

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



6 February 2009

Case document No. 5

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

**RESPONSE FROM DCI TO THE
GOVERNMENT'S SUBMISSIONS ON THE MERITS**

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Secretariat of the European Social Charter
Directorate General of Human Rights – DG II
Mr R. Brillat, Executive Secretary
Council of Europe
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Defence for Children International (DCI) v. The Netherlands
Complaint No. 47/2008

Response of Defence for Children International on the
Government's Observations on the Merits.

Dear Mr Brillat,

Herewith we present you our response on the Government's Observations on the Merits in complaint nr 47/2008.

We will send you this document by regular mail and by E-mail.

Yours sincerely,

J.P Kleijburg, MA
Executive director Defence for Children International the Netherlands

Cc: UNICEF the Netherlands
Stichting LOS
The Dutch section of the International Commission of Jurists.

Introduction

1. On 23 September 2008 the European Committee on Social Rights (hereinafter: the Committee) has declared the collective complaint lodged by Defence for Children International (hereinafter: DCI) admissible.
2. On 20 November 2008 the Netherlands Government (hereinafter: the Government) has sent her observations on the merits of the complaint to the Committee and DCI. In this letter DCI will respond to the observations of the Government.
3. In the following paragraphs DCI will therefore reiterate the issues related to the complaint, followed by some observations the reference to other instruments of human rights law and the scope of the Revised Charter.

Substance of the Complaint

The Government's interpretation

4. The Government seems to misinterpret the substance of the complaint. The Government interprets the complaint as opposition to the 'linkage principle' (koppelingsbeginsel) as introduced by the Benefit Entitlement Act (Koppelingswet), currently laid down in the Aliens Act 2000 (Vreemdelingenwet 2000). The Government then sets out to explain what the 'linkage principle' is meant to achieve. In doing so the Government further substantiates the complaint; the 'linkage principle' excludes children without a legal residence status from (amongst other things) housing.
5. The Government brings forward that, as government, it has the exclusive right to determine who may or may not reside on her territory. The Government further emphasizes that the 'linkage principle' is intended to make it impossible for illegal aliens to prolong their unlawful residence. The latter argument needs not be discussed as it falls outside the scope of the complaint.
6. As far as the exclusive right of the Government to decide on who gets residence in the Netherlands DCI most certainly does not want to deny the Government this right. However, DCI is in doubt whether the matter of the legality of residence is a strictly national affair given the Netherlands' membership to the European Union, the Council of Europe and the United Nations. Although the decision is taken at the national level, it is for a large part governed by international rules and regulations. Be that as it may, in the view of DCI the argument does not lift the

Governments obligations under the Revised Charter as far as children are concerned. Children as a matter of principle have no say in where their place of residence will be. DCI therefore is of the opinion that it would be an injustice to hold them accountable (see also below, para. 12).

7. In paragraphs 27-29 the Government brings forward arguments that might lead to the conclusion that children without legal residence in some cases are granted housing. In the following paragraphs DCI will provide arguments that show that this policy is still not in line with the Government's obligations under the Revised Charter.
8. First argument of the Government is that illegal immigrant children that cooperate with their return to their country of origin can qualify for up to twelve weeks of shelter. DCI first of all questions the possibilities of a minor to cooperate if the parent does not. Children of whom the parents do not cooperate are not eligible for this kind of shelter. Second, DCI knows from experience that twelve weeks is usually not enough to secure a return home. Children thus failing to secure a safe return within twelve weeks are removed from the shelter.¹ DCI refers in this respect to Council of Europe Resolution 1483 in which the Parliamentary Assembly declared that (failed) asylum seekers should not be evicted from shelter.²
9. Second argument of the Government is that unaccompanied minors are provided with accommodation and are provided with a residence permit until they reach the age of 18. Firstly DCI observes a flaw in the Government's description of the policy regarding unaccompanied minors. Contrary to what the Government suggests, the unaccompanied minor will not automatically be provided with a residence permit.³ Instead, the unaccompanied minors often end up in some sort of 'twilight zone' between legality and illegality. The only 'guarantee' they have is that they will not be deported until the age of 18 unless there is adequate accommodation and support in the country of origin. In most cases they receive shelter.⁴ In any case, it can be questioned whether the difference in treatment between accompanied and unaccompanied children can be justified under Article E of the Revised Charter. What DCI wants to emphasize is that the issue of the complaint lies mainly with children who are in the company of their parents as it rarely happens that an unaccompanied minor is evicted from shelter.
10. As a final argument the Government brings forward that illegal immigrants who are unable to leave the Netherlands through "no fault of their own" may qualify for a residence permit. Unlike the Government's presentation of this possibility it is extremely difficult to actually prove that one

¹ In DCI's response to the Government's observations on the admissibility a case was provided in which a young child drowned after escaping his mothers attention. This happened after the mother and child had been evicted from the shelter as meant by the Government.

