



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2299/2013<sup>\*, \*\*</sup>

<i>Communication submitted by:</i>	G.E. (represented by counsels, W.G. Fischer and C.J. Forder)
<i>Alleged victim:</i>	The author
<i>State party:</i>	The Netherlands
<i>Date of communication:</i>	9 November 2012 (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 30 October 2013 (not issued in document form)
<i>Date of adoption of the decision:</i>	3 November 2016
<i>Subject matter:</i>	Denial of social benefits to an alien with HIV
<i>Procedural issues:</i>	Incompatibility <i>ratione materiae</i> ; non-exhaustion of domestic remedies; insufficient substantiation
<i>Substantive issues:</i>	Prohibition of torture and other cruel, inhuman or degrading treatment or punishment; unlawful and arbitrary interference with one's privacy and home; prohibition of discrimination
<i>Articles of the Covenant:</i>	7, 17 and 26
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1.1 The author of the communication is G.E., a national of Ghana born on 13 April 1978. He alleges violations of articles 7, 17 and 26 of the Covenant. The Optional Protocol to the Covenant entered into force for the Netherlands on 11 March 1979.

\* Adopted by the Committee at its 118th session (17 October-4 November 2016).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez Rescia, Fabián Omar Salvioli, Yuval Shany and Margo Waterval.



1.2 On 12 May 2016, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to grant the author's request for interim measures concerning the continuation of a monthly benefit of €450 (see para. 7.2 below).

### **Factual background**

2.1 The author arrived in the Netherlands in 2004. In 2006, he was diagnosed with tuberculosis and HIV. The Central Agency for the Reception of Asylum Seekers accommodated him in a centre for asylum seekers and provided him with assistance.

2.2 In 2007, the author received a temporary residence permit, valid for one year, on medical emergency grounds. Since 6 November 2007, in accordance with the Work and Social Assistance Act, the Municipality of Amsterdam has paid the author a monthly allowance of €748.90, the amount given to a single person. After deduction of the medical insurance premium of €146.77, he received €602.13. He also received medical treatment and medicines. Late in 2007, he had to leave the place he rented. Since then, he has used the post restante address that the Municipality provides for homeless people. His residence permit was renewed in 2008 and 2009 on the same grounds.

#### *Proceedings concerning the author's applications for a residence permit*

2.3 On 22 June 2010, the author applied for a regular residence permit for the purpose of continued residence, within the meaning of section 14 of the Aliens Act of 2000. The author submits that, on 1 February 2011, the ministry responsible for immigration and asylum refused to renew his residence permit since he lacked a domicile. However, he only picked up the letter communicating the refusal of the residence permit renewal from the post restante address at the end of February 2011. By that date, the period within which he could appeal had already expired.

2.4 On 28 March 2011, the author wrote to the ministry for immigration requesting to be allowed to appeal the decision not to renew his residence permit and claiming that the antiretroviral medication he needed was not available in Ghana. On 14 April 2011, the ministry rejected the author's request.

2.5 On 18 April 2011, the author submitted a second application for a temporary regular residence permit for the purpose of continued residence, which was denied on 14 February 2012.

2.6 On 5 November 2012, the author filed an appeal to the Hague District Court against the refusal concerning his second application for residence permit. He also submitted a stay of removal, which was granted by the Court. On 6 June 2014, The Hague District Court, sitting in Amsterdam, declared the author's appeal against the denial to grant him a residence permit manifestly unfounded since adequate medical treatment was available to him in his country of origin. No appeal was lodged by the author against this judgment. Therefore, the proceedings on the author's request for a residence status came to an end.

#### *Access to shelter, medical treatment and a monthly allowance*

2.7 After the first application for a regular residence permit for the purpose of continued residence was denied (see para. 2.3), on 23 March 2011 the Municipality informed the author that since he lacked a residence permit his benefits would no longer be paid. Nevertheless, the author kept receiving the antiretroviral therapy and the medication he needed at the Academic Medical Centre, as well as €375 a month from the Municipality's Excluded Immigrants Fund. On 13 April 2011, the Municipality informed the author that the payment of his benefits under the Work and Social Assistance Act, including his medical insurance, had terminated on 1 February 2011 and that he was no longer entitled to

use the post restante address for homeless people. The author claims that he became homeless, that he no longer had medical insurance and that later, on an unspecified date, he started using the address of a church to receive his post.

