the right to appropriate social, legal and economic protection.

Part II: 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 c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support; (...)

As to the applicability of Article 17 to children unlawfully present in the Netherlands

66. In the light of the preliminary remarks made above concerning the rights of the child under the Revised Charter and bearing in mind its decision in *FIDH v France* (Complaint No. 14/2003, decision on the merits of 6 September 2004, § 30 and § 32), the Committee holds that children, whatever their residence status, come within the personal scope of Article 17 of the Revised Charter.

A – Submissions of the parties

1. The complainant organisation

67. DCI states that when parents, who have primary responsibility for their children, cannot, because of their residence status, provide them with minimum care (nutrition, clothing, housing), States must provide the necessary protection. DCI argues that Dutch legislation and practice denies children unlawfully present in the Netherlands this minimum care as concerns housing.

2. The respondent Government

68. The Government understands the complaint to allege a violation of the right to housing for unlawfully resident children. Hence, it does not put forward any new argument under Article 17.

B – Assessment of the Committee

69. The Committee observes that DCI invokes Article 17 generally. However, in the light of the preliminary remarks made above on the scope *ratione materiae* of the complaint, the Committee considers that the main allegations raised by DCI relate to Article 17§1.c.

70. Article 17§1.c requires that States take the appropriate and necessary measures to provide the requisite protection and special aid to children temporarily or definitively deprived of their family's support. The Committee observes that as long as their unlawful presence in the Netherlands persists, the children at stake in the instant case, are deprived of their family's support in that by law (see section 10 of the Aliens Act) they may not claim entitlement to the benefits or facilities which would *inter alia* secure them shelter.

71. In this respect, the Committee holds that the obligations related to the provision of shelter under Article 17§1.c are identical in substance with those related to the provision of shelter under Article 31§2. Insofar as the Committee has found a violation under Article 31§2 on the ground that shelter is not provided to children unlawfully present in the Netherlands for as long as they are in its jurisdiction, the Committee also finds a violation of Article 17§1.c of the Revised Charter on the same ground.

THIRD PART: ON THE ALLEGED VIOLATION OF ARTICLE E IN CONJUNCTION WITH ARTICLES 31 AND 17

Article E – Non-discrimination

“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.”

As to the applicability of Article E to paragraph 1 of the Appendix

72. The Committee holds that the prohibition of discrimination, which is enshrined in Article E of the Revised Charter, establishes an obligation to ensure that any individual or group, who falls within the scope *ratione personae* of the Revised Charter, equally enjoy the rights of the Revised Charter.

73. As the Court has repeatedly stressed when interpreting Article 14 of the Convention, the Committee has held that the principle of equality, which is reflected in the prohibition of discrimination, means treating equals equally and unequals unequally (*Autism-Europe v. France*, Complaint No. 13/2002, decision on the merits of 4 November 2003, § 52). Thus, as acknowledged above, States Parties may treat persons lawfully or unlawfully present on their territories differently. However, in so doing, human dignity, which is a recognised fundamental value at the core of positive European human rights law, must be respected.

74. The Committee observes that the question, as submitted by the complainant organisation in the instant case, does not concern equality of treatment of children unlawfully present in the Netherlands compared to children lawfully resident. The question is instead whether such a category of persons may claim entitlement to rights under the Charter and under what conditions. Article E of the Revised Charter does not serve this purpose.

75. For these reasons, the Committee considers that Article E is not applicable in the instant case.


CONCLUSION

77. For these reasons the Committee concludes

- unanimously that Article 31§1 is not applicable in the instant case;
- unanimously that there is violation of Article 31§2;
- unanimously that there is violation of Article 17§1.c;
- unanimously that Article E is not applicable in the instant case.


Andrzej SWIATKOWSKI
Rapporteur


Polonca KONČAR
President


Régis BRILLAT
Executive secretary