



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2498/2014\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	Ekaterina Abdoellaevna, on behalf of herself and her minor daughter, Y (represented by counsel, W.G. Fischer)
<i>Alleged victims:</i>	The author and Y
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	31 July 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 10 December 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	26 March 2019
<i>Subject matter:</i>	Access of stateless individuals to child benefits
<i>Procedural issue:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Best interests of the child; children's rights; discrimination; discrimination on other grounds; family rights; measures of protection; nationality; stateless persons
<i>Articles of the Covenant:</i>	23 (1), 24 (1) and (3) and 26, read in conjunction with 23 (1) and 24 (1)
<i>Article of the Optional Protocol:</i>	5 (2) (b)

1. The author of the communication is Ekaterina Abdoellaevna, who was born in Uzbekistan on 11 January 1989 and is now stateless. She submits the communication on behalf of herself and her minor daughter, Y, born on 15 May 2008 in the Netherlands. The author claims that the State party has violated her and Y's rights under articles 23 (1), 24 (3) and 26, read in conjunction with articles 23 (1) and 24 (1), of the Covenant, and Y's rights

\* Adopted by the Committee at its 125th session (4–29 March 2019).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\* A joint opinion by Committee members Marcia V.J. Kran and Yuval Shany (concurring) is annexed to the present Views.



under article 24 (1). The Optional Protocol entered into force for the State party on 11 March 1979. The author is represented by counsel, W.G. Fischer.

### **Factual background**

2.1 In 2000, at the age of 11, the author fled with her family from Uzbekistan to the Netherlands. On 18 November 2000, the author's parents and brother applied for asylum, including on behalf of the author. On 6 March 2002, the State Secretary of Justice of the Netherlands denied the application. Appeals against this decision were declared unfounded by the District Court of The Hague on 12 October 2004, and then by the Administrative High Court on 9 March 2005.

2.2 The author and her family subsequently left for Norway and applied for asylum there. Shortly thereafter, they were returned to the Netherlands. On 18 September 2006, the author applied in her own name for asylum in the Netherlands. On 19 September 2006 and 4 January 2007, she was interviewed by the Immigration Service. On 15 May 2008, Y was born. On 3 July 2008, the State Secretary of Justice denied the author's asylum application. In 2009, the District Court of The Hague rejected her appeal as unfounded, and the author did not appeal further.

2.3 On 24 March 2009, the State Secretary of Justice denied the author's application for relief under the *Ranov* amnesty scheme, which was set up to settle the legacy of the former Aliens Act. However, on 5 February 2010, the District Court of The Hague deemed that the author's application was well founded and annulled the State Secretary's decision. As a result, the author was permitted to stay in the Netherlands pending the appeal by the State Secretary of Justice against the District Court's decision. On 12 November 2010, the Council of State annulled the decision of the District Court.

2.4 On an unspecified date, the author rented accommodation in The Hague, which was paid for by third parties. Initially, she lived alone, but her parents and brother joined her following their eviction from an asylum centre. Neither the author nor her family members had a work permit or access to social benefits, due to a law establishing the so-called linkage principle. Under this principle, access to social services is contingent upon possession of a residence permit. The author and her family depended on others for food, housing and clothing.

2.5 On 14 April 2009, the author received an official notification that she had lost her Uzbek citizenship because she had not registered with the Uzbek Embassy within five years of leaving Uzbekistan.<sup>1</sup> The author attempted to leave the Netherlands and return to Uzbekistan, with the assistance of the Repatriation and Departure Service of the Netherlands. However, the authorities of Uzbekistan refused to issue the author a certificate of return or travel documents. The author maintains that the Repatriation and Departure Service was notified of the author's loss of Uzbek nationality in October 2009.

2.6 In 2011 and 2012, the author submitted various applications for housing, social and child benefits. Specifically, on 14 June 2011, she applied to the municipality of The Hague for shelter and social assistance. Her applications were rejected in July 2011, and the District Court rejected the author's appeal on 18 July 2012. The author's appeal regarding her application for shelter was pending before the Administrative High Court at the time the present communication was submitted. In addition, on 3 April 2014, the author applied to the State Secretary for shelter. On 22 April 2015, this application was denied, and on 25 January and 23 March 2016, the author's subsequent appeals were deemed to be ill-founded. In the same month of March 2016, however, the author and her family were offered shelter by the State Secretary, but it only has facilities that are necessary.

