United Nations CCPR/C/105/D/1840/2008

# International Covenant on Civil and Political Rights

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**Human Rights Committee**

## Communication No. 1840/2008

### Decision adopted by the Committee at its 105th session (9–27 July 2012)

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| *Submitted by:* | X.J. (represented by counsel, M.A. Collet) |
| *Alleged victim:* | The author |
| *State party:* | The Netherlands |
| *Date of communication:* | 8 September 2008 (initial submission) |
| *Document references:* | Special Rapporteur‟s rule 97 decision, transmitted to the State party on 10 December 2008 (not issued in document form) |
| *Date of adoption of decision:* | 23 July 2012 |
| *Subject matter:* | Unaccompanied minor claiming asylum |
| *Substantive issue:* | Arbitrary interference with the family; protection as a child |
| *Procedural issue:* | Non-exhaustion of domestic remedies; non-substantiation; and inadmissibility *ratione materiae* |
| *Articles of the Covenant:* | 17 and 24 |
| *Articles of the Optional Protocol:* | 1; 2; and 5, para. 2 (b) |

# Annex

## Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political rights (105th session)

concerning

## Communication No. 1840/2008*

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| *Submitted by:* | X. J. (represented by counsel, M.A. Collet) |
| *Alleged victim:* | The author |
| *State party:* | The Netherlands |
| *Date of communication:* | 8 September 2008 (initial submission) |

*The Human Rights Committee*, established under article 28 of the International Covenant on Civil and Political Rights,

*Meeting on* 23 July 2012,

*Having concluded* its consideration of communication No. 1840/2008, submitted to the Human Rights Committee by X.J. under the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication and the State party,

*Adopts* the following:

## Decision on admissibility

1.1 The author of the communication, dated 8 September 2008, is X.J., a Chinese national, born on 2 October 1986. She claims to be a victim of violations by the Netherlands of articles 17 and 24 of the Covenant. She is represented by counsel, M.A. Collet.[1]

1.2 On 1 April 2009, the Committee, acting through its Special rapporteur on new communications and interim measures denied the State party"s request for the Committee to examine the admissibility of the communication separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O"Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.
Pursuant to rule 92 of the Committee"s rules of procedure, Committee member Mr. Cornelis Flinterman, did not participate in the adoption of the present decision.

[1] The Optional Protocol entered into force for the State party on 11 December 1978.

**The facts as presented by the author**

2.1 When the author was 3 years old, her parents died. She then lived with her grandmother. After her grandmother died, one of the author"s uncles took care of her. Before they passed away, both the author"s grandmother and parents were politically active. After their death, the author received warnings from the local authorities not to engage in similar activities. She also was under pressure from inhabitants of her village. In 1999, the author"s uncle made arrangements for her to be brought to the Netherlands.

2.2 The author arrived in the territory of the Netherlands in 1999 when she was 13 years old. She lived with a man for two years whom she managed to escape from in 2001. It is at that time that she submitted her asylum application.

2.3 In November 2001, the author applied for asylum. Her application was rejected on 12 December 2001. Her appeal was rejected by the district court in The Hague on 24 January 2002 as far as her asylum request was concerned; at the same time, the court referred the part of her appeal requesting a residence permit as an unaccompanied minor to the immigration authorities for decision, on the understanding that she would not be required to leave the Netherlands while this request was pending. Her request for a residence permit as unaccompanied minor was rejected on 27 February 2007. In a decision of 21 November 2007, the District Court of The Hague, sitting in „s-Hertogenbosch, dismissed her appeal. The author appealed against the Court"s judgment on 11 December 2007. On 11 March 2008, the Administrative Jurisdiction Division of the Council of State confirmed the Court"s judgment, therefore concluding the domestic remedies.

**The complaint**

3.1 The author claims that the State party has violated her rights under article 17 of the Covenant in that she lived in the Netherlands since the age of 13 and did her best to integrate in the Dutch society. She has been taken care of by a Dutch guardian institute (Nidos)[2] and, at the time of submission of the communication, lived in a supervised home. She has learnt Dutch and has built a network of friends with whom she gets along well. Referring to the Committee"s jurisprudence in *Winata* v. *Australia*,[3] she states that, as she has been living in the Netherlands since she was 13, she has built all her life there, where she feels safe. Therefore, expelling her to China would constitute a violation of her right to private and family life.

3.2 The author also states that she has been a victim of violations of article 24 of the Covenant. She claims that the Immigration Office did not take into account that she was 15 years old when she filed her asylum application and therefore treated her like any adult asylum seeker. The author considers that the State party has not respected the principle of the best interest of the child, in connection with the Committee"s jurisprudence[4] as well as under articles 3 and 20 of the Convention on the Rights of the Child.