2.8 On 16 May 2011, the author challenged the Municipality's decision to terminate payment of his benefits and requested benefits and/or shelter.

2.9 On 17 May 2011, the author requested the Central Agency for the Reception of Asylum Seekers to provide him with financial assistance and/or shelter, given the state of his health, under the Asylum Seekers and Other Categories of Aliens (Provision) Order of 2005. He provided a medical report, issued by the doctor at the Amsterdam Medical Centre who had treated him, according to which he needed a regular lifestyle for the treatment of HIV to be effective.<sup>1</sup> The author further claimed that the monthly allowance of €375 that he received from the Municipality was not enough for a person with HIV to afford adequate food and shelter. On 7 June 2011, the Central Agency dismissed the author's request saying that it could only grant shelter to asylum seekers and "equivalent aliens". On 10 June 2011, the Central Agency added that there was no "acute medical emergency situation" justifying an exception to its rules and obliging it to provide the author with shelter pursuant to article 3 of the Central Agency for the Reception of Asylum Seekers Act. On 9 and 17 June 2011, the author appealed to the Hague District Court against the Central Agency's decisions; the Court rejected the appeal on 14 March 2012. A further appeal by the author was rejected by the Administrative Jurisdiction Division of the Council of State on 23 May 2012.

2.10 The author appealed the decision regarding the revocation of benefits before the Amsterdam District Court. He again claimed that the monthly allowance of €375 was insufficient to afford a place to stay and food; that this interfered with the effectiveness of his HIV treatment; that his private life was not being respected; and that the uncertainty regarding access to medical care was inhuman. Thus, the denial of benefits in his situation was contrary to articles 3 and 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). He further claimed that irregular residence status of aliens did not remove the State party's obligations to grant social welfare to aliens in its territory.

2.11 On 2 November 2011, the Amsterdam District Court rejected the author's appeal against the Municipality's refusal to pay benefits. The Court pointed out that the author continued receiving medical treatment and medicine in a medical centre; that there was no indication that this would stop; that in addition he received €375 a month from the Municipality's Excluded Immigrants Fund; that he had a postal address; and that, although he lacked a fixed place to sleep, he could generally stay with various friends. Since there was no indication that his health condition had deteriorated, the situation was not contrary to the obligations contained in article 3 of the European Convention on Human Rights (on the prohibition of torture and inhuman treatment) and the circumstances were not sufficiently exceptional to conclude that his private life had not been respected, which would constitute a violation of article 8 of the European Convention on Human Rights.

2.12 In a decision of 29 November 2011, the Municipality declared that the author did not fall into any of the statutory categories entitled to shelter. The author appealed that decision to the Amsterdam District Court, which rejected it on 2 February 2012. On 3 February 2012, the author appealed that decision to the Central Appeals Court, which dismissed it on 12 June 2012. The Court stated that article 8 of the European Convention on Human Rights could give rise to a duty to provide a person with shelter and that the duty arose when the refusal to provide shelter did not result from a fair balance between the need of the person concerned and the public interest. It also noted that the medical opinion provided by the

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<sup>1</sup> The communication provides a copy of a letter dated 25 May 2011 signed by a doctor of the Amsterdam Medical Centre, University of Amsterdam.

author was contrary to the advice of the Municipality's doctor, which stated that the author was not so ill as to require him to be sent to the sick bay. Given that background, the Court concluded that, even if the author were in need of shelter, the monthly allowance of €375 granted by the Municipality and the medical treatment given in a medical centre was, in the circumstances, sufficient as a temporary measure.

2.13 On 3 January 2013, the author requested the Municipality to reconsider his request for shelter under the Work and Social Assistance Act by increasing to €450 the monthly amount granted to him as social support. On 24 May 2013, the Municipality rejected the author's request. It stated that he had received €375 each month from the Municipality's fund (of the total, €200 was intended for shelter and €175 for food), which in July 2012 was increased to €450; that in March 2013 that sum was reduced to €225 per month; and that he also received support from a church. The Municipality concluded that the amount of the author's allowance should not be changed. On 5 June 2013, the author lodged an objection against that decision before the Municipality.

2.14 The author submits that, between March and December 2013, he also received €200 per month from a church. Because of this supplement, he was able to pay the rent on his room and have some money for food. He claims that the allowance granted by the Municipality since March 2013 was insufficient for his subsistence since he was paying €250 per month in rent.