2.7 The author applied to the Central Agency for the Reception of Asylum Seekers for shelter and social assistance on 14 June 2011. That application was denied and, on 19 December 2012, the administrative jurisdiction division of the Council of State upheld the

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<sup>1</sup> The author provides certificates from the Embassy of Uzbekistan in Belgium dated 14 April 2009, 25 May 2011, 14 March 2012 and 12 July 2013. The certificates state that the author lost her Uzbek nationality because she had not lived in Uzbekistan since 2000 and was not registered at the Uzbek Embassy. In view of that, she could not be granted an Uzbek passport or a return visa.

lower court's decision, finding that there was no obligation under international law to provide shelter for stateless persons, including minors. This decision cannot be appealed.

2.8 On 9 February 2012, the author applied to the Central Agency for the Reception of Asylum Seekers for money for Y. The application was denied and, on 5 October 2012, the administrative jurisdiction division of the Council of State rejected the author's appeal against the decision denying her application.

2.9 On 15 June 2011, the author applied to the organization that implements national insurance schemes in the Netherlands, the Sociale Verzekeringsbank, for general (non-means-tested) child benefits (*kinderbijslag*). On 13 June 2012, her application was denied.<sup>2</sup> On 10 April 2013, the District Court of The Hague deemed her appeal against the decision unfounded. The author's appeal against that decision, submitted on an unspecified date, was pending at the time the communication was submitted.

2.10 On 15 June 2011, the author also applied to the benefits section of the Tax and Customs Administration for a (means-tested) child budget (*kindgebonden budget*). On 13 June 2012, the tax authorities rejected her application. The author objected to that decision, arguing that the denial of the benefits constituted a violation of the Convention on the Rights of the Child and of article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights). On 27 August 2012, the tax authorities dismissed the author's objection, on the ground that the author had not demonstrated special circumstances that would have allowed a child budget to be granted to an individual without a residence permit. On 19 February 2013, the District Court of The Hague declared the author's appeal against the decision unfounded, finding that the denial of the child budget to aliens without residence permits could be discriminatory only when it concerned persons who could demonstrate very special circumstances. In the case of the author, the Court found no special circumstances, as she had not submitted proof of her statelessness and of her inability to leave the Netherlands.<sup>3</sup> On 5 February 2014, the Council of State rejected the author's appeal against the District Court's decision. The Council found no violation of the author's right to family life and to non-discrimination under articles 8 and 14 of the European Convention on Human Rights. It did not find special circumstances that could justify granting the author a child budget. In addition, it argued that the child budget was not intended to guarantee its beneficiaries a subsistence level of income. With regard to the right of the child to an adequate standard of living under the Convention on the Rights of the Child, the Council considered that children's rights were not at stake, as the beneficiaries of the budget were the parents, not the children.

2.11 On 28 October 2009, the author applied for a "no-fault" residence permit, claiming that she was stateless through no fault of her own. On 3 November 2009, the application was denied. On 20 November 2009, the District Court of The Hague declared the author's application for review unfounded. On 21 August 2012, the author filed another application for a no-fault residence permit, which was denied by the State Secretary of Justice on the same date.<sup>4</sup> On 18 July 2013, the District Court of The Hague denied the author's application for review.<sup>5</sup>

2.12 In December 2012, the Advisory Committee on Migration Affairs published a report entitled *No Country of one's own*, which concerned protection for stateless persons under international treaties. The Advisory Committee considered that the Netherlands was not

<sup>2</sup> According to the State party's initial observations, the application for general child benefits was denied because the author was not a lawful resident and was therefore not entitled to the benefits.

<sup>3</sup> In its initial observations, the State party indicates that, according to the District Court of The Hague, "the argument that the situation involved statelessness and the impossibility of leaving the Netherlands had not been – sufficiently – substantiated. Nor did the financial situation constitute a special circumstance, because it had not been argued or demonstrated that not granting child budget would lead to a humanitarian emergency situation."

<sup>4</sup> The information relating to this application was provided by the State party.

<sup>5</sup> According to the translation provided by the author, the District Court found that, although the author was stateless, she had not met the burden of proving that she was not responsible for the situation.

fully meeting its obligations under treaties relating to statelessness, including with regard to children who are born stateless.

2.13 On 27 May 2013, the author applied, on behalf of Y, for a long-term child residence permit, also known as a “children’s pardon”.<sup>6</sup> On 3 July 2013, the State Secretary of Justice rejected the application on the ground that Y had lived in the Netherlands for only four years before the passage of the law establishing the children’s pardon, instead of the requisite five years.<sup>7</sup> On 8 October 2014, the State Secretary of Justice denied the author’s appeal, but granted the author, her parents, her brother and Y a one-year residence permit on the ground that all members of the family were unable to leave the Netherlands through no fault of their own. In March 2015, the District Court of The Hague denied the author’s appeal regarding the children’s pardon. The author applied for an extension of her one-year residence permit and, at the time the communication was submitted, was awaiting a response.<sup>8</sup>

2.14 The author maintains that she has exhausted domestic remedies with regard to her claims of violations of her right to family life and non-discrimination and of the rights of her child. She states that she has not submitted the matter for consideration by another body of international investigation or settlement.