² <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1483.htm#1>.

³ The residence permit for unaccompanied minors is only granted if the minor meets the very strict criteria set by the government. In practice this proves to be extremely difficult.

⁴ They will for instance receive shelter if they have requested asylum.

belongs to this category, particularly for children.⁵ Besides that, the procedure usually takes years to complete in which period the immigrant child has no right to housing under Netherlands law.

Substance according to DCI

11. As mentioned above holding children accountable for their whereabouts is contrary to the position of children in today's world. Children are extremely vulnerable persons and for a large part of their existence dependent on others, usually their parents, for their survival. This dependence on others makes that children have very limited (or no) influence on their place of residence. It is the adult responsible (parent) that chooses, the child simply has no choice but to follow. If the choice of the adult turns out to be less favorable it should not result in substandard living conditions for the child. International Law has placed the first responsibility for the well being of children with their parents. If the parents cannot provide, the government becomes responsible to provide adequate and sufficient care and assistance.
12. Similar considerations as to the paragraph above can be said in relation to illegal immigrants. As a matter of principle illegal immigrants are in a vulnerable position. Limited possibilities of making a living, substandard housing, limited access to medical care, etcetera.
13. It needs no mentioning that the children DCI tries to assist and protect fall in both categories (children and illegal immigrants) and therefore run an even higher risk of being victim to their vulnerability. In this respect DCI refers to the Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium⁶ in which the European Court of Human Rights (hereinafter: the Court) identifies one of the applicants as 'indisputably [...] within the class of highly vulnerable members of society' as she was of a 'very young age, [and] the fact that she was an illegal immigrant in a foreign land'.⁷ The Court refers to earlier judgments when concluding that '[s]teps should be taken to enable effective protection to be provided, particularly to children and other vulnerable members of society, and should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge'.⁸
14. DCI has studied the outcome of the French case (see also below, para. 19) and has come to the conclusion that the Committee shares the view that children deserve protection on the basis of their (vulnerable) position. Where the French case deals with (emergency) medical care, DCI in its complaint focuses on housing (Article 31 ESC).

⁵ Illegal immigrants have to show (objective and verifiable) proof that the authorities of their country of origin will not allow or co-operate with a re-migration. This by its very nature is extremely difficult. The difficulty is illustrated by the numbers on 2008 in which year 30 of the so-called 'no fault of their own' residence permits have been issued (TK 2008-2009, 29344, 68, p. 44).

⁶ ECtHR 12 October 2006, Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 13178/03.

⁷ Ibid, §55.

⁸ Ibid, §53.

15. DCI is of the opinion that housing is a similarly basic and essential commodity for the well being of a child. Before medical care comes into consideration a child should live in a safe and healthy environment. Housing in this view is a prerequisite to all the rights referred to in the complaint; health (Article 11 ESC), social and medical assistance (Article 13 ESC), protection of the family (Article 16 ESC), protection of children (Article 17 ESC), and protection against social exclusion (Article 30 ESC).
16. In its observations, the Government accuses DCI of trying to bring also the parents of the children under the scope of the complaint. This is not the case. The Government is right in assuming that DCI is of the opinion that children should not be separated from their parents in order to secure shelter. In the end this might indeed lead to an indirect right to housing for the parents. Whether the Government disagrees with this result or not is of no consequence for the purpose of this complaint. In the end the Government has a separate and independent obligation towards the children on the basis of its international commitments through the treaties it has signed and ratified. Furthermore, the Government seems to imply that parents, DCI, and immigration lawyers (ab)use the children in order to solidify the legal status of the parents. The Government on the other hand has no problem using the children as leverage. This goes against the international legal order in which children have been deemed worth special care and protection. In the end it is the well being of the child that should be the defining argument in deciding what is in their best interest.
17. Once more, DCI wants to stress to the Committee that the complaint is not intended to create an entitlement to a residence permit for either the child or the parents. The Government has a choice in that respect; deport the child together with the parents or provide the necessary protection as long as the child is within the Netherlands jurisdiction. The Government has a responsibility to protect⁹ without the obligation of having to provide a residence permit.¹⁰

