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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2489/2014*, **, ***

Communication submitted by:	Jamshed Hashemi and Maryam Hashemi (represented by counsel, W.G. Fisher)
Alleged victims:	The authors
State party:	Netherlands
Date of communication:	19 July 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 4 December 2014 (not issued in document form)
Date of adoption of Views:	26 March 2019
Subject matter:	Denial of child benefit without residence permit; rights of the child; rights of the family
Procedural issue:	None
Substantive issues:	Discrimination on the grounds of other status (social security benefits); family and children's rights to social security
Articles of the Covenant:	23, 24 (1) and 26
Article of the Optional Protocol:	2

1.1 The authors of the communication are Jamshed Hashemi, born on 13 May 1977, and Maryam Hashemi, born on 25 October 1980, nationals of Afghanistan. They submit the communication on their own behalf and on behalf of their two children born in the Netherlands, R, born on 23 May 2002, and Q, born on 19 December 2008. The authors claim that the denial of their application for the general child benefit by the Social Security Bank constitutes a violation by the Netherlands of articles 23, 24 (1) and 26 of the

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

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

*** An individual opinion by Committee member José Manuel Santos Pais (dissenting) is annexed to the present Views.

Covenant. The Optional Protocol to the Covenant entered into force for the Netherlands on 11 March 1979. The authors are represented by counsel.

Factual background

2.1 The authors submit that they fled Afghanistan because of the Taliban and arrived in the Netherlands on 14 August 2001. They filed an initial request for asylum on 15 August 2001, which was denied on 24 February 2003. On 21 March 2003, the authors appealed that decision to the Regional Court of The Hague, which rejected the appeal. On 8 February 2005, the Administrative Jurisdiction Division of the Council of State confirmed the decision of the Regional Court.

2.2 The authors indicate that, on 21 December 2005, they applied for a residence permit on R's behalf, owing to her medical situation (see para. 2.7). When they did not receive a response, they submitted an objection on 17 August 2006. The objection was declared well-founded on 7 September 2007, but without any legal consequences, given that the authors had submitted a second request for a residence permit on R's behalf on 19 September 2006. The second application was rejected on 23 November 2006, a decision confirmed by the Administrative Jurisdiction Division of the Council of State on 9 October 2008.

2.3 On 13 October 2008, the authors submitted an application to postpone implementation of the order requiring them to leave the Netherlands, given that Ms. Hashemi was pregnant with the authors' second child, Q, who was born on 19 December 2008. On 3 November 2008, the Secretary of Justice of the Immigration and Naturalization Service granted a postponement, which allowed the authors to remain in the Netherlands from 11 November 2008 until six weeks after the birth of the child.

2.4 The authors indicate that they filed a second request for asylum on 22 January 2009. The Secretary of Justice denied the request on 29 May 2009, and the authors appealed on 17 July 2009. On 17 December 2009, the District Court at The Hague quashed the decision of the Secretary of Justice, requiring it to take a new decision. On 7 January 2010, the Secretary of Justice granted the authors a temporary residence permit on asylum grounds, with retrospective effect from 22 January 2009 to 22 January 2014, taking into account the fact that they could not return to Afghanistan. The authors applied to become Dutch citizens through naturalization on 5 June 2014, and they were granted Dutch citizenship on 26 November 2014.

2.5 From the time of their arrival in the Netherlands on 14 August 2001, the authors lived in an asylum seekers' centre operated by the Central Agency for the Reception of Asylum Seekers, but they were required to leave the centre on 17 March 2005, following the decision of the Council of State of 8 February 2005 rejecting their asylum request. On 4 November 2005,[1] they moved into an emergency shelter provided by a charity, Voice in the City, in Haarlem,[2] and they received €62 per week from the charity. From December 2007, they lived in a property provided by Voice in the City, and the charity paid the electricity and water bills[3] and provided them with a weekly assistance payment of €80.

2.6 At various points, the authors received financial assistance from government agencies. Between 1 January and 4 September 2007 and from 11 November 2008 (see para. 6.2), they had access to reception facilities and received a monthly assistance payment of approximately €213.72 from the Central Agency for the Reception of Asylum Seekers, addressed to R, in accordance with the Payments to Certain Categories of Aliens

[1] The authors do not indicate where they lived between 17 March and 4 November 2005.

[2] The authors provide a copy of a letter dated 7 December 2007 from the Coordinator of Voice in the City confirming this. In the letter, it is also indicated that the authors had no income.

[3] The authors provide a copy of a rental agreement dated 14 December 2007 between Living Cooperation (it is not clear whether this is a private or public entity) and Voice in the City. They also provide water and energy bills for March 2006 and June and December 2007, which were directed to Voice in the City.