### **The complaint**

3.1 The author submits that, by denying her application for a child budget, the State party violated her and Y’s rights under articles 23 (1), 24 (3) and 26, read in conjunction with articles 23 (1) and 24 (1), of the Covenant, as well as Y’s rights under article 24 (1). With respect to article 23 (1), the author asserts that, in conformity with the jurisprudence of the European Court of Human Rights,<sup>9</sup> the Dutch courts have found that payment of the child budget may be regarded as a discharge of the State’s positive obligation to protect family life under article 8 of the European Convention of Human Rights. The author adds that the child budget is similarly protected under article 23 (1) of the Covenant, and that the denial of her application amounts to a violation of the right to family life. The linkage principle should not be rigidly applied to stateless individuals, especially when minors are involved, as is the case here. It is well established under Dutch law that the linkage principle is not set in stone and cannot prevail when violations of human rights are at stake.<sup>10</sup> The author lost her Uzbek nationality at the age of 17. As a result, Y was born stateless in the Netherlands. The author has submitted several official documents from the Uzbek authorities to demonstrate her loss of nationality. The Repatriation and Departure Service has acknowledged that, because of the author’s loss of nationality, she cannot be repatriated or expelled.<sup>11</sup> In addition, the author and Y cannot formally be declared stateless because the Netherlands has no such procedure. Thus, they cannot access the special protection afforded to stateless persons under article 32 of the Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, to which the Netherlands is a party. This amounts to a violation of the author’s and Y’s rights under article 24 (3) of the Covenant. Because the author and Y were unable to solve their

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<sup>6</sup> The State party indicates that this procedure is a transitional scheme for long-term resident children.

<sup>7</sup> The State party indicates in its initial observations that, on 6 September 2013, the author again applied for a residence permit for Y under the transitional scheme. The application was denied on 2 December 2013 on the same grounds as before. The author contested both decisions in her appeal.

<sup>8</sup> The State party notes in its initial observations that the residence permit was extended until 13 June 2016.

<sup>9</sup> The author cites European Court of Human Rights, *Niedzwiecki v. Germany* (application No. 58453/00), judgment of 25 October 2005, para. 31.

<sup>10</sup> The author cites Centrale Raad van Beroep (Central Appeals Tribunal), case No. ECLI:NL:CRVB:2006:AV0197, judgment of 24 January 2006.

<sup>11</sup> The author provides a translation of a letter from the Repatriation and Departure Service dated 24 July 2013. The letter refers to the certificate issued by the Embassy of Uzbekistan in Belgium on 12 July 2013 stating that the author had lost her Uzbek nationality.

residency issues, they fell into hardship amounting to a violation of their right to family life.<sup>12</sup>

3.2 Regarding the claim under article 24 (1) of the Covenant, whereas the State party maintains that children lack legal standing with regard to the child budget because it is paid to the parent, the child budget should in fact be regarded as a measure of protection required by Y's status as a minor. Children are afforded protection because they are considered to be vulnerable on account of their age. As a result, when a claim to a child budget is at stake, the interests and rights of the child should be taken into account. Indeed, the Supreme Court of the Netherlands has acknowledged that family benefits such as general child benefits are intended to improve the position of the child.<sup>13</sup> This reasoning should also apply to the child budget, and by deeming that the budget accrued to the author and not to Y, the Dutch authorities failed to consider Y's rights or her situation as a stateless minor with no control over her immigration status. Y's best interests should have been paramount in the assessment of the claim.

3.3 Concerning the claim under article 26, read in conjunction with article 23 (1), of the Covenant, the denial of the child budget was discriminatory with respect to the family life of the author and Y, because the State party treated them differently from its own citizens due to their status as irregular migrants. However, they did not choose to be stateless, as the author was only 11 years old when her parents fled Uzbekistan, Y was born stateless and both the author and Y were unable to leave the Netherlands due to this statelessness. Thus, there is no "weighty reason" – referring to the jurisprudence of the European Court of Human Rights – that could justify their different treatment.

3.4 The denial of the child budget on the basis of the author's lack of a residence permit was in violation of article 26, read in conjunction with article 24 (1), of the Covenant, and was discriminatory with regard to Y, because the State party's authorities did not make any distinction between the situation of the author and that of Y. This distinction is crucial, because the interest of the parent differs from the interest of the child. Children, especially very young children, are unable to influence their parents' choices.<sup>14</sup>

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

4.1 In its observations dated 24 July 2015 and 12 January and 9 June 2016, the State party provides additional information on two types of child allowances provided for under Dutch law: the child budget (*kindgebonden budget*), which is means tested, and general child benefits (*kinderbijslag*). Neither type of allowance is intended to serve as a general income support scheme. General child benefits were established under the General Child Benefit Act of 1962. Under this Act, insured persons who care for or support minor children are entitled to general child benefits. Such benefits are paid per household and represent a contribution towards related costs; recipients are not meant to fully reimburse these costs. General child benefits are not awarded on the basis of the parents' income.

