United Nations CCPR/C/102/D/1564/2007

International Covenant on Civil and Political Rights

Distr.: General*
15 September 2011

Original: English

Human Rights Committee
102nd session
11 to 29 July 2011

Views

Communication No. 1564/2007

Submitted by:	X. H. L. (represented by counsel, M.A. Collet)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	8 January 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 15 May 2007 (not issued in document form)
	CCPR/C/97/D/1564/2007 – decision on admissibility dated 7 October 2009
Date of adoption of Views:	22 July 2011

* Made public by decision of the Human Rights Committee.

Subject matter:	Unaccompanied minor claiming asylum
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Inhuman treatment; arbitrary interference with the family; protection as a child
Articles of the Optional Protocol:	1; 2; and 5, paragraph 2 b)
Articles of the Covenant:	7; 17; and 24

On 22 July 2011, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1564/2007.

[Annex]

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (102nd session)

concerning

Communication No. 1564/2007**

Submitted by:	X. H. L. (represented by counsel, M.A. Collet)
Alleged victim:	The author
State party:	The Netherlands
Date of communication:	8 January 2007 (initial submission)
Date of Admissibility decision:	7 October 2009

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

Meeting on 22 July 2011

Having concluded its consideration of communication No. 1564/2007, submitted to the Human Rights Committee on behalf of Mr. X. H. L. 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:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 8 January 2007, is Mr. X. H. L., a Chinese national, born in 1991. He claims to be a victim of violations by the Netherlands of articles 7, 17 and 24 of the Covenant. He is represented by counsel Mr. M. A. Collet

1.2 On 16 October 2007, the Committee, acting through its Special rapporteur on new communications, granted a request from the State party to split the consideration of the admissibility of the communication from its merits.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, 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. and Mr. Krister Thelin

Pursuant to rule 90 of the Committee's rules of procedure, Committee members, Mr. Cornelis Flinterman and Ms. Margo Waterval did not participate in the adoption of the present decision.

The texts of three individual opinions signed by Committee members, Sir Nigel Rodley, Mr. Krister Thelin, Mr. Gerald L. Neuman, Mr. Yuji Iwasawa and Mr. Fabían Omar Salvioli are appended to the present Views.

Facts as submitted by the author

2.1 The author entered the Netherlands as an unaccompanied minor when he was 12 years old. He states that he left China with his mother on 24 February 2004 by plane from Beijing to Kiev. They stayed in Kiev for three days. In the evening of 27 February they left Kiev by car and drove until the next evening. His mother then left with two unknown persons, and the author was taken by a man in a car to the Netherlands, where he arrived on 3 March 2004.

2.2 Upon arrival in the Netherlands, the author applied for asylum. His request was rejected on 24 March 2004 in the so-called "48-hour accelerated procedure"[1]. On appeal, the District Court, by decision of 30 July 2004, quashed the Minister's decision and ordered a reconsideration of the author's application under the regular procedure.

2.3 On 21 April 2005, the Minister of Immigration rejected the author's application arguing that he had not provided any reasonable grounds for fear of persecution. In relation to the author's young age, the Minister considered that Chinese unaccompanied minors were not eligible for a special residence permit, as adequate care was provided in their country of origin. The District Court, by decision of 13 February 2006, rejected the author's appeal. A further appeal was rejected by the Council of State on 17 July 2006. The author continues to reside in the Netherlands.

The complaint

3.1 The author claims that the decision to return him to China violates article 7 of the Covenant because he would be subjected to inhumane treatment. He explains that, since he was only 12 when he left China, he does not have his own identity card or *hukou* registration. Without these, he cannot prove his identity or access orphanages, healthcare, education, or any other kind of social assistance in China. He notes that, given that he has no contact or family connections in China, he would be forced to beg in the streets.

3.2 He further claims that the State party's decision to return him to China constitutes a breach of his right to private and family life recognised by article 17 of the Covenant. He notes that he considers his Dutch guardian as his only family, as he has no family left in China and is unaware of his mother's whereabouts.

3.3 Finally, he claims a violation of article 24 of the Covenant and article 3 of the Convention on the Rights of the Child, since the Netherlands did not take his best interests as a child into account by subjecting him to the accelerated asylum procedure. He claims that he was left with the burden to prove that he would not have access to an orphanage in China, which is too heavy a burden for a child. A further violation of article 24 is claimed because rejecting his request for asylum or for a permit on humanitarian grounds is against his best interests as a minor. He argues that he has integrated into Dutch society since his arrival in 2004 and has learned the language.

State party's observations concerning the admissibility of the communication

4.1 By submission of 16 July 2007, the State party requested that the Committee declare the communication inadmissible.

4.2 With regard to the author's claim under article 7, the State party argued that it had not been sufficiently substantiated for purposes of admissibility, because all documents submitted by the author were of a general nature and did not relate to his specific case.