2.15 On 19 August 2013, the Municipality rejected the author's objection against its decision of 24 May 2013 (see para. 2.13). The author's appeal against the decision and a request for interim measures were denied by the Amsterdam District Court on 19 December 2013. The author appealed the decision before the Central Appeals Court, claiming, *inter alia*, that he should be given at least €530 for food and rent.

2.16 On the same day of the appeal, the author submitted a request for interim measures before the Central Appeals Court, as a result of which the parties reached an agreement on 26 February 2014 to the effect that he would receive a subsistence benefit of €450 per month from the Municipality starting in January 2014, while his appeal was pending before the Court.

2.17 The author claims that he exhausted domestic remedies with the Central Appeals Court's decision of 12 June 2012.

### **The complaint**

3.1 The author claims that, by refusing his request for shelter and benefits, the State party violated his rights under articles 7, 17 and 26 of the Covenant.

3.2 The author alleges that refusing shelter and social benefits to a man with HIV because he lacks a residence permit amounts to inhuman and degrading treatment, which is contrary to article 7 of the Covenant. Because of this refusal, the author is obliged each evening to search for a place to stay. Furthermore, he is unable to follow his physician's instructions regarding his medical treatment, which include eating regular and balanced meals and getting regular rest at night. As a result, he lives in the terrifying knowledge that the protective effect of the medication will be undermined and cost him his life. He points out that his communication does not relate to the granting of his residence permit. Rather, since he is allowed to remain in the State party while the proceedings concerning the renewal of his residence permit are pending, the State party should afford him treatment that takes into account his health conditions and particular circumstances. The State party's

failure to provide him with an adequate standard of living, including food, clothing and shelter, constitutes a violation of his rights under article 7 of the Covenant.<sup>2</sup>

3.3 The author maintains that his rights under article 17 have been violated by the failure of the State party's authorities to provide adequate and sufficient help and to take into account his illness and personal needs while assessing his request for shelter and benefits. He argues that his request for shelter as a form of primary health care falls under the rights established by article 17 of the Covenant. Although article 10 (2) of the Immigration Act of 2000 provides that an alien without a residence permit has the right to receive the necessary medical care, in practice the State party's authorities and its courts have limited that right to access to medicines. Moreover, the fact that the State party refused to provide shelter and benefits on the basis of medical advice indicating that the author did not need to be placed in a sick bay shows the inadequacy of the assessment made by the authorities concerning the request lodged by a person with HIV. Finally, the author argues that the authorities have implicitly recognized that he is in need of special assistance. Between 2007 and 2011, when he had a residence permit, they gave him social benefits. Afterwards, although they denied his request for social benefits, he continued to receive €375 per month (an amount that was not, however, sufficient for the author's subsistence). Accordingly, the State party's decision to terminate his benefits and the subsequent refusal to provide shelter constitute an arbitrary interference in his private life.

3.4 As to his claim under article 26 of the Covenant, the author alleges that the denial of his request for shelter and benefits was based on his lack of a residence permit. This involves a different treatment vis-à-vis other aliens with similar medical conditions, who hold a residence permit. As a result, he is forced to live in unacceptable conditions, putting his health at serious risk.

#### **Additional factual information provided by the parties**

4. By a note verbale dated 9 April 2014, the State party informed the Committee that on 28 March 2014 the author was notified that he would receive accommodation for the duration of the proceedings related to his request for residence and that such accommodation had, since then, been provided to him by the Central Agency for the Reception of Asylum Seekers. Accordingly, the State party requested the Committee to discontinue its examination of the present communication.

5.1 On 17 April 2014, the author informed the Committee that he had not received any accommodation from the Central Agency for the Reception of Asylum Seekers and opposed the State party's request for discontinuance. He argued that his requests for accommodation to the Central Agency in 2011 and 2013 had all been rejected and that the Hague District Court and the Council of State had denied his appeals on 23 or 24 December 2013 and on 19 March 2014, respectively.