Other instruments of International Human Rights Law

18. The Government expresses concern with respect to the references by DCI to the Convention on the Rights of the Child (hereinafter: CRC). Unlike the Government submits is it not the intention of DCI to have the Committee review the Government's obligations under the CRC. DCI does however ask the Committee to view the complaint in light of the Netherlands obligations under the CRC. Furthermore, DCI asks the Committee to view the complaint within the legal context of the Netherlands, that is being a part of the international legal order. This enables the use of and reference to other instruments of International Human Rights Law regarding the interpretation of

⁹ A. v. United Kingdom, ECtHR 23 September 1998, 100/1997/884/1096, and Z. v. United Kingdom, ECtHR 10 May 2001, 29392/95.

¹⁰ N. v. united Kingdom, ECtHR 21 May 2008, 26565/05.

obligations under the Revised Charter. Contrary to the position of the Government, it can be considered as a custom that is used throughout the international legal order.¹¹

Scope of the Revised Charter

19. The Government argues that the complaint is unfounded on the basis of *ratione personae*. The Government in this respect refers to the Appendix to the Revised Charter, the Vienna Convention on the Law of Treaties (hereinafter: the Vienna Convention) and the Committee's decision on the merits in the case of the International Federation of Human Rights Leagues (FIDH) v. France (hereinafter: the French case).¹²
20. The Government brings forward that the Appendix excludes non-nationals who reside illegally on the territory of a Member State in very clear wording. The Government further states that there has been no indication that the Member States to the Revised Charter have expressed the wish to change this wording after the Committee's findings in the French case. With reference to the Vienna Convention the Government indicates that the Appendix should be understood in its ordinary meaning¹³; that is: excluding non-nationals illegally residing in the Member States from protection through the Revised Charter.
21. DCI contests this point of view for two reasons. The first reason is that, although the Committee of Ministers is the organ that takes the final decision in the collective complaints procedure, it is first and foremost the legal interpretation of the Committee that determines the interpretation of the scope and substance of the Revised Charter. The fact that the political will, expressed through the Committee of Ministers, has not changed does not necessarily mean that there has been no change in legal interpretation of the texts. The second reason why DCI contests the view of the Government is that the Vienna Convention is used wrongly in two ways. First, looking at the ordinary meaning of the Appendix, the French case has to be taken into account. The Appendix may be clear and obvious¹⁴ in excluding the children DCI tries to protect, it should be read in light of the French case. This implies that children without a legal residence permit can be brought within the scope of the Revised Charter. By denying the Committee's findings in the French case the Government's interpretations can be considered to be too rigid. Second, the Vienna

¹¹ The European Court of Human Rights has in many cases made reference to other international instruments such as the European Social Charter (i.e. *Sørensen & Rasmussen*, ECtHR 11 January 2008, 52562/99 and 52620/99, *Sidabras & Dziautas*, ECtHR 27 July 2004, 55480/00) and the Convention on the Rights of the Child (*Case of Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, ECtHR 12 October 2006, 13178/03). The UN Human Rights Committee has referred to judgments of the ECtHR (i.e. *Kindler v. Canada*, HRC 18 November 1993, Communication No. 470/1991). Furthermore the European Court of Justice has declared the CRC as being a part of the fundamental rights of the European Union on the basis of Article 6(2) TEU and the fact that all Member States have ratified the CRC (Case C-540/03, ECJ 27 June 2006, para. 36-39).

¹² Complaint No. 14/2003.

¹³ Article 31§1 of the Vienna Convention on the Law of Treaties.

¹⁴ In the words of the Government "completely unambiguous".

Convention is not meant to limit the (level of) protection of International treaties. It is rather meant to prevent a (too) narrow interpretation of treaty provisions by governments.

22. The Government finds it necessary to point out that in the French case the population that needed protection under the Revised Charter was more diffuse than the population concerned in the present complaint. DCI fails to see the relevance of this remark as the Government does not challenge the Committee's finding in the French case that it is contrary to the Revised Charter to have in place "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".

Conclusion

23. DCI first of all wishes to express its gratitude for being able to address the merits of its complaint in written form. DCI however is of the opinion that to further clarify the matter it would very much like the opportunity to present cases in a hearing before the Committee.
24. With regard to the merits of the complaint, DCI asks the European Committee on Social Rights to consider the arguments and to find that the Netherlands is in violation of Articles 11, 13, 17, 30 and 31 in conjunction with Article E of the Revised Charter.