[1] The author notes that this accelerated procedure is used to decide on apparently weak asylum cases.

4.3 The State party further submitted that the author had not brought his claim under article 17 before the domestic courts, and that this claim was thus inadmissible for non-exhaustion of domestic remedies.

4.4 With regard to the author's claim under article 24, the State party noted that the author's asylum application was at first rejected through an accelerated procedure, but that the District Court ordered the reassessment of the author's application under the regular asylum procedure, which was subsequently done. Accordingly, the author had ample opportunity to substantiate his claims. Therefore, the State party contended that this part of the communication was not sufficiently substantiated for the purposes of admissibility.

4.5 Finally, the State party claimed that the parts of the communication relating to alleged breaches of the CRC were inadmissible under article 1 of the Optional Protocol.

Author's comments

5.1 By submissions of 31 July 2008 and 2 December 2008, the author noted, with regard to his claim under article 17 of the Covenant, that it was not possible to address a breach of family life under Dutch asylum law. Nevertheless, he stated that he had raised a possible violation of article 8 of the European Convention on Human Rights before the Court of Appeal in the Netherlands, which was an equivalent provision.

5.2 With regard to his claim under article 7, the author claimed that he could not provide information relating to his personal situation in China, as he had been in the Netherlands since 2004. He referred to general information that showed that it was impossible to return and live in China without any documentation.

5.3 The author explained that he had invoked article 3 of the CRC only in conjunction with article 24 of the Covenant. He further maintained that the State party's intention to have his claim dealt with under the accelerated procedure was a violation of article 24 of the Covenant, even though this decision was later overturned by the District Court.

Committee's decision on admissibility

6. On 7 October 2009, the Committee declared the communication admissible under articles 7, 17 and 24. With regard to the State party's allegation that the author had not expressly invoked article 17 before national courts, the Committee noted the author's argument that it was not possible for the Courts to address such claims in the context of an asylum procedure, and that he had nevertheless raised in his appeal the possible violation of article 8 of the European Convention on Human Rights, which relates to a similar substantive right. With regard to the author's claim under article 24 because he had been subjected to the accelerated asylum procedure, the Committee considered that part of the claim inadmissible under article 2 of the Optional Protocol because the Court ordered the reassessment of the author's claim through the regular procedure, which was subsequently done. However, the Committee considered that there were no obstacles to the admissibility of the part of the author's claim that the decision to reject his application for asylum and for a permit on humanitarian grounds violated his rights under article 24 because he was well integrated into Dutch society.

State party's observations concerning the merits of the communication and author's comments

7.1 On 4 May 2010, the State party noted that it was the author's responsibility to prove that there were serious grounds for believing that, if returned to China, he would be subjected to a treatment in violation of article 7. The State party added that, according to the country report on China issued by the Minister of Foreign Affairs of the Netherlands, every family in China had a *hukou* or family book, and all *hukou* registers were kept

indefinitely by regional authorities, even in the event that citizens left the country, in which case these were required to report the change of address to the *hukou* administrative body. The State party noted that the author had not supplied any information to conclude that he was not registered in China. In the State party's view, the fact that the author attended school and had access to health care in China supports the assumption that he was registered. The State party further noted that the author had now reached the age of majority and could be expected to care and provide for himself. The State party observed that the mere fact that the author's circumstances would be significantly less favourable if he were to be removed from the Netherlands could not in itself be considered a violation of article 7 of the Covenant. The State party added that there were no grounds for assuming that the author would not have access to adequate care in China. According to recent reports, China had made caring for orphans a priority and medical care provided was basic but acceptable by local standards.

7.2 With regard to the author's claim under article 17, the State party noted that the only issue raised by the author during the national procedures was his request to be reunited with his mother. The State party notes that the author did not make use of the opportunity to have his right to a private and/or family life assessed by applying for a regular residence permit under the Aliens Decree 2000. The State party also noted that the author's ties with his guardian could not be characterised as family ties, especially since he was now 18 years old and no longer in need for guardianship. Additionally, the State party noted that the author had not specified why his ties with the Netherlands were so important to him that he could not return to China, nor had he provided any evidence that he could not resettle in China. The State party concluded that, if the Committee were to conclude that there had been interference with the author's right under article 17, it should be nonetheless considered that such interference would be neither arbitrary nor unlawful.

7.3 With regard to the author's claim under article 24, the State party stressed that the author had now reached the age of majority and could be expected to care and provide for himself. The State party noted that the policy of returning unaccompanied minor asylum seekers was based on their own interest, since few uprooted or displaced children would benefit from being separated from their families. On the contrary, the best interest of the child required restoring their relationship with their parents, family and social surroundings.

