

**EUROPEAN COMMITTEE OF SOCIAL RIGHTS
COMITE EUROPEEN DES DROITS SOCIAUX**



16 April 2008

Case document No. 2

Defence for Children International (DCI) v. The Netherlands
Complaint No. 47/2008

**OBSERVATIONS OF THE GOVERNMENT ON THE
ADMISSIBILITY**

Registered at the Secretariat on 7 April 2008

Introduction

1. On 14 January 2008, Defence for Children International (“DCI”) lodged a complaint with the European Committee of Social Rights (“the Committee”) on the basis of the 1995 Additional Protocol to the European Social Charter (“the Additional Protocol”), alleging a violation of the Revised Social Charter (“the Revised Charter”) by the Government of the Netherlands (“the Government”).
2. By letter of 14 February 2008, the Executive Secretary of the Committee forwarded the complaint to the Government, expressing the Committee’s wish to receive the Government’s observations on the admissibility of the complaint before 7 April 2008.
3. The complaint concerns the impossibility under Dutch law for children residing illegally in the Netherlands to enjoy the rights enshrined in the following articles of the Revised Charter:
 - Article 11: the right to protection of health;
 - Article 13: the right to social and medical assistance;
 - Article 16¹: the right of the family to social, legal and economic protection;
 - Article 17: the right of children and young persons to social, legal and economic protection;
 - Article 30: the right to protection against poverty and social exclusion;
 - Article 31: the right to housing;alone, or read in conjunction with:
 - Article E: non-discrimination.
4. The letter of complaint itself was signed by the Chairman and the Executive Director of “Defence for Children International the Netherlands”, and accompanied by a letter of 30 May 2007, signed by the President of the International Executive Council of DCI, and addressed “to whom it may concern”, mandating the former organisation to

¹ The fact that Article 16 is not referred to in the conclusion of the complaint is for the purposes of these observations considered to be an omission, given the arguments put forward in the substantive part.

file a complaint on behalf of the latter, regarding “*the exclusion of illegal children (children without a residence permit) from state social provisions in the Netherlands*”.

5. Furthermore, a letter of support was appended from the Dutch national committee of UNICEF. The letter of complaint refers to support from the Dutch human rights organisations *Stichting LOS* and the *Nederlands Juristen Comité voor de Mensenrechten*, but apparently this support was not laid down in any written form.

The admissibility of the complaint

A. The status of the complainant

6. The Government is of the opinion that the status of the complainant under the Additional Protocol is, at best, unclear. The complaint appears to be submitted by the organisation *Defence for Children International the Netherlands*, mandated thereto by its parent organisation DCI. The complaint does not contain any information on the relationship between the two organisations. Whereas the Government recognises that DCI itself has the right to submit complaints under Article 1 of the Additional Protocol, it would point out that the Netherlands has not made the declaration provided for in Article 2 of that Protocol, recognising the right of representative national non-governmental organisations to lodge complaints against it. By allowing complaints from such organisations by mandate or delegation, the Committee risks rendering Article 2 futile. As the Government is insufficiently informed about the relationship between the two organisations involved, it must reserve its position on this issue and refer to the Committee’s decision in this regard.

B. The scope of the Revised Charter

7. DCI states in its letter of complaint that a strict interpretation of the Appendix to the Revised Charter (“the Appendix”) would mean that the subjects of the complaint, i.e. children not lawfully resident in the Netherlands, are not protected by the Revised Charter. DCI refers to the Committee’s decision on the merits in the case of *the International Federation of Human Rights Leagues (FIDH) v. France*² (“the French case”). In this decision, the Committee held “*that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter*”.³
8. The Government would respond as follows. Paragraph 1 of the Appendix explicitly limits the scope of the Revised Charter 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*”. In the Government’s view, this straightforward provision speaks for itself and can only lead to the conclusion that persons unlawfully resident in the Netherlands, irrespective of their age, do not come under the scope of the Revised Charter.
9. There is no question here of a strict interpretation of the provision, or, for that matter, of a broad interpretation. Should there be any doubt about how to interpret the provision – which, the Government submits, is not the case – such interpretation should be neither narrow nor broad, but merely *bona fide*. After all, the Vienna Convention on the Law of Treaties provides that “*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.⁴ Furthermore, in the *Second Admission Case* the International Court of Justice stated that:

² Complaint No. 14/2003.

³ Paragraph 32 of the Committee’s decision on the merits.

⁴ Vienna Convention on the Law of Treaties, Article 31, paragraph 1.

“[...] the first duty of a tribunal which is called upon to interpret and to apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”⁵

10. Assuming that there is no difference of opinion between DCI and the Government about the *meaning* of the terms used in paragraph 1 of the Appendix, the question arises of whether either the *context* in which they occur or the *object and purpose* of the Revised Charter and the Appendix would shed another light on those terms and support DCI’s interpretation of the provision. The context of the provision, it would seem, is the relationship between the obligation of states to guarantee their citizens economic, social and cultural rights on the one hand and the sovereign power of states to decide which foreigners to allow entry into their territory. The object and purpose of the provision are to ensure that that sovereign power is not negated by international obligations to provide facilities to those who are not lawfully resident. Clearly, by adopting the unequivocal wording of the Appendix, the Contracting Parties aimed to exclude all aliens who are not lawfully resident from the scope of the Revised Charter, irrespective of their age. Only in this light can the second sentence of paragraph 1 of the Appendix be understood: the unambiguous exception laid down in the first sentence does not prejudice the extension by any of the Parties of the rights laid down in the Revised Charter to other categories of persons, for example, persons not lawfully resident within the territory of the Party concerned or children in those circumstances.