Regulation.[4] The authors indicate that payments made under the Regulation are available to persons whose applications for residence permits are pending and that an application for such a payment must be made each month. Furthermore, they indicate that their applications for other forms of government assistance were denied. The authors also indicate that they received support from various charity organizations.[5] In February 2010, the authors moved to "regular housing" in the municipality of Haarlem.

2.7 The authors' daughter experiences health issues. A representative from the children's day-care centre that she attended provided a letter regarding her situation, dated 1 February 2008, indicating that she suffered from "chronic stress disorder" as a result of the "traumatic experiences" of her past and that deportation would have "disastrous consequences" for her development. The Bureau of Child Services also prepared a report on R's situation, dated 1 August 2008, in which it confirmed that she suffered from "chronic stress disorder". Furthermore, it indicated that she experienced "stagnating speech development", "stagnating social-emotional development", detachment from her parents and "regression because of the traumatic situation" of the family. The authors note that, as at 23 July 2007, five health care organizations were assisting with R's health issues.

2.8 The authors indicate that they have submitted three applications for the general child benefit, which is granted to all parents with young children to assist with the costs of upbringing, to the Social Security Bank, on 6 November 2007, 27 February 2009[6] and 8 March 2010.[7] The communication concerns only the denial by the State party of the authors' first application on behalf of R for the general child benefit, submitted on 6 November 2007, covering the period from the fourth quarter of 2006 until the first quarter of 2008. A condition for receiving the general child benefit is that the person must be insured. Article 6 (1) of the General Child Benefit Act sets out who may be considered an insured person, and article 6 (2), introduced by the Linkage Act,[8] provides that an alien who does not reside lawfully in the Netherlands, within the meaning of section 8 (a)–(e) and (l) of the Aliens Act, is not considered an insured person.[9]

2.9 On 22 January 2008, the Social Security Bank denied the authors' first application, because they did not have a valid residence permit. On 29 January 2008, the authors submitted an objection against that decision. On 30 May 2008, the Bank denied the authors' objection, on the basis that the authors did not possess a valid residence permit.[10] On 31 May 2008, the authors appealed against that decision, claiming that their right to the general child benefit was guaranteed under various international conventions. On 25 November 2008, the Regional Court of Amsterdam rejected the authors' appeal, reasoning that the State party, when weighing the aims of the Linkage Act with the applicant's interest in deciding whether to grant the general child benefit, may reasonably restrict the

[4] The Payments to Certain Categories of Aliens Regulation is a ministerial order, based on the Act on the Central Agency for the Reception of Asylum Seekers, providing certain categories of aliens with basic subsistence.

[5] The authors provide a list of charity organizations assisting the family. However, it does not indicate what type of assistance the organizations provided or for how long.

[6] Covering the period from the second quarter of 2008 until the first quarter of 2009, on behalf of both children.

[7] Covering the period from the first quarter of 2009 until the first quarter of 2010, on behalf of both children. After a residence permit was issued to the authors on 7 January 2010, with retrospective effect from 22 January 2009, on an unknown date, the Social Security Bank granted the general child benefit to the authors with retrospective effect from the second quarter of 2009.

[8] The Linkage Act is aimed at preventing aliens who are illegally residing in the Netherlands from gaining access to government assistance.

[9] Section 8 (a)–(e) of the Aliens Act refers to residents with a permanent or temporary residence permit or who are resident on the grounds of an arrangement under the Treaty establishing the European Community or the Treaty establishing the European Economic Area.

[10] The Social Security Bank indicated that only a person who was insured on the first day of a calendar quarter was entitled to receive the general child benefit in that quarter.

general child benefit to those who have a valid residence permit. The authors appealed the decision to the Central Administrative Court.[11]

2.10 On 11 March 2011, the authors' appeal against the decision of the Regional Court of Amsterdam of 25 November 2008 was heard before the Central Administrative Court, together with 10 other similar appeals. On 15 July 2011, the Court quashed the decision of the Social Security Bank, requiring it to take a new decision on the authors' application for the general child benefit. The Court considered that the distinction made between lawful residents and unlawful residents for the purposes of granting the general child benefit was justified, if it pursued a legitimate aim and if the means used to pursue that aim were reasonably proportionate (see para. 4.9). Furthermore, referring to the European Convention on Human Rights, the Court reasoned that a distinction based primarily on nationality must be justified by "very weighty reasons". It considered article 6 (2) of the General Child Benefit Act to be reasonable in principle, but not in the authors' case, given that they had lived in the Netherlands for a long time, a period of which was lawful, and had developed such a bond with the Netherlands that they could be considered "part of the Dutch community". The Court also took into account the fact that the authorities had been aware that the authors had been living in the State party during that extended period of time. The Social Security Bank appealed the decision to the Supreme Court, and on 16 May 2012, the Attorney General advised the Supreme Court that the appeal should be allowed to be considered.