**State party's observations on admissibility and merits**

4.1 On 10 February 2009, the State party challenged the admissibility of the communication on grounds of non-exhaustion of domestic remedies, non-substantiation and inadmissibility *ratione materiae*. The State party argues that the author has not raised her

[2] The NIDOS Foundation is a national guardianship agency for unaccompanied minor refugees and asylum seekers.

[3] The author refers to communication No. 930/2000, Views adopted on 26 July 2001, para. 7.3.

[4] The author refers to communication No. 1069/2002, *Bakhtiyari* v. *Australia*, Views adopted on 29 October 2003, para. 9.7.

allegations under article 17 before national courts, thereby denying them the opportunity to respond to these complaints. The State party therefore contends that this part of the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol.

4.2 The author followed the national procedure for applying for an asylum residence permit. Given the author's age at the time, the Government considered whether she was also eligible for a regular residence permit entitled "residence as unaccompanied minor asylum seeker". The domestic proceedings therefore concentrated on whether the author required protection under the asylum law or rather on the grounds of her status as a minor. If, however, the author believed that she was eligible for a residence permit on the basis of the family life she had built in the Netherlands, she could have applied for a regular residence permit on special grounds as referred to in article 3.4, paragraph 3, of the 2000 Aliens Decree. Since she failed to do so, she has not exhausted domestic remedies.[5]

4.3 With regard to the author's reference to the Committee's jurisprudence in *Winata* v. *Australia*, the State party considers the situations incomparable. In that case, which concerned a child whose entire childhood had been spent in Australia and who had little or no connection with the parents' country of origin, the expulsion of the parents would have constituted an unlawful interference in the right to family life. In the present case, the author lived in China, her country of origin until the age of 13. She therefore speaks Chinese and is familiar with Chinese culture and society.

4.4 Given the author's failure to substantiate the nature of her family life in the Netherlands, this part of the communication should also be considered insufficiently substantiated pursuant to article 2 of the Optional Protocol. It is clear that the author has no family in the Netherlands. She describes the family life she has built in terms of wide network of friends with whom she gets along well but offers no further details than this.

4.5 The State party also considers that the author's allegations under article 24 of the Covenant should be deemed inadmissible for failure to exhaust domestic remedies since the legal action taken by the author was limited to challenging the assessment of whether she was eligible for a regular residence permit entitled "residence as unaccompanied minor asylum seeker". She did not take legal action against the rejection of the asylum application itself. The State party also notes that first mention of the alleged violation of article 24 was made in the grounds for the application for judicial review of 18 April 2007. The author was 20 years old at that time. Given the author's age and in the light of the fact that the author was an adult when domestic remedies were concluded, invoking this provision is without merit.

4.6 The State party claims that the author's allegations under articles 3 and 20 of the Convention on the Rights of the Child are inadmissible under article 1 of the Optional Protocol in so far as they refer to violations of rights enshrined in the Convention on the Rights of the Child and not in the Covenant.

4.7 On 10 June 2009, the State party submitted its observations on the merits insisting that its observations on admissibility stood and prevailed. It submits that asylum applications from unaccompanied minors are assessed carefully. There are, however, additional safeguards during the interviews due to the minor's age. As a rule, the best interests of the child require restoration of their relationship with their parents, family and/or surroundings. The State party adds that, following the denial of an unaccompanied minor's asylum application, the State Secretary investigates as a matter of course whether return to the minor's country of origin or another country would be possible and

[5] The State party further develops this argument in paragraph 4.12 below.

responsible. If it is established that neither option is possible, the minor asylum seeker may be granted a regular residence permit entitled "residence as unaccompanied minor alien".

4.8 With regard to the notion of adequate care and protection of the minor in the country of return, the State party defines it as care under conditions that do not differ fundamentally from the conditions in which care and protection are provided to the asylum seeker"s peers who are in a comparable situation. Care in a private or public facility may be regarded as adequate if the care provided there is regarded as acceptable by local standards.

4.9 Unless the purpose for which an alien wishes to remain in the Netherlands is connected in such a way to the situation in the country of origin that, in the State Secretary"s opinion, a proper assessment requires the submission of an asylum application, a residence permit may be issued to the alien pursuant to article 3.4, paragraph 3, of the Aliens Decree, but subject to a restriction other than those listed in that article. In other words, the residence permit will be granted on the grounds of exceptional, individual circumstances. If an alien believes that the right to family life in an exceptional, individual situation makes him/her eligible for residence rights, he/she may apply for a residence permit. Such a permit can only be issued following an application pursuant to article 3.4 in conjunction with article 3.6 of the Aliens Decree.