11. The Government finds support for its views in the dissenting opinions to the above-mentioned decision of the Committee in the French case. Committee members Evju, Koncar, François and Birk all express the view that there is no room for the Committee to extend the scope of the Revised Charter defined by a clear text.

12. Be that as it may, the present case cannot be compared to the French case. Apart from the fact that the group of persons involved in the French case was more diffuse than

⁵ ICJ Rep. 1950, p. 8.

in the present case, comprising not only illegal immigrants but also French nationals usually residing outside French territory,⁶ and, perhaps related thereto, the fact that the French Government itself did not challenge the admissibility of the complaint, the Committee's reasoning as to the admissibility of that complaint hinges on the denial by the French Government of medical assistance to foreign nationals not lawfully resident in France. The Committee holds that the restriction contained in paragraph 1 of the Appendix applies to a wide variety of social rights and impacts on them differently. In the circumstances of the case in question, according to the Committee, the restriction affects a right of fundamental importance to the individual since it is connected to the right to life itself and touches on the very dignity of a human being. It impacts adversely on children who are exposed to the risk of no medical treatment.

13. The Government would observe in passing that, if the above reasoning were to be applied to the Dutch situation, the outcome would probably be the opposite of what it was in the French case. As DCI rightfully states in its complaint, the Benefit Entitlement (Residence Status) Act (*Koppelingswet*) excludes essential medical treatment, in addition to education and legal assistance, from the general rule that makes entitlement to public services dependent on lawful residence.
14. But even if one were to accept that the question of denial of medical treatment to illegal aliens would suffice to trigger admissibility of a complaint under the Revised Charter, which the Government does not, the Government points out that the present complaint is of a much broader nature than the complaint in the French case. It invokes no less than seven articles of the Revised Charter. Accepting admissibility in this case would go far beyond the very specific approach taken by the Committee in the French case and undermine the provision laid down in paragraph 1 of the Appendix.

⁶ A similar situation may be found in the Committee's decision of 7 December 2005 on the merits in the case of *the European Roma Rights Centre v. Italy*, complaint No. 27/2004, paragraph 18, where the group of persons involved did at least comprise an undefined number of persons falling within the scope of the Revised Charter.

15. The Government therefore concludes that the present complaint should be declared inadmissible by virtue of paragraph 1 of the Appendix and that such declaration would be fully in conformity with the Committee's own case law.

C. References to the Convention on the Rights of the Child

16. The Government notes that DCI finds support for the admissibility of its complaint in the United Nations Convention on the Rights of the Child ("the CRC"), to which the Netherlands is a Party, and asks the Committee to consider the rights granted in the Revised Charter in the light of the CRC.

17. The Government strongly rejects this argument. The task of examining the realisation by the States Parties of the obligations laid down in the CRC is assigned to the Committee on the Rights of the Child by Article 43 of the CRC. The Government cannot accept a treaty body extending its powers by applying or interpreting the provisions of a different treaty than the one to which it owes its existence, if such application or interpretation has not been specifically provided for. Any other approach would lead to diverging obligations for different States Parties under the same treaty. It would be legitimate to ask, for example, whether the fact that the Netherlands is not a Party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families diminishes or otherwise influences its obligations under Article 19 of the Revised Charter. The Government submits that that is clearly not the case.

18. The Government therefore concludes that the complaint should be declared inadmissible inasmuch as it invokes provisions of the CRC.

D. Substantiation of the complaint

19. As its final argument against the admissibility of the complaint, the Government wishes to observe that it finds it difficult to assess the precise nature and aim of the

complaint, due to a lack of substantiation. In other words, DCI has not succeeded in showing what conduct by the Government leads to a perceived violation of the Revised Charter. As already stated, DCI acknowledges that domestic legislation ensures the provision, including to aliens who are not lawful residents, of education, legal assistance and essential medical treatment. DCI is also aware of the fact that the Benefit Entitlement (Residence Status) Act, which would appear to be the most pivotal piece of legislation mentioned in the complaint, is not intended to be applied in a rigorous manner.⁷ This being the case, the Government fails to see what situations are targeted by the complaint.

20. Being aware that this argument may have a bearing on the admissibility or the merits of the complaint, the Government sees fit to put it forward at this stage of the proceedings. It suggests that the complaint may be declared inadmissible for lack of substantiation.

Conclusion

21. With regard to the admissibility of the present complaint, the Government concludes that:

- given the lack of clarity concerning the relationship between the organisation lodging the complaint and the organisation allowed to submit complaints under the Additional Protocol, it must reserve its position on this issue and refer to the Committee's decision in this regard;
- the complaint is inadmissible, since it concerns a group of persons that is unequivocally excluded from the scope of the Revised Charter by virtue of paragraph 1 of the Appendix;
- the complaint should be declared inadmissible inasmuch as it relies on provisions of the CRC, since the Committee is not called upon to decide on the States Parties' adherence to any instrument other than the Revised Charter;

⁷ See the reference in footnote 10 to the letter of complaint.

- the complaint may be declared inadmissible for lack of substantiation.

The Hague, 7 April 2008

Roeland Böcker
Agent of the Government of the Netherlands