2.11 On 23 November 2012, the Supreme Court overturned the decision of the Central Administrative Court.The Supreme Court considered that the exclusion of the authors from receiving the general child benefit was not primarily based on nationality, but on both nationality and residence status; therefore, there was no requirement to apply the "very weighty reasons" test.[12] Furthermore, referring to article 14 of the European Convention on Human Rights and to article 26 of the Covenant, the Court indicated that discrimination occurs when the dispute in the proceedings did not serve a legitimate aim or when the means used to pursue that aim were not proportionate and reasonable. The Court considered that an objective and reasonable justification existed for the distinction made in the Linkage Act on nationality and residence status. It also considered that the distinction in cases similar to those of the authors served a legitimate aim. The Court further considered that the exclusion from the general child benefit in the authors' case was reasonable and proportionate, having regard to the aim pursued, because States were allowed to make distinctions on the grounds of nationality, when taking immigration measures.[13] In addition, it considered that States could take measures that were aimed at protecting their economic interests[14] and that they were entitled to a broad margin of appreciation when regulating social security. The Court indicated that factors such as the authors' long-term residence in the Netherlands and their bond with the country did not change that conclusion, noting that the authors' long-term residence in the Netherlands without a valid residence permit was not "an inherent or immutable characteristic of the person, but contain[ed] an element of choice".[15]

2.12 The authors indicate that they have exhausted all domestic remedies and that the matter is not being examined under another procedure of international investigation or settlement.

[11] In their appeal, the authors referred to European Court of Human Rights, *Niedzwiecki v. Germany* (application No. 58453/00), judgment of 25 October 2005.

[12] The Court referred to European Court of Human Rights, *Niedzwiecki v. Germany*, para. 33. It also referred to European Court of Human Rights, *Gaygusuz v. Austria* (application No. 17371/90), judgment of 16 September 1996, and *Andrejeva v. Latvia* (application No. 55707/00), judgment of 18 February 2009.

[13] The Court referred to European Court of Human Rights, *A and others v. United Kingdom* (application No. 3455/05), judgment of 19 February 2009.

[14] The Court referred to European Court of Human Rights, *Nacic and others v. Sweden* (application No. 16567/10), judgment of 15 May 2012.

[15] The Court referred to European Court of Human Rights, *Bah v. United Kingdom* (application No. 56328/07), judgment of 27 September 2011, para. 47.

The complaint

3.1 The authors claim that the denial of their application for the general child benefit by the Social Security Bank on the basis of their residence status is discriminatory and constitutes a violation by the State party of articles 23, 24 (1) and 26 of the Covenant.

3.2. The authors submit that, given that the general child benefit is paid to the parents in the child's interest, it constitutes a means of fulfilment of the State party's obligation under articles 23 and 24 of the Covenant. In that regard, they indicate that, given that the Netherlands has made a reservation to article 26 of the Convention on the Rights of the Child by which the possibility of a child having his or her own right to social security benefits is excluded, the general child benefit is paid to the parents in the child's interest. They therefore assert that the payment of the general child benefit should be considered as a measure to protect the family aimed at complying with article 23 (1) of the Covenant. They refer to the European Court of Human Rights decision in the case of *Niedzwiecki v. Germany*,[16] in which the Court held that, by granting child benefits, States were able to demonstrate their respect for family life, under article 8 of the European Convention on Human Rights. In addition, the authors indicate that the general child benefit can be considered as a measure of protection required owing to the child's status as a minor, on the part of the child's family, society and the State, as provided for under article 24 of the Covenant.

3.3 The authors affirm that, given that the right to equal protection of the law under article 26 of the Covenant is not limited to discrimination concerning rights under the Covenant,[17] such provision should be applied to their case, in particular with regard to the discrimination they have suffered with respect to their right to social security, to protection and assistance and to an adequate standard of living, as enshrined in articles 9, 10 (1) and 11 (1) of the International Covenant on Economic, Social and Cultural Rights.

