

<u>Originating Body</u>	EUROPEAN COMMITTEE OF SOCIAL RIGHTS
<u>Decision</u>	
Type	Decision on the merits
Date	20/10/2009
Importance level	1*
Conclusion	Article 31§1, not applicable ; Violation of Article 31§2 ; Violation of Article 17§1.c ; Article E not applicable
Separate Opinion	No
Published in	Collective Complaint Procedure : Decisions on the Merits
<u>Complaint</u>	
Title/ Number	47/2008 – Defence for Children international (DCI) v. The Netherlands
Respondent State	THE NETHERLANDS
Date of registration	04/02/2008
Articles	11, 13, 16, 17, 30, 31 and E
<u>Other information</u>	
ECHR Case-law	Moustaquim v. Belgium, judgment of 18 February 1991, Series A no. 193; Beldjoudi v. France, judgment of 26 March 1992, Series A no. 234-A; Mubilanzila Mayeka and Kaniki Mitunga v Belgium, judgment of 12 October 2006.
ECSR Case-law	International Commission of Jurists v. Portugal, Complaint No. 1/1998, decision on the merits of 9 September 1999; Autism-Europe v. France, Complaint No. 13/2002, decision on the merits of 4 November 2003; FIDH v France, Complaint No. 14/2003, decision on the merits of 8 September 2004; Confédération Française de l'Encadrement (CFE CGC) v. France, Complaint No 16/2003, decision on the merits of 12 October 2004; World Organisation against Torture (OMCT) v. Greece, Complaint No. 17/2003, decision on the merits of 7 December 2004; OMCT v. Ireland, Complaint No 18/2003, decision on the merits of 7 December 2004; ERRC v. Italy, Complaint No. 27/2004, decision on the merits of 7 December 2005; Marangopoulos Foundation for Human Rights v. Greece, Complaint No. 30/2005, decision on the merits of 6 December 2006; ERRC v. Bulgaria, Complaint No. 31/2005, decision on the merits of 6 December 2006; International Movement ATD Fourth World ("ATD") v. France, Complaint No. 33/2006, decision on the merits of 5 December 2007; European Federation of National Organisations working with the Homeless (FEANTSA), Complaint No. 39/2006, decision on the merits of 5 December 2007. Conclusions 2003, France, Italy, Slovenia, Sweden Article 31; Conclusions 2005, Norway, Article 31
Other sources	United Nations Convention on the Rights of the Child (Articles 3 and 27); Committee on the Rights of the Child: Concluding observations on the Netherlands (document CRC/C/NLD/CO/3) of 27 March 2009 and General Comment No. 6 on Treatment of Unaccompanied and Separated Children outside their Country of origin (document CRC/GC/2005/6); United Nations Covenant on Economic, Social and Cultural Rights (Article 11); European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); Charter of Fundamental Rights of the European Union (Article 1).
Keywords	Best interest of the child, unlawful presence in a State, personal scope, human dignity, adequate shelter; eviction, asylum, immigration.

* 1 – 3 importance levels:

- 1 – High importance: new case-law or decisions which make a significant contribution to the clarification or modification of the case-law
- 2 – Medium importance: Decisions which do not make a significant contribution to the case-law but nevertheless do not merely apply existing case-law
- 3 – Low importance: decisions with little legal interest

NOTICE

Right to adequate shelter for children unlawfully present in the territory of a State for as long as they are in its jurisdiction; banning of their eviction from shelter as this would place them in a situation of extreme helplessness which is contrary to the respect for their human dignity.

Preliminary issues

A – Role of the European Committee of Social Rights (in reply to the Government's submissions)

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).

B – Rights of the child under the Revised Charter

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).

The Committee has 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. In particular, it considers itself bound by the internationally recognised requirement to apply the best interests of the child principle: "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" (General Comment No. 5, document CRC/GC/2003/5, §§ 45-47).

C – Interpretation of paragraph 1 of the Appendix concerning the scope of the Charter in terms of persons protected

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).

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.

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). Moreover, the restriction in paragraph 1 of the Appendix attaches to a wide variety of social rights and impacts on them differently (FIDH v. France, Complaint No. 14/2003, decision on the merits of 8 September 2004, § 30). Such restriction should not end up having unreasonably detrimental effects where the protection of vulnerable groups of persons is at stake.

Thus, with regard to each alleged violation, the Committee determines preliminarily whether the right invoked is applicable to the specific vulnerable category of persons concerned, i.e. children unlawfully present in the Netherlands.

FIRST PART: THE ALLEGED VIOLATION OF THE RIGHT TO HOUSING

- 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

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.

However, 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).

Under Article 31§1 (the right to adequate housing), 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 (Conclusions 2003, Article 31§1, France and FEANTSA v. France, Complaint 39/2006, decision on the merits, 5 December 2007, § 76).

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 is concerned, 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.

Accordingly, children unlawfully present on the territory of a State Party do not come within the personal scope of Article 31§1.

- 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

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).

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

Children, whatever their residence status, come within the personal scope of Article 31§2.

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.

Article 31§2 is directed at the prevention of homelessness with its adverse consequences on individuals' personal security and well being (Conclusions 2005, Norway 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, alternatives to detention should be sought in order to respect the best interests of the child.

As to living conditions in a shelter, under Article 31§2 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).

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, 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.

States Parties are required, under Article 31§2, 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.

As this is not the case, 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

Children, whatever their residence status, come within the personal scope of Article 17 (FIDH v France, Complaint No. 14/2003, decision on the merits of 6 September 2004, § 30 and § 32).

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. 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.

In this respect, 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 on the same ground.

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

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

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, 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.

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 does not serve this purpose.

Article E is not applicable in the instant case.