4.2 In contrast, the child budget, which was established under the Child Budget Act of 2007, is means tested, meaning that the amount of the budget is inversely related to the parents' ability to pay the costs of raising and caring for children. The child budget may be paid to parents earning a low annual income, and its amount depends on the number of children and their ages. It accrues to the parent, not to the child. It was introduced as part of a social security provision after it had become apparent that many low-income families did not owe the minimum income tax required in order for them to benefit from the existing child tax credit. Aliens who have not been admitted to the Netherlands are not eligible for general child benefits or the child budget, due to the principle of linking social entitlements to residence status.

<sup>12</sup> The author provides a letter from an individual, Z, dated 18 July 2011. It states that Z had been financially supporting the author and her family in The Hague for a few years, but was no longer able to assist them, except by offering them food.

<sup>13</sup> The author cites Supreme Court of the Netherlands, case No. ECLI:NL:HR:BW7740, judgment of 23 November 2012, sect. 3.5.10.

<sup>14</sup> The author refers to *Derksen v. Netherlands* (CCPR/C/80/D/976/2001).

4.3 The linkage principle, established under the Benefit Entitlement (Residence Status) Act of 1998, aims primarily to ensure that an alien without an unconditional residence permit cannot claim entitlement to public provisions. The Act provides for three exceptions to this rule, in that public provisions relating to education, health care and legal aid are available to all aliens, including those without a residence permit.<sup>15</sup>

4.4 Moreover, in the Netherlands, the most basic provisions, such as medically necessary health care, are available to every alien residing in the country unlawfully. Although lawfully resident aliens are not entitled to benefits through the regular social security system, alternative provisions are available to them. Aliens awaiting a decision on an asylum application are provided with access to reception facilities, and can obtain a weekly financial allowance and other financial provisions. Aliens who are not asylum seekers are given a financial allowance and have access to a medical expenses scheme to provide for the necessary means of subsistence. Reception facilities may be available if there is a prospect of the individual leaving the Netherlands. Specific financial provisions have been made for minors, who constitute a particularly vulnerable group. Extra reception facilities are available to vulnerable aliens residing in the country illegally, including unaccompanied minors and aliens with medical problems whose legal remedies have been exhausted. Following a Supreme Court decision of 21 September 2012, minor aliens who are not lawfully resident in the Netherlands and live with their family are offered shelter in a family accommodation centre if this is necessary to avert a humanitarian emergency. The families receive shelter until they depart for their country of origin, or until every child in the family has reached the age of majority.

4.5 The State party adds to the factual background of the complaint and acknowledges that, after living outside Uzbekistan for five years, the author lost her Uzbek nationality. On 8 October 2014, the author and Y were granted *ex proprio motu* a temporary regular residence permit, valid from 13 June 2014 to 13 June 2015, on temporary humanitarian grounds, on the basis of the no-fault policy. The residence permit was extended to 13 June 2016. It was granted after the Repatriation and Departure Service had issued a memorandum on 13 June 2014 expressing the view that the author and her family were unable to leave the Netherlands through no fault of their own. With this memorandum, the cumulative conditions for granting a residence permit on a no-fault basis were met.

4.6 Regarding general child benefits, the State party notes that, in mid-2014, due to an error in which one file was mistaken for another, the author was erroneously considered to be a lawful resident and, in a decision dated 1 December 2014, the author was granted general child benefits and was paid retroactive statutory interest. This error came to light during the examination of the present communication. On 23 July 2015, the decision granting general child benefits was revoked, although repayment was not requested.

4.7 The State party considers that the communication is inadmissible under article 5 (2) (b) of the Optional Protocol on the basis that the author has not exhausted domestic remedies, as her appeal against the decision of the District Court of The Hague dated 10 April 2013, concerning her application for general child benefits, remains pending. It is emphasized that entitlement to the child budget is contingent upon entitlement to general child benefits.