4.10 With regard to the present case, the State party first points out that the statements made by the author to the Committee on the circumstances under which she left China as well as the date of her arrival in the Netherlands do not tally with the version the author presented to the State party"s authorities. The author had not mentioned that she arrived in the Netherlands in 1999 and that she was held by a man for two years before she managed to escape and submit her asylum application.

4.11 The State party recalls that, in the framework of the asylum procedure, the first interview took place on 11 December 2011. On 12 December, the author was given an opportunity to comment on her asylum application. A written report was made of both interviews, during which she was assisted by a Mandarin-speaking interpreter. By letter of 12 December 2001, the author took the opportunity to make written changes and/or additions to the contents of the reports. On 12 December 2001, written notification was given of the intent to dismiss the application for an asylum residence permit and to deny the application for the issuance of a regular residence permit entitled "residence as unaccompanied minor alien". The author was given the opportunity to express her view on the notification, which she did on 12 December 2001. By decision of 12 December 2001, the author"s application was denied and it was decided not to issue her with a residence permit entitled "residence as an unaccompanied minor alien".

4.12 The author lodged an application for review of this decision with the district court, which was forwarded to the State Secretary by letter of 24 January 2002 with the request that it be processed as an objection, a request under administrative law that the decision be reconsidered. The district court declared that it was not competent to take cognizance of the application for review because the author had submitted no grounds disputing the refusal to issue her with a temporary residence permit.[6] The author"s objection was subsequently

[6] Pursuant to section 29, subsection 1 of the Aliens Act, a temporary asylum residence permit may be granted to an alien who is a refugee under the terms of the Refugee Convention; who makes a plausible case that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment; who cannot, for compelling reasons of humanitarian nature connected with the reasons for his departure from the country of origin, reasonably be expected to return to his country of origin; or for whom return to the country of origin would constitute an exceptional hardship in connection with the overall situation there.

declared unfounded by decision of 27 February 2007. As for the author"s application for judicial review, it was declared unfounded by judgement of the District Court of The Hague, sitting in „s-Hertogenbosch on 21 November 2007. On 11 December 2007, the author lodged an appeal against the judgement of the district court with the Administrative Jurisdiction Division of the Council of State, which was declared unfounded by judgment of 11 March 2008. At the time of the State party"s observations, the author had submitted no application for the issuance of a residence permit on the grounds of exceptional, individual circumstances. Nor had she applied for any other regular residence permit.

4.13 With regard to the author"s allegations under article 17 of the Covenant, the State party notes that any determination of what kind of interpersonal relationships come under the term "family" is based on cultural traditions of the countries that are party to the Covenant as mentioned by the Committee in its general comment No. 16 on article 17 of the Covenant.[7] A close friendship involving no blood ties or cohabitation cannot according to Dutch norms be considered a family tie, nor can it be according to Chinese norms, where the concept of family is much broader than it is in Europe. The State party takes the view that there is no family life in the present case and, as a result, no interference with the right to family life.

4.14 The author lived in China until she was at least 13 years old and there is therefore no reason why she could not return to China, especially since she has no family in the Netherlands and, on the other hand, she speaks Chinese and is familiar with Chinese culture and society. In no way has she demonstrated that her return would lead to her social exclusion or economic hardship. The State party therefore considers that the author"s claims under article 17 should be declared manifestly unfounded. Should the Committee conclude that the State party has interfered with the author"s family life the State party considers that such interference was neither arbitrary nor unlawful. Indeed, given the author"s familiarity with the Chinese language, culture and customs, a reasonable balance was struck in this case between the author"s right to family life on the one hand and the public interest served by pursuing a restrictive admissions policy on the other.

4.15 With regard to the author"s allegations under article 24 of the Covenant, the State party contends that the interests of the child did take precedence when the Dutch policy on unaccompanied minor aliens whose asylum applications are denied was formulated. The rule that unaccompanied minor aliens are returned to their country of origin is in the best interests of the minors themselves. As a rule, the best interests of the child require restoration of their relationship with their parents, family and, of paramount importance in the present case, social surroundings. If there is no care and protection according to local standards available for minor asylum seekers and they cannot support themselves, they may be granted a residence permit entitled "residence as unaccompanied minor alien". In addition, account is taken of the age of the applicant in that unaccompanied minors are assigned a guardian by Nidos. Similarly, their age is taken into account during the interviews and the assessment of their applications. Sufficient safeguards in this respect have therefore been built in the national procedures.

4.16 The State party finally notes that the author had sufficient time to demonstrate that, in her case in particular, there would be no adequate care and protection available in China on account of exceptional, individual circumstances. The author had a legal representative assigned by Nidos and a lawyer who represented her in the proceedings under Aliens Law.

[7] The State party refers to its understanding of the Committee"s general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, *Official Records of the General Assembly, Forty-third Session, Supplement No. 40* (A/43/40), annex VI, para. 5.

