

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



28 November 2008

Case document No. 4

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

**OBSERVATIONS OF THE GOVERNMENT OF THE
NETHERLANDS ON THE MERITS**

Registered at the Secretariat on 20 November 2008

**Observations of the Government of the Netherlands
on the merits of Complaint No. 47/2008**

DEFENCE FOR CHILDREN INTERNATIONAL

v.

The Netherlands

Introduction

1. By decision of 23 September 2008, the European Committee of Social Rights ('the Committee') declared admissible the complaint lodged by Defence for Children International ('DCI') 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 Netherlands.
2. By letter of 29 September 2008, the Executive Secretary of the Committee forwarded the aforementioned decision to the Government of the Netherlands ('the Government'), expressing the Committee's wish to receive the Government's submissions on the merits of the complaint before 21 November 2008.
3. In its decision,¹ the Committee joined to the merits the majority of the Government's objections to the admissibility of the complaint. Inevitably, therefore, a substantial part of the Government's observations on admissibility, set forth in the Annexe to its letter of 7 April 2008, will be reiterated below.

The scope of the Revised Charter

4. 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* ('the French case').² 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

¹ Paragraph 14.

² Complaint No. 14/2003.

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

5. The Government would respond as follows. First of all, it should be noted that the group of persons involved in the French case was more diffuse than in the present case, comprising not only immigrants not lawfully resident in France, but also French nationals usually residing outside French territory. A similar situation may be found in the Committee's decision on the merits in the case of *the European Roma Rights Centre v. Italy*,⁴ where the group of persons involved did at least comprise an undefined number of persons falling within the scope of the Revised Charter.
6. More important, however, is the following. 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 not lawfully resident in the Netherlands, irrespective of their age, do not come under the scope of the Revised Charter.
7. 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*'.⁵ Furthermore, in the *Second Admission Case* the International Court of Justice stated that:

'[...] 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.'⁶
8. The Government submits that the *ordinary meaning* of the terms used in paragraph 1 of the Appendix makes perfect sense and is completely unambiguous. That should therefore be the end of the matter, as held by the International Court of Justice.

⁴ Complaint No. 27/2004, decision on the merits of 7 December 2005, paragraph 18.

⁵ Vienna Convention on the Law of Treaties, article 31, paragraph 1.

⁶ ICJ Rep. 1950, p. 8.

9. But even if one were of the opinion, for whatever reason, that the terms of the provision are not sufficiently clear, an assessment of the *context* in which they occur and of the *object and purpose* of the Revised Charter would lead to exactly the same conclusion. The *context* of the provision, it would seem, is the relationship between the obligation of states under international law to guarantee their populations economic, social and cultural rights on the one hand, and, on the other, the sovereign power of states to decide which foreigners to allow entry into their territory, more specifically the interest of the Contracting Parties in ensuring that the latter is not impeded by the former. The *object and purpose* of the Revised Charter may be found in its preamble, which, in referring to the European Social Charter of 1961, recalls that the member States agreed to secure *to their populations* the social rights specified therein. Without wishing to define the term *populations* in general, given the specific context of the present observations, the Government submits that 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. The Government can find no argument, linguistic or otherwise, that would contradict the validity and reasonableness of the above interpretation of the term *populations*. In other words, even if one were to find the wording of paragraph 1 of the Appendix insufficiently clear – which, once again, the Government denies – neither the context of that paragraph, nor the object and purpose of the Revised Charter, lead to an interpretation different from the Government's.
10. The Government notes that its views are shared by members of the Committee itself, as may be inferred from 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.

11. Comparing the merits of the present case to those of the French case, the Government would note the following. The Committee's reasoning as to the merits of the latter 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 French case, the Committee holds that 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.

12. The Government submits that the Committee's opinion that the question of denial of medical treatment to aliens not lawfully resident suffices to bring the complaint within the scope of the Revised Charter cannot automatically be applied to the present complaint, since it is of a different nature than the complaint in the French case. It partly invokes other articles of the Revised Charter on which, as the Committee acknowledged in the French case, paragraph 1 of the Appendix has a different impact. Bringing the present complaint within the scope of the Revised Charter on the basis of the same reasoning as developed in the French case would go far beyond the very specific approach taken by the Committee in that case and would gradually render the provision of the Appendix meaningless.