4.8 Moreover, the State party considers that the communication is without merit. Article 23 (1) of the Covenant does not require a child budget to be provided. As the refusal to grant the child budget is not an obstacle to family life, the issue of government interference or failure to act with respect to the life of the author and Y as a family unit does not arise. Contrary to the author's argument, the Covenant does not create an affirmative obligation to protect the family unit by providing financial assistance, let alone any specific child budget or child benefit. Neither general child benefits nor the child budget is a general income support scheme providing families with children with a minimum subsistence income payment, even if the individuals concerned have resided in the country for a long

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<sup>15</sup> The State party adds that several additional exceptions to the rule exist for various categories of persons, including suspected victims of trafficking in women.

period with the knowledge of the State. Even if article 23 did create affirmative obligations, these would relate more to measures to protect family unity and family reunification.

4.9 It is clear from the Committee's general comment No. 17 (1989) on the rights of the child that article 24 of the Covenant concerns protecting children against harm to their physical or psychological well-being, and that parents have the primary responsibility, including financial responsibility, for their children. The author acted on this responsibility by providing herself with a place to live in The Hague from 15 June 2011, the date on which she applied for the child budget, to 26 March 2014. It is emphasized that need is not a criterion for being granted the benefit, and that basic provisions are available to unlawful resident aliens in the country. Indeed, on 26 March 2014, the municipality of The Hague offered shelter to the author and Y and, on 2 May 2014, they were offered places at a family location. Since December 2014, they have been provided with what is termed "regular housing". Moreover, the author's allegations regarding an alleged lack of accommodation are irrelevant to the subject matter of the communication. The cases cited by the author do not support the notion that article 24 of the Covenant creates specific child rights that indirectly arise from government decisions regarding the child's parents. It is emphasized that neither type of child benefit constitutes an entitlement of the child. For the same reason, the Netherlands made a reservation to article 26 of the Convention on the Rights of the Child, to the effect that the provision does not imply an independent entitlement of children to social security, including social insurance. Both general child benefits and the child budget fall within the scope of this reservation. In the Netherlands, a minor has independent social security entitlements only in exceptional situations.

4.10 Regarding article 26 of the Covenant, distinctions based on residence status are by no means unusual in the context of human rights treaties.<sup>16</sup> Moreover, article 26 of the Covenant matches the scope and content of article 14 of the European Convention on Human Rights. These provisions do not prohibit all forms of unequal treatment; rather, they prohibit only those forms of unequal treatment that qualify as discrimination. Discrimination arises in the absence of a sufficiently objective and reasonable justification, a legitimate aim and reasonable and proportionate means to achieve that aim.

4.11 According to the jurisprudence of the European Court of Human Rights, it is only in situations where discrimination is based exclusively on nationality that very weighty reasons must exist to establish an objective and reasonable justification. In the author's case, the distinction is based instead on residence status and is sufficiently justified, given the objective and reasonable justification for treating a country's own nationals differently from unlawfully resident aliens with regard to social entitlements. Indeed, an unqualified obligation to treat unlawfully resident aliens equally with a country's own nationals and lawful residents would deprive a State of the ability to pursue an immigration policy to protect the country's economic well-being. It is therefore both objective and reasonable that the State party limits entitlement to general child benefits and the child budget to lawful residents. According to the European Court of Human Rights, States have the right to control the entry, residence and expulsion of aliens, and measures aimed at ensuring effective immigration control may serve a legitimate aim of preserving the economic well-being of a country.<sup>17</sup> Neither the European Convention on Human Rights nor any United Nations treaty protects entitlements to child benefits.

4.12 Concerning the argument that, due to the statelessness of the author and Y, no legitimate aim is served by the distinction made in the eligibility criteria for child benefits, the State party observes that Dutch law allows for the granting of residence permits to individuals who have demonstrated that they have become stateless through no fault of their own. The author did not have such a residence permit in 2011, when she applied for the child budget. Thus, at that time, her situation did not differ from that of other unlawfully resident aliens. Moreover, at the time of application, she was under an obligation to leave

<sup>16</sup> The State party cites, inter alia, article 1 of the European Convention on Social and Medical Assistance and article 1 (1) of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>17</sup> The State party cites European Court of Human Rights, *Nacic and others v. Sweden* (application No. 16567/10), judgment of 15 May 2012, para. 79.

the Netherlands pursuant to a judicial decision of the highest instance. If all types of financial benefits were granted to unlawfully resident aliens and stateless individuals – regardless of the reasons for their statelessness – this would result in a semblance of legality and the establishment of such a strong legal position that it would be virtually impossible to expel them. Furthermore, that would render it unnecessary for aliens to apply for a residence permit through standard procedures.

4.13 With regard to the author’s argument that Y has suffered indirect discrimination because the child budget, while paid to the author, was intended for her, the State party reiterates that the contribution is granted to the parents, who are free to spend it as they wish, without any obligation to spend it on child welfare. Moreover, Y has not been subject to discrimination, as all parents and their children who are unlawful residents are ineligible for the general child benefit and the child budget under the Benefit Entitlement (Residence Status) Act.