8. On 31 December 2010, the author noted that the State party had not put forward any new arguments. Therefore, the author did not add any new comments on the merits of the case.

Issues and proceedings before the Committee

Reconsideration of the Committee's decision on admissibility with regard to the author's claim under article 17

9. With regard to the author's claim that his return to China would violate his right to private and family life, the Committee notes the State party's argument in the sense that the author failed to use his opportunity to invoke this right by not applying for a regular residence permit on grounds of exceptional personal circumstances, according to the relevant domestic legislation. In light of this new information, which has not been challenged by the author, the Committee considers that the author's claim under article 17 is inadmissible for non-exhaustion of domestic remedies.

Considerations on the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee recalls that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[2] The Committee must therefore assess whether there are substantial grounds for believing that there is a real risk that the author would be subjected to the treatment prohibited by article 7 if he were to be removed to China[3]. In the present case, the Committee takes note of the author's argument that, since he does not have an identity card or *hukou* registration, he is unable to prove his identity or access any social assistance services in China, and since he does not have any family or connection in the country, he would be forced to beg to survive. The Committee notes the State party's argument to the effect that the author must have been registered in China but considers that it cannot be expected from an unaccompanied 12-year-old that he know his administrative obligations regarding notification to the relevant *hukou* administrative body. Moreover, it would have been unreasonable to demand from the author that he notify his residence in the Netherlands to the Chinese authorities given the fact that he was seeking asylum. The Committee notes that the author's claim under article 7 is closely linked to his claim under article 24, namely, the treatment he may have been subjected to as a child had the deportation order been implemented at the time where it was adopted. Therefore, the Committee will examine both claims jointly.

10.3 With regard to the author's claim that the State party did not take his best interest as a child into consideration when deciding on his return to China, the Committee notes that, from the deportation decision and from the State party's submissions, it transpires that the State party failed to duly consider the extent of the hardship that the author would encounter if returned, especially given his young age at the time of the asylum process. The Committee further notes that the State party failed to identify any family members or friends with whom the author could have been reunited in China. In light of this, the Committee rejects the State party's statement that it would have been in the best interest of the author as a child to be returned to that country. The Committee concludes that, by deciding to return the author to China without a thorough examination of the potential treatment that the author may have been subjected to as a child with no identified relatives and no confirmed registration, the State party failed to provide him with the necessary measures of protection as a minor at that time.[4]

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party's decision to return the author to China violates his rights under article 24, in conjunction with article 7 of the Covenant.

12. Pursuant to article 2, paragraph 3(a), of the Covenant, the Committee considers that the State party is under an obligation to provide the author with an effective remedy by reconsidering his claim in light of the evolution of the circumstances of the case, including the possibility of granting him a residence permit. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

[2] See General Comment No. 20, on article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment), paragraph 9.

[3] See General Comment No. 31, on article 2 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), paragraph 12. See also the Committee's Views on communications No 1315/2004, *Singh* v *Canada*, 30 March 2006, paragraph 6.3, No. 706/1996, *T* v *Australia*, November 1997, paragraph 8.4, and No. 692/1996, *A.R.J.*, 28 July 1997, paragraph 6.12.

[4] See also the Committee's Views in communication No. 1554/2007, *El-Hichou* v *Denmark*, 22 July 2010, paragraphs 7.4 and 7.5.

13. 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 or not 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 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. In addition, it requests the State party to publish the Committee's Views.

[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.]

Appendix

Individual opinion of Committee members, Sir Nigel Rodley and Mr Krister Thelin (dissenting)

In a few short words and without explanation, the Committee has embarked on novel jurisprudence. In previous cases involving fears of adverse consequences if a decision to deport were implemented, the Committee has expressed the opinion that, if the decision were implemented, the rights at issue *would be* violated. This indeed was the case in *El-Hichou v Denmark*, the very one cited by the Committee as authority for its decision (see footnote 4). Also, the operative date for the Committee's analysis has typically been, not the date the authorities took their decision, but the date of its own decision, so as to ensure that serious harm is avoided.

Now, out of the blue, the Committee has decided that a mere unimplemented decision of the State party's authorities entails a violation of article 24 (protection of children – at the time of the authorities' decision the author was a child; now he is 19 or 20) and this read together with nothing less than article 7 (prohibition of torture and similar ill-treatment). The Committee invokes the notion of the best interests of the child, as if this were the only applicable criterion for the interpretation of article 24, a status it does not enjoy even under the Convention on the Rights of the Child, from which the Committee has imported it. According to article 3, paragraph 1, of the latter Convention, the best interests of the child are 'a primary consideration', not 'the primary consideration', and certainly not the only consideration.

Another factor for the Committee seems to have been the State party's failure to conduct a 'thorough examination' of the consequences of such a deportation. The fact that those consequences could have been addressed at the stage of the practical implementation of the decision is ignored by the Committee. In any event, the implementation never happened.

