

DECISION ON ADMISSIBILITY

23 September 2008

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 231st session attended by:

Mrs Polonca KONČAR, President
Mssrs Andrzej SWIATKOWSKI, First Vice-President
Tekin AKILLIOĞLU, Second Vice-President
Jean-Michel BELORGEY, General Rapporteur
Alfredo BRUTO DA COSTA
Nikitas ALIPRANTIS
Stein EVJU
Mrs Csilla KOLLONAY LEHOCZKY
Mssrs Lucien FRANCOIS
Lauri LEPPIK
Colm O' CINNEIDE
Mrs Monika SCHLACHTER
Birgitta NYSTRÖM
Lyudmila HARUTYUNYAN
Annalisa CIAMPI

Assisted by Mr Régis BRILLAT, Executive Secretary

Having regard to the complaint dated 14 January 2008, registered on 4 February 2008 as number 47/2008, lodged by Defence for Children International (DCI) and signed by the Chairman and the Executive Director of DCI-the Netherlands (DCI-NL), Mr Vianen and Mr Kleijburg, requesting the Committee to find that the Netherlands is not in conformity with Articles 11, 13, 16, 17, 30 and 31 of the Revised European Social Charter ("the Revised Charter") taken alone or in conjunction with Article E;

Having regard to the documents appended to the complaint;

Having regard to the observations on admissibility submitted on 7 April 2008 by the Dutch Government ("the Government");

Having regard to the response to such observations submitted by DCI on 3 June 2008;

Having regard to the Revised Charter and, in particular, to Articles 11, 13, 16, 17, 30, 31 and Article E, which read as follows:

Article 11 – The right to protection of health

Part I: Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.

Part II: With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:

- 1 to remove as far as possible the causes of ill-health;
- 2 to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
- 3 to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

Article 13 – The right to social and medical assistance

Part I: Anyone without adequate resources has the right to social and medical assistance.

Part II: With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake:

- 1 to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
- 2 to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
- 3 to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
- 4 to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.

Article 16 – The right of the family to social, legal and economic protection

Part I: The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development.

Part II: With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

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 a) to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
- b) to protect children and young persons against negligence, violence or exploitation;
- c) to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
- 2 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Article 30 – The right to protection against poverty and social exclusion

Part I: Everyone has the right to protection against poverty and social exclusion.

Part II: With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a) to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;
- b) to review these measures with a view to their adaptation if necessary.

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.

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.

Having regard to the Additional Protocol to the European Social Charter providing for a system of collective complaints ("the Protocol");

Having regard to the Rules of the Committee adopted by the Committee on 29 March 2004 at its 201st session and revised on 12 May 2005 at its 207th session ("the Rules");

Having deliberated on 23 September 2008;

Delivers the following decision, adopted on the above date:

1. DCI submits that children not residing lawfully in the Netherlands, who represent 25 000 to 60 000 individuals, are not entitled by law to receive the social assistance benefits (Article 13) which could help them enjoy adequate housing (Article 31). DCI maintains that the denial of the right to housing hinders the proper protection of the right to health (Article 11), the right to develop fully, both physically and mentally (Article 17) as well as the right to the full development of the family (Article 16). DCI considers that illegal children are discriminated against in the enjoyment of these rights because of their residence status. Moreover, DCI alleges that by denying adequate housing to illegal children, Dutch legislation contributes to increasing extreme poverty and social exclusion (Article 30).

THE LAW

As to the admissibility conditions set out in the Protocol and the Committee's Rules of Procedure and the Government's related objections

2. The Committee observes that the Netherlands accepted the collective complaint procedure at the time of ratification of the Revised Charter on 3 May 2006 and that this procedure entered into force in respect of the Netherlands on 1 July 2006. In accordance with Article 4 of the Protocol, the complaint has been submitted in writing and concerns Articles 11, 13, 16, 17, 30 and 31 of the Revised Charter taken alone or in conjunction with Article E, provisions accepted by the Netherlands when it ratified this treaty on 3 May 2006 and to which it is bound since the entry into force of this treaty in its respect on 1 July 2006.

3. Moreover, the grounds for the complaint are indicated.

4. The Committee notes that, in accordance with Articles 1 b) and 3 of the Protocol, DCI is an international non-governmental organisation with participatory status with the Council of Europe. It is included on the list, established by the Governmental Committee, of international non-governmental organisations that are entitled to lodge complaints.

5. The Committee considers that the complaint was submitted in a field in which DCI has particular competence within the meaning of Article 3 of the Protocol. According to Articles 1 and 4 of its Statute, DCI is an independent, international movement founded in July 1979 (the International Year of Children) with the aim of promoting, protecting, defending and developing the rights of all children by influencing national and international legislation.

6. Whilst the Government does not contest that DCI itself has the right to submit complaints under Article 1 of the Protocol, it highlights that the complaint was signed by DCI-NL and that the relationship between the two organisations is not clear. In addition, it recalls that the Netherlands has not made the declaration provided for in Article 2 of the Protocol, recognising the right of representative national non-governmental organisations to lodge complaints against it. The Government submits that by allowing complaints from such organisations by mandate or delegation, Article 2 of the Protocol might become futile.