#### **Author’s comments on the State party’s observations on admissibility and the merits**

5.1 In comments dated 1 December 2015 and 18 April 2016, the author submits that the pending proceedings concerning her application for general child benefits are irrelevant, because her application for the child budget was filed separately, and the two kinds of benefit are not connected. In the final decision of the Council of State on the application for the child budget, there is no reference to the pending case concerning general child benefits. The Council of State did not consider that the pending case rendered inadmissible the matter concerning the child budget.

5.2 In its observations on the merits, the State party disregarded both the poverty faced by the author and Y and Y’s interests as a vulnerable child. These circumstances warrant a more flexible application of the linkage policy. The three exceptions to the linkage principle cited by the State party (relating to education for minors, health care in life-threatening situations and legal aid as services accessible to individuals without a residence permit) do not ensure fulfilment by the State party of its obligation to protect the interests of the child. The author and Y subsist on an income level far below the Dutch poverty threshold, and they have no means to change their situation. Whereas the State party maintains that basic provisions were available to them, that is not an accurate reflection of their circumstances, and they were fully dependent on third parties for housing, food and clothing. The State party did not intervene, despite multiple confirmations of statelessness by the Uzbek authorities. Only on 2 May 2014 did a representative of the State party offer the author and Y shelter in a rudimentary family facility. The State party does not contest the destitution the author and Y face.

5.3 The State party’s position that the child budget is not based on need is incorrect, as the State party’s explanatory memorandum to the Child Budget Act clearly refers to the child budget as a *tegemoetkoming*, which translates as a “reimbursement” or “allowance” toward the cost of children. It is means tested, which assumes a need to reimburse the costs of children.

5.4 Although the State party argues that, in furtherance of the legitimate aim of immigration control, it is reasonable to exclude the author and Y from child benefits, the State party was informed many years ago that they are stateless, and it does not substantively address its obligations in relation to their statelessness in its observations. The State party does not acknowledge that it could have remedied the authors’ statelessness through its own policies.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.



6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author's claims in connection with the denial of the child budget on behalf of herself and Y under articles 23 (1) and 26, read in conjunction with articles 23 (1) and 24 (1), of the Covenant, and on behalf of Y under article 24 (1). The Committee also notes that the State party contests the author's claim that she has exhausted all available domestic remedies, based on her pending appeal regarding her application for general child benefits. In this regard, the Committee notes the State party's information that entitlement to the child budget is contingent upon on entitlement to general child benefits. The Committee observes, however, that the author had appealed the negative decision of the District Court of The Hague of 10 April 2013 concerning her application for general child benefits before she submitted the present communication on 17 September 2014. The Committee recalls that the requirement of article 5 (2) (b) of the Optional Protocol to exhaust all available domestic remedies is not the rule where the application of the remedies is unreasonably prolonged. In the absence of information explaining the delay of over four years in processing the author's appeal concerning general child benefits, the Committee considers that the application of that remedy has been unreasonably prolonged. It notes the author's argument that, when rendering a final merits decision concerning the child budget application, the Council of State did not refer to the pending general child benefits application and did not consider it an obstacle to admissibility. Given these circumstances, the Committee considers that the sole fact that the author has not demonstrated entitlement to general child benefits does not preclude the Committee from examining her claims relating to entitlement to the child budget. Thus, in the absence of other objections from the State party regarding the exhaustion of domestic remedies by the author, the Committee considers that article 5 (2) (b) of the Optional Protocol does not constitute a barrier to the admissibility of the aspects of the communication pertaining to the denial of the child budget to the author.

6.4 The Committee also notes the author's claim under article 24 (3) of the Covenant that she and Y are unable to obtain a formal declaration that they are stateless. The Committee observes, however, that the author does not appear to have raised this claim before the domestic authorities. The Committee therefore considers that it is precluded by article 5 (2) (b) from examining the author's claim under article 24 (3) of the Covenant.

6.5 The Committee considers that the author has sufficiently substantiated her claims on behalf of herself and Y under articles 23 (1) and 26, read in conjunction with articles 23 (1) and 24 (1), of the Covenant, and on behalf of Y under article 24 (1), for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its consideration of the merits.

#### *Consideration of the merits*

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claims that, by rejecting her application for a child budget, the State party failed to provide measures of protection required by Y on account of her status as a minor under article 24 (1) of the Covenant. In this matter, the Committee is not called upon to decide generally upon the obligations of States parties to provide child benefits, nor does it decide the extent to which it is justified to limit entitlement to such benefits based on residency status. Rather, the Committee limits itself to the question of whether, in the particular circumstances of this case, the denial of the author's application for the child budget violated Y's rights under article 24 (1).