5.2 The author points out that on 21 March 2014 he received a letter from the Secretary of State for Security and Justice and the Director of Migration Policy informing him that foreigners without a residence permit, including persons with medical conditions, could apply to the Return and Departure Service for shelter in a liberty-restricting location. According to the author, under article 56 of the Aliens Act of 2000, sojourn in a liberty-restricting location would include the imposition of restrictive measures and the foreigner would have to cooperate with the authorities on his or her departure. On 28 March 2014,

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<sup>2</sup> The communication also makes reference to articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights' general comment No. 14 (2000) on the right to the highest attainable standard of health and the jurisprudence of the European Committee of Social Rights, *Defence for Children International v. Netherlands*, complaint No. 47/2008, para. 47.

the author received an e-mail from the Central Agency for the Reception of Asylum Seekers informing him that he could admit himself to the centre at Ter Apel. The author claims that although the Central Agency referred to a shelter, in practice this implied a form of detention and a restriction to his liberty of movement. Moreover, the letter from the Secretary of State for Security and Justice appeared to suggest that he was in fact being invited to voluntarily accept a form of detention for migrants. The offer to which the State party referred to in practice would, therefore, constitute a violation of article 9 of the Covenant and could not be accepted by him.

6.1 In a note verbale dated 9 February 2015, the State party maintained that the author himself interpreted the e-mail from the Central Agency for the Reception of Asylum Seekers and the offer of accommodation in the light of the letter from the Secretary of State for Security and Justice. The letter, however, was general in nature and was a response to a request for accommodation and subsistence by the author's counsel on behalf of several persons unlawfully residing in the Netherlands. The author was not offered accommodation in a location where a liberty-restricting measure could be imposed or under the condition of having to cooperate with the authorities on his return to his country of origin. Instead, the Central Agency offered him accommodation in a facility similar to others in which he had stayed.

6.2 The State party also informed the Committee that the author had appealed against the State party's offer to the Hague District Court. During a hearing on 15 July 2014, he stated that he did not want to accept the offer because he was already renting a room. On 18 July 2014, the Court declared the appeal inadmissible owing to the absence of a legal interest in bringing forward proceedings.

7.1 On 7 May 2015, the author informed the Committee that on 9 February 2015 he had submitted a new request for social support to the Municipality. On 24 April 2015, the Municipality rejected the author's request because he did not have a residence permit as described in article 8 of the Aliens Act of 2000, which was a requirement to be eligible for social support according to the Social Support Act of 2015. It also noted that he received a monthly benefit of €450.

7.2 On 8 April 2016, the author informed the Committee that on 23 March 2016 the Central Appeals Court had dismissed his appeal concerning his request for shelter to the Municipality (see paras. 2.13 and 2.15) since the Court had concluded that he did not belong to the category of vulnerable people who, in the light of article 8 of the European Convention on Human Rights, required special protection; that he had not made it plausible that his physical and psychic health would be substantially threatened should he be deprived of shelter; that the Executive Board of the Municipality had offered him shelter and benefits from the Excluded Immigrants Fund, in line with its policy; that he failed to provide to the authorities information concerning housing and the cost of rent; and that therefore the reduction of his benefits was not contrary to the law. The author claimed that his situation had worsened and that in practice he would be forced to live on the streets, which represented a risk to his life. Given that background, he asked the Committee to take interim measures and to request the State party to continue paying him a monthly allowance of €450, provided by the Municipality, while his communication was under consideration by the Committee (see also para. 1.2 above).

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

8.1 On 20 July 2016, the State party submitted its observations on admissibility and the merits of the communication. It maintains that the communication is inadmissible on the grounds of failure to exhaust domestic remedies, incompatibility *ratione materiae* and non-substantiation.

8.2 As to the facts of the case, the State party points out that in respect of the proceedings concerning the author's second application for a temporary regular residence permit on 25 July 2011 the Immigration and Naturalization Service asked the Medical Advisors' Office for a report. That Office issued reports on 25 August 2011 and 29 November 2011 indicating that HIV could be treated in Ghana. Thus, the author's application for a residence permit was denied on the grounds that he could receive medical treatment for HIV in his country of origin. No appeal was lodged by the author against the dismissal of the Hague District Court, which is why the proceedings concerning the author's application for a residence permit came to an end.

8.3 After the Amsterdam District Court dismissed the author's application for a review of the Municipality's refusal to pay benefits (see para. 2.11), on 13 December 2011 the author lodged an appeal before the Central Appeals Court for Public Service and Social Security Matters. On 25 February 2012, the author applied to the Central Appeals Court for interim relief. The appeal and the interim relief application were joined with the proceedings relating to the author's application for access to shelter under the Social Support Act (see para. 2.12).