We therefore dissent from a decision that is unprecedented, unjustified and arbitrary. This dissent should not be interpreted as approval of the State party's actions. Humane behaviour by the State party would be demonstrated by a reversal of the decision to deport after the author has spent so much time and developed such roots in The Netherlands. It is just that the Committee has no basis in law for finding an unimplemented decision of this sort to violate the Covenant.

[*signed*] Sir Nigel Rodley

[*signed*] Krister Thelin

[Done 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.]

Individual opinion of Committee members Mr. Gerald L. Neuman and Mr. Yuji Iwasawa (dissenting)

The State party's Observations concerning this communication detail its efforts to ascertain that the author would benefit from appropriate supervision and care if he were returned to his own country. We cannot share in the majority's negative evaluation of its efforts to take into account the best interests of the child as a primary factor in its decision.

It might have been helpful for the State party also to specify the additional steps that it would have taken to clarify the author's status if it had attempted to implement the return order; but the order was never implemented and he is now an adult and no longer in need of supervision. We hope that the Committee's future approach in similar cases will not establish a pattern that provides encouragement to the needless placement of unaccompanied children, without documents, in the hands of smugglers, which exposes them to serious risks of human trafficking, injury, and death.

[*signed*] Gerald L. Neuman

[*signed*] Yuji Iwasawa

[Done 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.]

Individual opinion of Committee member Mr. Fabián Salvioli

1. I concur with the Committee's Views as expressed in communication No. 1564/2007 concerning *X.H.L. v. the Netherlands*, as I fully share the Committee's reasoning and conclusion that the State party has violated article 24, read together with article 7, of the Covenant. However, I consider that the Committee should have also found an independent violation of article 24 of the Covenant.

2. Paragraph 1 of article 24 of the International Covenant on Civil and Political Rights is a directive of great scope and power, as it states that all children shall have the right to such measures of protection as are required by their status as minors, on the part of the family, society and the State.

3. In its general comment No. 17, the Committee stated that the measures that should be adopted by virtue of article 24, paragraph 1, are not specified in the Covenant, and it is for each State to determine them in the light of the protection needs of children in its territory and within its jurisdiction.[1]

4. Of course, those measures cannot be arbitrary and must be adopted within the framework of other international obligations which the State party has undertaken; in this case, that framework is provided by the Convention on the Rights of the Child,[2] which was ratified by the Netherlands in 1995.

5. The obligations established in the Convention, to the extent that they are relevant, go hand in hand with the obligations set forth in article 24 of the International Covenant on Civil and Political Rights. These obligations constitute the parameter for the analysis that the Human Rights Committee should undertake in all cases that involve a boy or a girl and a State party to both instruments. This should always be the case, and especially when a boy or a girl has been a victim of human trafficking. In those cases, States parties have an even greater duty to ensure that the children do not become victims again. Failing to carry out a comprehensive analysis of the obligations freely adopted by States parties creates an artificial division that is associated, no doubt, with approaches that have been superseded by a more coherent doctrine on the issue. The focus of that doctrine is invariably on ensuring that the provisions contained in human rights instruments have the proper effects.

6. In the current case, in addition to the violation of article 24, read together with article 7, the Committee should also have found an independent violation of article 24. Under the particular circumstances of the case, the decision by the Netherlands to return X.H.L. to China constituted in itself a violation of article 24 of the Covenant, independently of whether or not the decision could do harm to the minor's psychological well-being.

7. There is one final aspect that I consider important to highlight in this individual opinion. In paragraph 11 of its Views, the Committee correctly rules that the State party's decision to return the author to China violates his rights under article 24, in conjunction with article 7, of the Covenant, which indicates the presence of an actual, rather than a potential, violation.

8. If the Committee had decided that there was a "potential violation" owing to the fact that X.H.L. is still living in the Netherlands and has not actually been sent to China, it would then have failed to consider the violation itself. The current case does not have

[1] Human Rights Committee, general comment No. 17 (1989), para. 3.

[2] The Convention on the Rights of the Child, adopted in 1989, should, in my opinion, be entitled "the Convention on the Rights of Boys and Girls", in view of the need to use appropriate language.

anything to do with possible cases of deportation to a place where a person might be tortured; in that type of case, it is logical to consider *ratione temporis* the possible violation at the moment that the ordered deportation occurs, since the violation depends on the circumstances that exist in the country to which the person is sent.

9. In this case, which has completely different characteristics, the violations of article 24 and article 7 of the Covenant were actually committed when the decision was taken by the State party (i.e., the decision gave rise to international responsibility), and this was fully understood by the Human Rights Committee.

[*Signed*] Fabián Salvioli

[Done in English, French and Spanish, the Spanish 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.]