7.3 The Committee recalls that, under article 24, every child has a right to special measures of protection because of her or his status as a minor.<sup>18</sup> It also recalls that the principle that, in all decisions affecting a child, the child's best interests shall be a primary

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<sup>18</sup> See the Committee's general comment No. 17, para. 4, and *Mónaco de Gallicchio v. Argentina* (CCPR/C/53/D/400/1990), para. 10.5.

consideration, forms an integral part of every child's right to measures of protection, as required by article 24 (1).<sup>19</sup> The States parties to the Covenant have a positive obligation to protect children from physical and psychological harm, which may include guaranteeing minimum subsistence, in order to comply with the requirements of article 24 (1).

7.4 As a preliminary matter, the Committee notes the State party's position that, because the child budget is paid to the parent and may be spent as the parent wishes, including on items unrelated to childcare, Y's rights under article 24 (1) are not implicated by the denial of the child budget. The Committee observes, however, that, according to the State party's submission, the amount of the child budget is inversely related to the parents' ability to pay the costs of raising and caring for children and is also dependent on the number and age of children per household. The Committee also notes the information provided by the State party in its fourth periodic report to the Committee on the Rights of the Child, stating that the child budget (*kindgebonden budget*) is a contribution towards the maintenance costs of a child aged under 18 (CRC/C/NLD/4, para. 175). The Committee considers that, while the parent is the direct recipient of the child budget, both the parent and the child benefit from it. Noting the State party's position that the Committee's general comment No. 17 limits article 24 protections to those relating to the physical or psychological well-being of children, the Committee observes that the absence of social protection for children may in certain circumstances adversely affect their physical and psychological well-being.

7.5 The Committee notes the State party's position that, under Dutch law, non-resident aliens are not entitled to the child budget. The Committee also notes, however, that, according to the decisions issued by the domestic authorities, the child budget may in special circumstances be granted to individuals without a residence permit. Nevertheless, in the author's case, the domestic authorities considered that she had not demonstrated such special circumstances, noting in particular that she had not substantiated her allegations that she was stateless and was unable to leave the Netherlands, and had not argued or shown that the failure to grant the child budget would lead to a humanitarian emergency situation. The domestic authorities based their decision on the notion that the child budget was not intended to guarantee a subsistence level of income to the beneficiaries and on the principle that the beneficiary of the budget is the parent, not the child.

7.6 In evaluating this reasoning through the lens of article 24 (1) of the Covenant, the Committee observes that the State party has not indicated the kinds of special circumstances under which the child budget may be granted to individuals without a residence permit. It is not clear whether any criteria or guidelines exist, in the Child Budget Act or elsewhere, according to which such special circumstances are determined in such a manner as to ensure that the child's best interests form a primary consideration. While the State party's authorities maintained that the author had not substantiated her allegations of statelessness and inability to leave the Netherlands, the Committee notes that the author claims to have informed the State party's authorities of her statelessness in 2009. In this regard, the Committee notes the certificates dated 14 April 2009, 25 May 2011, 14 March 2012 and 12 July 2013 from the Embassy of Uzbekistan in Belgium, stating that the author had not lived in Uzbekistan since 2000, had lost her Uzbek nationality and could not be granted a passport or a return visa. The Committee notes that the State party does not contest having received these certificates and observes that the most recent of them was acknowledged in a letter dated 24 July 2013 by the State party's Repatriation and Departure Service, which issued a memorandum on 13 June 2014 acknowledging that the author and her daughter were unable to leave the Netherlands through no fault of their own. The Committee notes that the author applied for the child budget in 2011 and that a final decision on that matter was reached in 2014. The State party has not indicated the steps the author could have taken and failed to take in order to substantiate her statelessness and inability to leave the Netherlands during the relevant period. In addition, the Committee observes that the State party does not contest the author's assertions that she and Y had no choice in the decisions that led to their statelessness. In this regard, the Committee notes the author's statements that she fled Uzbekistan with her family at the age of 11 and became stateless at the age of 17, and that Y was born stateless in the Netherlands. The Committee

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<sup>19</sup> *Bakhtiyari and Bakhtiyari v. Australia* (CCPR/C/79/D/1069/2002), para. 9.7.

also notes that, although the author's first two applications for a residence permit on the basis of no-fault statelessness were denied in 2009 and 2012, she was eventually granted such a permit in 2014, and it has since been renewed. Thus, the State party's own authorities have determined that the author is stateless through no fault of her own.