Nevertheless, the author failed to submit documents to establish convincing arguments as to why adequate care and protection for her was not available in China. The State party adds that the author‟s reference to *Bakhtiyari* v. *Australia* is irrelevant as, in that case, the parents had to leave the country although the children were permitted to stay. In the present case on the other hand, the author does not have any family in the Netherlands, which makes those two cases incomparable.

**Author's comments**

5.1 On 8 October 2009, the author replies that she invoked the substance of article 17 before the national court by reference to the parallel article 8 of the European Convention on Human Rights. The author further notes that the applicable Dutch immigration law is organized in a manner which allows a strict division between asylum procedures and other immigration procedures. According to that law, the Immigration Office can disregard a claim on the right to privacy or family life, when the claim is made in an asylum procedure. The author made a claim in relation to article 8 of the European Convention in her asylum procedure. The Immigration Office and the district court disregarded her claim based on the national immigration law; however, on the basis of the Dutch Constitution under which the State party is bound by international treaties such as the European Convention and the Covenant, they should have considered the claim.

5.2 On the admissibility of article 24, the author claims that she invoked its substance before the national courts. The author arrived in the Netherlands when she was 13. However she was never treated as a minor during the asylum procedure which in addition was unreasonably delayed. In the meantime, the author integrated into the Dutch society. The fact that at the time of appeal she had reached 20 years old does not matter, since the breach of her rights occurred when she was under 18 years old.

5.3 With regard to her claims under articles 3 and 20 of the Convention on the Rights of the Child, although it may fall outside the scope of the Committee‟s competence, the applicability of those provisions is undisputed. The essence of these articles interrelates with the essence of the articles of the Covenant.

5.4 On the merits, the author insists that during the asylum procedure, she did not dare to mention that she had been held by a man for two years as she was afraid of the consequences on her asylum procedure. However, she revealed it later as mentioned in her grounds of appeal dated 18 April 2007. With regard to the State party‟s contention that she could already know at an early stage of the procedure that the residence permit would be denied, she replies that it is her right to appeal such a decision and she cannot be reproached for doing so.

5.5 With regard to article 17, the author is of the opinion that the question whether the author would theoretically be able to establish roots in China is not relevant to the current communication. The relevant question is whether sending her to China when she has built a life in the Netherlands constitutes a breach of article 17 of the Covenant. In addition, she has lived in the Netherlands since she was 13 years old which is the most important period of her life. Although she is still able to speak Chinese, the author is not used to living in China and is not familiar with its customs anymore. Given that there is interference in her family life, the author considers that such interference is not in conformity with article 17.

5.6 As for article 24, the author considers that the burden of proof imposed on her was as high as for any adult asylum seeker. The hearings were the same as any other hearing before the Immigration Office and the way the judgment was passed was no different. The only difference was related to her being taken care of by a guardian from Nidos. The author agrees that the best interest of the child is to stay with his/her parents. However she has no parents or family to stay with in China. It is therefore in her best interest to stay in the

Netherlands where she has close ties and a social network to rely on. The author finally notes that her reference to *Winata* v. *Australia* was meant to draw attention to the fact that a State party"s discretion in its immigration policy may come to be exercised arbitrarily in certain circumstances.[8] The author mentioned *Bakhtiyari* v. *Australia* in so far as it emphasizes the principles laid down in article 24, paragraph 1, of the Covenant.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 With regard to the exhaustion of domestic remedies, as required under article 5, paragraph 2 (b), of the Optional Protocol, the Committee notes the arguments by the State party that the author failed to make an application for a regular residence permit on special grounds as referred to in article 3.4, paragraph 3, of the 2000 Aliens Decree and that such a permit can only be issued following an application pursuant to that provision in conjunction with article 3.6 of the same decree. The Committee notes that the author has invoked her rights in her appeal after having been denied a residence permit as an unaccompanied minor alien but that she did not invoke these rights through the application for a regular residence permit on grounds of exceptional personal circumstances, according to the relevant domestic legislation.[9] In the present case, the author had a legal representative assigned by Nidos and a lawyer who represented her in the proceedings under Aliens Law. Therefore, she was in a position to be sufficiently advised on the remedies she was expected to exhaust to claim her rights under the Covenant, which included the application for a residence permit on grounds of exceptional personal circumstances. For this reason, the Committee considers that the communication is inadmissible for non-exhaustion of domestic remedies, under article 5, paragraph 2 (b), of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) That this decision shall be communicated to the State party and to the author.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee"s annual report to the General Assembly.]

[8] The author refers to para. 7.3 of the Committee"s Views.

[9] See communication No. 1564/2007, *X.H.L* v. *the Netherlands*, Views adopted on 22 July 2011, para. 9.