8.4 In June 2012, the amount of €375 per month granted to the author was increased as a result of indexation to €450 per month. In March 2013, that amount was reduced to €225 per month. In addition, the author received €225 per month from an organization called AIDS Fonds.

8.5 On 10 March 2014, the author applied to the State Secretary for Security and Justice for shelter and an allowance to cover living expenses to supplement the €450 per month he was receiving from the Municipality. On 21 March 2014, the State Secretary offered the author shelter in restrictive accommodation. On the same day, the State Secretary denied the author's application for shelter and an allowance to cover living expenses. On 9 April 2014, the author lodged an objection to that decision. By a decision dated 28 July 2014, the State Secretary declared the objection inadmissible. On 5 August 2014, the author applied for a review of the decision to the Hague District Court, which declared the author's application unfounded on 11 June 2015. The author did not appeal that decision.

8.6 The State party recalls the offer for shelter made by the Central Agency for the Reception of Asylum Seekers and the decision of the Hague District Court of 18 July 2014 (see paras. 6.1 and 6.2).

8.7 Furthermore, in the light of the Central Appeals Court's dismissal of the author's request for shelter (see para. 7), on 8 July 2016 the Municipality informed the author that the subsistence payment of €450, which was being granted to him as interim relief, would be terminated as of 1 September 2016 (see also para. 2.16).

8.8 The State party provides a detailed description of relevant legislation and case law<sup>3</sup> concerning temporary and permanent residence permits for aliens, access to social benefits, including access to shelter or accommodation to asylum seekers and aliens residing irregularly in the State party, and the conditions of stay in reception centres. Notably, it points out that in its legal system the right to social benefits and assistance is linked to lawful residence. Under the Social Support Act aliens are eligible for individual services or benefits if they are lawfully resident in the State party. Aliens who are lawfully resident in the State party solely on the basis that they are permitted to await the decision on their residence application are not denied all forms of social provision or benefits. Although they cannot derive any rights from the regular social security system, alternative provision is

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<sup>3</sup> The State party refers to the jurisprudence of the Administrative Jurisdiction Division (case No. ECLI:NL:RVS:2015:3415) and of the Central Appeals Court (case No. ECLI:NL:RVS:2015:3803), both of 26 November 2015.

available to them. Under the Asylum Seekers and Other Categories of Aliens (Provision) Order, they are entitled to reception facilities and can obtain a weekly financial allowance and other financial provisions. In addition to these arrangements, the State party has a system for the reception and housing of current and former asylum seekers that ensures that no migrant is forced to live on the street. The same applies to those who have not submitted an application for asylum, since the Asylum Seekers and Other Categories of Aliens (Provision) Order of 2005 views several categories of aliens as asylum seekers, thereby rendering them eligible for shelter and benefits. Once the statutory departure period has expired, aliens can stay in restrictive accommodation, where they receive assistance in arranging for their departure. The option of staying in restrictive accommodation is available to persons who have not sought asylum, as in the author's case, provided that they are willing to cooperate in returning to their country of origin. In general, people residing in restrictive accommodation are free to move only within the municipality in which the facility is located.

8.9 The State party maintains that the author has failed to exhaust all available domestic remedies for obtaining a residence permit since he did not lodge an appeal with the Council of State against the judgments of the Hague District Court upholding the decisions denying his application for a residence permit. In that connection, it points out that in its legal system the right to social assistance is linked to lawful residence. The State party adds that the author did not exhaust all available domestic remedies in the proceedings regarding access to shelter since he did not lodge an appeal against the judgments of the Hague District Court of 18 July 2014 (see para. 6.2) and 11 June 2015 (see para. 8.5). Moreover, the author did not avail himself of the State Secretary's offer of shelter for the duration of the residence procedures.

8.10 The author's claims regarding the denial of his application for shelter and/or social assistance are in essence an invocation of social rights and based on provisions of the International Covenant on Economic, Social and Cultural Rights. Although a violation of social rights may in certain cases be regarded as a violation of the Covenant, if in principle obligations under the Covenant have been fulfilled, an invocation of a social right cannot then lead to a finding of a breach of the Covenant. In the author's case, he has been provided with basic needs and, therefore, his claims fall outside the scope of the Covenant. Accordingly, the communication should be declared inadmissible *ratione materiae*.