13. The Netherlands ratified the Additional Protocol on the understanding that its law and practice with regard to aliens not lawfully resident did not come within the scope of the Revised Charter. It based this understanding on the unequivocal terms of paragraph 1 of the Appendix, but also on the legitimacy and reasonableness of the law and practice itself and by the fact that this law and practice is fully in line with European standards. After all, as has been confirmed time and again by the European Court of Human Rights, States have the right under international law to control the entry, residence and expulsion of aliens. Aliens policy is pre-eminently an issue dealt with at the level of national states. It would 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. This is not changed when the persons concerned are minors. Making a categorial exception for minors to the denial of certain rights would still seriously frustrate the right of the State to

control immigration. This is even more true where, as DCI would appear to advocate, these rights should subsequently be assigned to the minors' parents as well. It is striking, in this regard, that the complaint nowhere refers to the origins of the children's unlawful stay in the Netherlands and is silent on the role and responsibilities of their parents or guardians.⁷ This is particularly remarkable since 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. Furthermore, DCI appears to assume automatically that migration to and prolonged stay in the Netherlands are in the children's best interest.

14. Any other view than the one just expressed would seriously call into question the meaning of paragraph 1 of the Appendix, as ratified by the Netherlands and other States Parties. It should be added that the examination of the French case by the Committee of Ministers further supports the Government's interpretation. In its resolution closing the examination of that case,⁸ the Committee of Ministers merely took note of the position of the French Government, without adding any recommendation. This course of events, in any case, does not reveal an intention among the contracting Parties to interpret the Appendix differently from before.
15. The Government concludes that the complaint is unfounded, since it falls outside the scope of the Revised Charter *ratione personæ*. The following comments are only relevant if the Committee does not share the Government's opinion in that regard.

References to the Convention on the Rights of the Child

16. The Government notes that DCI bases its complaint partly on the United Nations Convention on the Rights of the Child ('the CRC'), to which the Netherlands is party, and

⁷ In the press, too, DCI appears to ignore those aspects of the problem. In the TV programme *Een vandaag* of 6 October 2008 an example was shown of a family with children staying unlawfully in the Netherlands. There was no clarification whatsoever, by the DCI spokesperson, of the reasons for their unlawful status.

⁸ Resolution ResChS(2005)6, adopted by the Committee of Ministers on 4 May 2005 at the 925th meeting of the Ministers' Deputies.

asks the Committee to consider the rights granted in the Revised Charter in the light of the CRC. While DCI holds that it does not invoke the provisions of the CRC as such, but only uses them as a reference for the interpretation of the Revised Charter, it expresses the view that the scope of the CRC is broader than the scope of the Revised Charter.⁹

17. The Government acknowledges that the scope of the CRC is broader than the scope of the Revised Charter, in that the CRC lacks a specific provision comparable to paragraph 1 of the Appendix. The Government, however, finds it difficult to understand how the CRC might help to interpret the Revised Charter precisely in an area where the texts of the two conventions are so clearly different. After all, the inclusion of paragraph 1 in the Appendix, unequivocal as it is, was clearly intended to limit the scope of the Revised Charter. In other words, rather than seeking inspiration from the CRC in explaining certain provisions of the Revised Charter which might otherwise be prone to multiple interpretations, DCI's references to the CRC mean a *de facto* replacement of the system of one treaty by that of another.

18. The Government furthermore submits that the CRC is not only broader than the Revised Charter in one area, but also narrower in another, in that it does not recognise a right of collective complaint. The CRC has a different supervision mechanism. The task of examining the fulfilment 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, depending on their level of ratification of *other* instruments.¹⁰ It would be legitimate to ask, for example, whether the fact that the Netherlands is not 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.

⁹ Page 5 of the letter of complaint of 14 January 2008.

¹⁰ This approach would become even more cumbersome, given that it would necessitate taking into account any reservations by the respondent State to such other treaties. The Netherlands has, for instance, entered a reservation on article 26 of the CRC, to the effect that the right of children to benefit from social security does not extend to an *independent* right of the child to social security.