7.7 Regarding the argument of the domestic authorities that the failure to pay the child budget would not lead to an emergency humanitarian situation, the Committee notes the State party's observation that, when the author applied for the child budget in 2011, she had found a place to live. However, the Committee also notes the statement provided by the author in 2011 from an individual claiming that the author was reliant on his financial support, which he was unable to continue providing. The Committee observes that the State party has not contested the author's claims that, during the relevant period, she had to rely on charity to meet basic needs. With respect to the State party's position that the author had the primary responsibility for providing for Y, the Committee notes that the author had no access to the formal labour market during the relevant period, due to her lack of residence and work permits. The Committee notes the State party's position that the child budget was not intended to guarantee a subsistence level of income, but also notes that the author did not receive any other types of financial assistance from the State party during the relevant period that would provide for Y's subsistence. With respect to the argument of the State party's authorities that the beneficiary of the child budget is the parent and not the child, the Committee refers to its conclusions in paragraph 7.3 above.

7.8 In light of the totality of the aforementioned circumstances, including the vulnerability of the author and Y, both of whom are stateless through no fault of their own, the Committee considers that the State party has not specified the kinds of special circumstances that allow individuals without a residence permit to receive the child budget, taking into account the fact that the author's other applications for various types of subsistence-related benefits were denied. The Committee further considers that, under article 24 (1) of the Covenant, the State party had a positive obligation to ensure that Y's physical and psychological well-being was protected, including through a guarantee of subsistence under circumstances where her mother had no access to work or other income. Accordingly, the Committee concludes that the facts before it disclose a violation of Y's rights under article 24 (1) of the Covenant.

7.9 In view of the foregoing, the Committee does not deem it necessary to further examine the author's claims concerning the same matter under articles 23 (1) and 26, read in conjunction with articles 23 (1) and 24 (1), of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it discloses a violation by the State party of Y's rights under article 24 (1) of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide Y with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, *inter alia*, to (a) review Y's circumstances with a view to ensuring her access to minimum subsistence, including by re-evaluating the author's application for the child budget, as appropriate; and (b) provide adequate compensation to Y for the violations suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

## Annex

### **Joint opinion of Committee members Marcia V.J. Kran and Yuval Shany (concurring)**

1. We are in agreement with the Committee that the State party has failed to clearly indicate the kinds of special circumstances under which the child budget may be granted to individuals without a residence permit, and that it has not explained the steps the author could have taken and failed to take in order to substantiate her statelessness and inability to leave the Netherlands during the relevant period (para. 7.6).
2. This leads us to conclude that the eligibility criteria for the child budget (*kindgebonden budget*), including the exceptional circumstances under which non-eligible families would be entitled to receive the budget, were not set out in a clear, objective manner and were not applied to the author in a reasonable manner. Consequently, the actual exclusion of the author from eligibility to both regular and exceptional avenues for receipt of the child budget was based, in our view, on criteria that were neither reasonable nor objective, and that constituted a form of discrimination, contrary to articles 26 and 2 (1), read in conjunction with article 24, of the Covenant.<sup>1</sup>
3. At the same time, we have some doubts regarding what appears to be the Committee's main conclusion: that the State party was required to allow the author to receive support from the child budget by virtue of article 24. While I share the position of the Committee that, under article 24 (1) of the Covenant, the State party had a positive obligation to ensure that Y's physical and psychological well-being was protected, including through a guarantee of subsistence under circumstances where her mother had no access to work or other income (para. 7.8), we are of the view that the State has broad discretion in identifying the appropriate social security programme through which to implement this positive obligation. We further note that the State party claimed that neither general child benefits nor the child budget was a general income support scheme providing families with children with a minimum subsistence income payment (para. 4.8).
4. However, the State party has not identified what other social security measures were in place to address the needs and best interests of children facing acute poverty and destitution, which puts their physical and psychological well-being at real risk.
5. For these reasons, we would have based the Committee's article 24 finding not on the specific refusal to afford the author support under the child budget programme, but rather on the State party's failure to identify any social security programme that would evaluate and address the needs of the author's minor child. We therefore propose to read paragraph 7.8 of the Committee's Views relating to the separate violation of article 24 in that light.

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<sup>1</sup> The Committee recently examined two similar cases in which the application of domestic laws was found to be discriminatory, because the reasons for allowing some exceptions to a general norm, but not allowing other exceptions to the same norm, were not clearly explained or resulted in particularly harsh consequences. See *Yaker v. France* (CCPR/C/123/D/2747/2016), para. 8.15, in which it was noted that the State party provided no explanation why the blanket prohibition on the author's veil was reasonable or justified, in contrast to the exceptions allowable under the act concerned, and *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 11.8, in which it was noted that, given that the exclusion of the author from the care programme concerned could result in the author's loss of life or irreversible, negative consequences for the author's health, the distinction drawn by the State party for the purpose of admission to the programme between those with legal status in the country and those who had not been fully admitted to Canada was not based on a reasonable and objective criterion.