8.11 Should the Committee find the communication admissible, the State party maintains that it does not disclose a violation of the author's rights under articles 7, 17 and 26 of the Covenant. Articles 7 and 17 of the Covenant do not give rise to a right to shelter or to social assistance for persons who are not lawfully resident in the States parties. The Covenant does not impose a requirement on a State party to offer every person in an irregular residence situation access to social services.<sup>4</sup>

8.12 In the present case, the situation of the author does not entail a treatment contrary to article 7 of the Covenant. Likewise, the authorities' refusal to grant the author supplementary support does not constitute arbitrary interference in his right to privacy, which is protected by article 17 of the Covenant. Such a measure was justified in view of the balance that has to be struck between the interests of the author in having shelter and social assistance and the interests of the State party in ensuring that shelter and social assistance remain affordable and accessible and in ensuring an effective immigration policy.

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<sup>4</sup> The State party refers to the jurisprudence of the European Court of Human Rights in its judgments in the following cases: *N. v. the United Kingdom*, judgment of 27 May 2008, application No. 26565/05, para. 44; *Ponomaryovi v. Bulgaria*, judgment of 21 June 2011, application No. 5335/05, para. 54; and *Chapman v. the United Kingdom*, judgment of 18 January 2011, application No. 27238/95, paras. 99-101.



The author's basic needs and medical care are covered: he receives medication for the treatment of HIV free of charge and shelter in a restrictive accommodation is available to him; in such accommodation, he would also have access to medical care. In the various domestic proceedings, the State party authorities, including judicial organs, carried out an assessment of the author's health situation as a result of being HIV positive and, on the basis of medical advice and the author's actual circumstances, concluded that his situation did not constitute a medical emergency that would require his applications for supplementary support to be granted.

8.13 With respect to the author's allegations under article 26 of the Covenant, the State party submits that drawing a distinction for access to shelter and social benefits on the basis of residence status is justified in so far as that distinction aims to enable the State party to pursue its immigration policy with a view to protecting its economic well-being. The principle of linking social entitlements to residence status aims to prevent persons who are residing in the State party unlawfully from being able to prolong their residence through, inter alia, the provision of social assistance. It is also intended to prevent persons residing in the State party unlawfully from establishing the appearance of lawful residence or establishing such a strong legal position (or the appearance thereof) that once their procedure is complete it will be virtually impossible to expel them. An absolute obligation to treat aliens without legal residence status on an equal basis with nationals and individuals who have been admitted to the country would deprive States of the possibility of pursuing an immigration policy that protects the country's economic well-being.

#### **Author's comments on the State party's observations**

9.1 On 1 August 2016, the author provided his comments on the State party's observations. He argues that the communication meets the admissibility requirements established by the Optional Protocol. As to the State party's argument that the author failed to exhaust all domestic remedies in the procedures related to his application for a residence permit, he submits that the procedures are not relevant for determining whether all domestic remedies have been exhausted since they do not adjudicate his claims concerning access to shelter, which is the matter raised in the communication in question.

9.2 With regard to the proceedings in relation to access to shelter, the author argues that the judgment of the Hague District Court of 18 July 2014 (see para. 6.2) was a repetition of a procedure that ended with a final judgment on 19 March 2014 (see para. 5.1). Given the finding of the Court that the author had no legal interest in bringing proceedings forward and the short period of time that had elapsed since then, an appeal against the judgment of 18 July 2014 would have resulted in a similar decision. As to the proceedings that ended with the judgment of the Hague District Court of 11 June 2015 (see para. 8.5), the author claims that an appeal would not have led to relief since the Council of State deals with issues of law exclusively. Many similar cases previously submitted to the Council of State were dismissed after the Council found that they did not raise issues of law. An appeal would have been declared inadmissible.

9.3 The author submits that his communication raises claims concerning rights enshrined in the Covenant. Therefore, it is not incompatible with the Covenant.

9.4 The author reiterates that he is a vulnerable person as a result of being HIV positive. Although he receives medication for the treatment of HIV, the success of the treatment depends on, for example, the patient taking the medication at the prescribed time and storing it in a fridge. Since he is not able to comply with such requirements owing to the lack of sufficient support by the State party, the treatment will not be effective for long.

9.5 The author reiterates that the facilities to which the State party refers as possible shelter for irregular migrants are only available to aliens who are willing to leave the

country and that accepting such shelter also means accepting restrictive conditions. In addition, in practice there is hardly any chance of gaining access to the accommodation offered, even for irregular migrants who do wish to cooperate in leaving the country.