Substance of the complaint

19. Having regard to the documents submitted by DCI in the present proceedings so far, the Government is still uncertain as to the precise nature of the complaint in legal terms. In responding to the merits of the complaint, it makes quite a difference whether the complaint alleges a violation of the right to housing only,¹¹ laid down in article 31 of the Revised Charter, or a violation of no less than seven articles of the Revised Charter, namely:

- article 11: the right to protection of health;
- article 13: the right to social and medical assistance;
- article 16: 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;
- article E: non-discrimination.

20. The Government understands the complaint to allege a violation of the right to housing for unlawfully resident children, in that the Government guarantees neither *de facto* housing for that group, nor the financial means to ensure housing. Since adequate housing, according to DCI, is a *conditio sine qua non* for the enjoyment of other rights, violations of those rights are inherent in the violation of the right to housing. Furthermore, it is clear that the complaint has to a large extent been inspired by opposition to what has become known as the ‘linkage principle’ (*koppelingsbeginsel*). In the following paragraphs the Government will therefore explain the history and philosophy behind that principle and set out the exceptions to it.

21. The Government is opposed in principle to rights to benefits for aliens without lawful residence rights, who, as stated above, are under an obligation to leave the Netherlands. In

¹¹ In its response to the Government’s observations on admissibility of 3 June 2008, DCI holds that the complaint focuses on the right to housing ‘for all children residing in the Netherlands, *no matter what their residence status might be*’ (page 2), which adds to the Government’s confusion.

order to prevent aliens not lawfully resident from receiving *de facto* assistance from the Government without the lawfulness of their residence being examined, thereby facilitating the prolongation of their unlawful residence in the Netherlands and creating a false image of legality, an Act of Parliament entered into force on 1 July 1998, amending the Aliens Act and certain other Acts of Parliament, the object being to link entitlement to various provisions, benefits, exemptions and licences to lawful residence in the Netherlands.¹² This piece of legislation, which incorporates the ‘linkage principle’, is known as the Benefit Entitlement (Residence Status) Act (*Koppelingswet*).

22. The Benefit Entitlement (Residence Status) Act was intended to put an end to a situation that had arisen in the Netherlands and that was considered unjust and undesirable. In the 1970s and 1980s many aliens who were not entitled to residence in the Netherlands nonetheless succeeded in prolonging their *de facto* residence in this country, partly because they could obtain public provision such as unemployment and invalidity benefit and social assistance. As things stood, the government’s policy to curb unlawful residence in the Netherlands was thwarted by the fact that the assessment of entitlement to public provision did not include checking to see whether the person concerned was residing lawfully in the Netherlands.
23. The Benefit Entitlement (Residence Status) Act incorporates the linkage principle by linking aliens’ residence status to their entitlement to public provision by the Government, in the sense that an alien who is residing unlawfully in the Netherlands cannot lay claim to such provision. This principle is subject to certain exceptions, which will be dealt with below. For aliens who are residing lawfully in the Netherlands, the rule is that entitlement is linked to their residence status. This means that an alien who has been admitted to the Netherlands unconditionally has the same entitlement, in principle, as someone of Dutch nationality. An alien who has only been admitted for a temporary stay cannot in principle claim entitlement to public provision.
24. Since 1 July 1998, before any provision is granted to someone who does not possess Dutch nationality, it is first ascertained whether he or she is residing lawfully in the Netherlands. Then a further check is performed, to ascertain to what extent the person’s residence status

¹² Bulletin of Acts and Decrees 1998, 203.

entitles him or her to public provision. Claims by aliens who are not entitled to residence in the Netherlands, aside from the specific exceptions listed below, are rejected.