7. In its response to this observation, the complainant highlights that the President of DCI represents the organisation at the political and legal levels (Article 32 DCI Statute). Nothing prohibits him/her from mandating such power to the national sections, which are the institutional representatives of DCI in a determined country (Article 8 DCI Statute).

8. The Committee observes that the complaint was indeed signed by the Chairman and Executive Director of DCI-NL, Mr Vianen and Mr Kleijburg. However, the Committee also notes that a letter authorising DCI-NL to lodge a complaint on behalf of DCI was attached to the complaint. To assess whether the complaint was signed by the person(s) with the competence to represent the complainant organisation (Rule 23 of the Rules), the Committee must therefore determine whether the delegation of legal representation was made by the entity entitled thereto.

9. Having examined the Statute of DCI, the Committee observes that the competence of political and legal representation of DCI belongs to its Presidency which is composed of the President and the International Executive Council (IEC) (Article 32 DCI Statute), which at present comprises eight senior members from different national sections. The Committee further notes that the decisions of the IEC are taken by simple majority of at least 50% of its present or represented members (Article 30 DCI Statute).

10. On the basis of the information in the file, the Committee first notes that the above mentioned letter mandating DCI-NL to lodge the complaint on behalf of DCI was signed only by the President of DCI, Mr Kassis. The Committee however also notes from further letters received in September 2008 and signed by IEC members Mr Van Keirsbilck (DCI-Belgium), Mr Guillén (DCI-Argentina), Mrs Murillo, (DCI-Costa Rica) and Mr Kleijburg (DCI-NL), that a majority of the IEC also mandated DCI-NL to lodge the complaint on behalf of DCI. The Committee therefore considers that DCI-NL was duly authorised to represent DCI in the complaint procedure. The conditions stipulated in Rule 23 of the Committee's Rules are thus fulfilled. The fact that the letters of the members of the IEC were received after the initial lodging of the complaint does not lead the Committee to take another view in this regard (*SUD*

Affaires Sociales, SUD ANPE and SUD Collectivités Territoriales v. France, Complaint No. 24/2004, decision on admissibility of 7 December 2004).

11. As to the Government's additional argument that allowing national non-governmental organisations to lodge complaints by mandate or delegation, might render Article 2 of the Protocol futile, the Committee observes that it is not in its powers to decide about the sharing of competencies within the international non-governmental organisations entitled to lodge complaints. Whether it decides to lodge a complaint through delegation of legal representation or not, the entitled international non governmental organisation concerned - and not the entity acting on its behalf - remains the complainant in the proceedings before the Committee.

As to the Government's other objections concerning the admissibility of the complaint

12. The Government further argues that:

- the complaint falls outside the scope *rationae personae* of the Charter by virtue of paragraph 1 of the Appendix since it specifically concerns persons not residing lawfully on its territory;
- the Committee cannot decide on States Parties' adherence to any instrument other than the Revised Charter and DCI systematically refers to provisions of the United Nations Convention on the Rights of the Child (UNCRC);
- the complaint is not substantiated as it does not succeed in showing what conduct by the Government leads to a perceived violation of the Charter.

13. DCI responds by reiterating that:

- housing, on the same grounds as health care (*International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004), is a prerequisite for the preservation of human dignity, thus legislation or practise which denies entitlement to housing to foreign nationals, even if they are on the territory illegally, should be considered contrary to the Revised Charter;
- the UNCRC provisions are not invoked as such, but are used as a reference for the interpretation of provisions of the Revised Charter;
- the complaint is not based on theoretical problems, it does have substance as several concrete examples provided demonstrate.

14. The Committee considers that these objections can only be properly assessed when examining the merits of the complaint.

15. Therefore the Committee considers that the pleas of inadmissibility raised by the Government cannot be sustained.

16. For these reasons, the Committee, on the basis of the report presented by Mr. Andrzej SWIATKOWSKI and without prejudice to its decision on the merits of the complaint,

DECLARES THE COMPLAINT ADMISSIBLE

In application of Article 7§1 of the Protocol, requests the Executive Secretary to notify the complainant organisation and the respondent state of the present decision, to transmit it to the parties to the Protocol and the states having submitted a declaration pursuant to Article D §2 of the Revised Charter, and to make it public.

Invites the Government to make written submissions on the merits of the complaint by 21 November 2008.

Invites DCI to submit a response to the Government's submissions by a deadline which it shall determine.

Invites parties to the Protocol and the states having submitted a declaration pursuant to Article D§2 of the Revised Charter to make comments by 21 November 2008 should they so wish.

In application of Article 7§2 of the Protocol, requests the Executive Secretary to inform the international organisations of employers or workers mentioned in Article 27§2 of the Charter and to invite them to make observations by 21 November 2008.

Andrzej SWIATKOWSKI
Rapporteur

Polonca KONČAR
President

Régis BRILLAT
Executive Secretary