#### **Further information provided by the State party**

10. On 20 September 2016, the State party reiterated its previous observations concerning the need for exhaustion of domestic remedies and the alleged impact on the author's health of the Municipality's decision to stop paying an allowance. It also informed the Committee that the author could still apply for accommodation in a VBL and that the only condition is to actively cooperate in departure. Finally it referred to the European Court of Human Rights' decision of 5 July 2016 in the case of *Hunde v. the Netherlands* (application No. 17931/16), in which the Court stated that the fact that admission to VBL was subject to the condition that the applicant would cooperate in organising his departure to his country of origin could not, as such, be regarded as incompatible with Article 3 of the European Convention on Human Rights.

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

##### *Consideration of admissibility*

11.1 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.

11.2 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.

11.3 The Committee takes note of the State party's argument that the claims raised in the communication are in essence an invocation of social rights and that they are based on provisions of the International Covenant on Economic, Social and Cultural Rights; that the author has been provided with basic needs by its authorities; and that, against this background, these claims are incompatible *ratione materiae* with the Covenant. The Committee observes, however, that, although the main facts of the communication are related to the author's access to sufficient social benefits, they do not raise claims concerning the author's rights to adequate housing and social security as such. Rather, the author claims that the lack of access to shelter and the allegedly insufficient benefits granted constitute, in the particular circumstances of his case as a person with HIV, a violation of his rights under the Covenant. In these circumstances, the communication is compatible with the provisions of the Covenant to the extent that it raises issues under articles 7, 17 and 26 of the Covenant. Accordingly, the Committee considers that it is not precluded from examining the present communication pursuant to article 3 of the Optional Protocol.

11.4 The Committee takes note of the author's allegations under articles 7 and 17 of the Covenant that, as a result of the State party's decision to terminate his allowance owing to the lack of a valid residence permit and the subsequent refusal of shelter and social benefits while the proceedings concerning the renewal of his residence permit were pending, he has been unable to have a regular lifestyle and to follow adequately the medical treatment for HIV, and he lives with the anguish that this will ultimately affect the protective effect of the medication and cost him his life. The author submits that, by failing to take adequately into account his health conditions as a result of being HIV positive, the State party has violated his rights under articles 7 and 17 of the Covenant.

11.5 The Committee observes that it is only called upon to determine whether the State party violated the author's rights under the Covenant while the proceedings concerning the renewal of his residence permit were pending owing to the alleged lack of access to sufficient social benefits. In that regard, it observes that, as a consequence of the refusal to renew his residence permit, on 23 March 2011 the Municipality informed the author that his payment benefits under the Work and Social Assistance Act would be terminated. Nevertheless, the author has continued to receive medical treatment and drugs for the treatment of HIV free of charge and a monthly allowance of between €375 and €450 from the Municipality. According to the undisputed findings of the proceedings, the author has been able to stay with various friends or to rent a room to live in. Moreover, on 28 March 2014 the Central Agency for the Reception of Asylum Seekers offered him shelter in the Tel Apel centre, which the author voluntarily decided not to take, alleging that doing so would result in restrictive measures being imposed on him. In that connection, the Committee observes that the offer contained in the Central Agency's e-mail of 28 March 2014 (provided by the author) made no mention of restrictive measures. The State party has indicated that in general the freedom of movement of people residing in restricted accommodation is limited to the municipality in which the facility is located. However, even if the access to shelter required that the author accept this restriction, he has not explained how such a restriction would affect his medical treatment for HIV so negatively as to put his health or life at serious risk. In the light of the foregoing, the Committee considers that the author has failed to sufficiently substantiate the claim that he has suffered a violation of articles 7 and 17 of the Covenant and, therefore, that the allegations are inadmissible under article 2 of the Optional Protocol.

11.6 The Committee takes note of the author's allegation of a violation of article 26 based on the denial of his request for shelter and benefits owing to his lack of a valid residence permit, which amounts to different treatment vis-à-vis aliens with similar medical conditions who hold a residence permit. The Committee considers, however, that the author has failed to sufficiently substantiate his claims under article 26 and declares this part of the communication inadmissible pursuant to article 2 of the Optional Protocol.

12. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
  - (b) That the present decision shall be transmitted to the State party and to the author of the communication.
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