25. The linkage principle and the exceptions to it are currently laid down in section 10 of the Aliens Act 2000 (*Vreemdelingenwet 2000*). Exclusion from entitlement to specific benefits or facilities is laid down in the relevant Acts, such as the Work and Social Assistance Act (*Wet werk en bijstand*), the General Child Benefit Act (*Algemene kinderbijslagwet*), the Housing Benefit Act (*Wet op de huurtoeslag*) and the Youth Care Act (*Wet op de jeugdzorg*). In addition, the entitlements of lawfully resident aliens must be in accordance with their residence status, as laid down in section 11 of the Aliens Act 2000. This section lays the basis for the differences in aliens' entitlements: the 'stronger' their right of residence, the more entitlements they enjoy. The actual entitlements granted are governed by the specific Acts referred to above.

26. Certain benefits and facilities are not linked to a person's residence status and, as such, constitute exceptions to the linkage principle.

- In the area of education: possession of a residence permit plays no role in the admission of minors (persons under the age of 18) to education. Thus an educational establishment need not examine a minor's residence status.
- In the area of health care: the Benefit Entitlement (Residence Status) Act relates to the funding of health care and not to access to health care as such. The Act nowhere states explicitly that an alien who is not lawfully resident should not receive health care. What is more, it is a generally recognised principle in the Netherlands that essential health care must be provided. The basic premise is that aliens who do not have a residence permit pay their own bills. They may take out private insurance. An exception has been made to this basic premise for the funding of essential medical care and preventive care to minimise threats to public health. This includes notably care provided in, or to prevent, life-threatening situations, situations involving the permanent loss of essential functions, or situations where there is a hazard to third parties, e.g. in the case of TB and other infectious diseases, psychological disorders linked to aggressive behaviour, and care surrounding pregnancy and childbirth. In addition, the exception includes preventive youth health care and the vaccination programme. Children not lawfully resident hence have access to medical care of this kind. Where an unlawfully resident alien receives care in the sense just described and

is not able to pay the costs him- or herself or through the assistance of a third party, the care provider may recover the costs from a special fund, overseen by the Linkage Foundation (*Stichting Koppeling*).¹³

- In the area of legal aid: under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law based on this article, an alien who is not lawfully residing in the Netherlands is entitled to legal aid on an equal footing with others, regardless of the nature of the case in which he or she is involved. This means that legal aid will be granted without any checks being performed on residence status.

27. The linkage principle does not make an explicit exception for the provision of housing to unlawfully resident minors. These minors, too, must therefore leave the country. Unlawfully resident families with children may, however, 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 is now also available for unlawfully resident families, so that they can prepare for their return to their country of origin (obtain travel documents, seek assistance from the International Organisation for Migration). A measure for restriction of liberty is imposed on those staying in the centre, preventing unauthorised departure. Once they have been rejected, only unaccompanied minor aliens who applied for an asylum residence permit are provided with accommodation; this continues until they reach the age of 18, but may end earlier if adequate care and protection become available in their country of origin. During this period, they hold a regular residence permit and are therefore not illegal residents.

28. The foregoing clearly shows that, although it is under no obligation to do so, the Government provides accommodation for children unlawfully resident in the Netherlands (and their parents), provided they cooperate with their departure.

29. Finally, the Government would observe that aliens who are unable to leave the Netherlands through no fault of their own may qualify for a residence permit on these grounds if they meet certain conditions. For instance, they should demonstrate, e.g. by

¹³ New legislation is currently under preparation which makes the Ministry of Health, Welfare and Sport directly responsible for the reimbursement of such costs.

means of objectively verifiable documents, that they cannot leave the Netherlands through no fault of their own because they are unable to obtain the necessary travel documents, and there should be no doubts concerning the information they have provided on their identity and nationality. The residence permit issued to such aliens entitles them to housing.

30. Having regard to the aforementioned considerations, the Government is of the opinion that it duly fulfils its obligations under human rights law.

Conclusion

31. With regard to the merits of the present complaint, the Government concludes that:

- the complaint is unfounded *ratione personæ*, since it concerns a group of persons who are unequivocally excluded from the scope of the Revised Charter by virtue of paragraph 1 of the Appendix;
- the complaint is unfounded 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; and
- the complaint is unfounded since law and practice in the Netherlands allow for certain exceptions to the principle that unlawfully resident children cannot enjoy entitlements to public provision and since the Government does provide accommodation for those who cooperate with their departure from the Netherlands.

The Hague, 20 November 2008

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