3.4 The authors claim that the State party should have taken into account the authors' particular circumstances, such as their reasons for seeking asylum, health issues, bonds and roots with the Netherlands and long-term residence there, due to the fact that the authorities took years considering their asylum application, to decide whether they were "to be admitted". They submit that their claim is supported by the Views adopted by the Committee in *Winata et al v. Australia*, in which it determined that a State party was entitled to implement a restrictive immigration policy, but could not apply such a policy arbitrarily and without regard to the individual's particular circumstances.[18] The authors assert that the State party cannot therefore apply the Linkage Act inflexibly to deny all benefits to all unlawful residents,[19] especially those whose applications for a residence permit are pending.[20] They claim that the inflexible exclusion of the authors from receiving the general child benefit because they did not have a valid residence permit is contrary to the principle established in *Winata et al v. Australia*. Furthermore, the authors argue that they were not "illegals" as contemplated by the Linkage Act; rather, they presented themselves to authorities upon arrival, filed a request for asylum and held a residence

[16] European Court of Human Rights, *Niedzwiecki v. Germany*.

[17] The authors refer to *S. W. M. Broeks v. Netherlands*, communication No. 172/1984, paras. 12.2–12.5, and *F. H. Zwaan-de Vries v. Netherlands*, communication No. 182/1984, paras. 12.2–12.5.

[18] *Hendrick Winata and So Lan Li v. Australia* (CCPR/C/72/D/930/2000), para. 7.3. The authors inform that the following cases have followed a similar reasoning: ECHR, Application 22689/07, *De Souza Ribeiro v. France*, 13 December 2012; ECHR, Application 55597/09, *Nunez v. Norway*, 28 June 2011; and ECHR, Application 31465/96, *Sen v. The Netherlands*, 21 December 2001.

[19] The authors indicate that the State party has acknowledged such "flexibility" in its discussions in the context of the adoption of the Linkage Act. They refer parliamentary documents, in which it is indicated that the Linkage Act must be applied with some nuance and that it certainly cannot mean that "non-admitted" aliens are inflexibly denied all provisions, services, benefits and permits.

[20] The authors affirm that the State party has recognized the difficulty of applying the Linkage Act to unlawful residents whose applications for a residence permit are pending. They refer to parliamentary documents, in which it is indicated that there were aliens present in the Netherlands with the knowledge and approval of the Dutch authorities, even though they were not yet "admitted" into the country by the immigration law authorities; they were even provided with accommodation by the State, as well as services and some benefits; and that group was "in proceedings" to establish whether or not they would be "admitted".

permit for most of their time in the Netherlands. They add that, taking into account the aims of the Linkage Act,[21] the exclusion from social benefits would be effective only if the concerned persons had the possibility to leave the State party and that, given that they were unable to return to Afghanistan, such an exclusion should not have been applied to them.

3.5 The authors also claim that the denial of their application for the general child benefit compelled them to survive at "sub-subsistence levels", in contravention of articles 23, 24 and 26 of the International Covenant on Civil and Political Rights. They assert that they lived in absolute poverty[22] and that, although the general child benefit is not ordinarily considered a subsistence benefit, in the authors' case it acquired such character, given that it was necessary to prevent them from living under the poverty line. The authors recall that, after they were requested to leave the Central Agency for the Reception of Asylum Seekers shelter in 2005, they only received a weekly assistance payment of €62, provided by Voice in the City, and that, at the end of 2007, they moved into an apartment paid for by the same charity and received a weekly assistance payment of €80, also from the charity. They affirm that their degree of poverty could be demonstrated when comparing the assistance they received during those periods with the monthly amount of social security benefits established for couples with children by the National Institute for Budget Advice, which is €1,256. The authors indicate that R's medical condition was mainly caused by the family's situation of "acute poverty," which was tremendously stressful.

3.6 The authors refer to a 2012 decision of the German Federal Constitutional Court, in which the Court held that the State's failure to take realistic account of the actual needs of asylum seekers when granting benefits amounted to a violation of the principle of humanity contained in the German Basic Law. The Court noted that article 1 (1) of the Basic Law guaranteed the right to a basic subsistence minimum, which, the authors assert, is derived from articles 23 and 26 of the Covenant. The authors request that the Committee interpret the Covenant so as to acknowledge the presence of a right similar to that found in German Basic Law. They submit that such a right should, on the basis of article 26 of the Covenant, require the State party to provide for a minimum subsistence level to persons lawfully residing in the country but without a valid residence permit.

3.7 The authors claim that the State party's failure to take into account the children's interests constitutes a violation of article 24 of the Covenant.[23] They assert that the children's interests in receiving the general child benefit should be considered separately from their parents' interests.[24] They therefore reject the Supreme Court's reasoning that the authors' residence status contained an "element of choice", noting that R was clearly not in a position to make choices about her residence status. The authors also reject the decisions of the Social Security Bank and the courts' underlying reasoning, according to which children's rights, including those under the Convention on the Rights of the Child, are irrelevant to the authors' case.[25] They also point to inconsistencies in the decisions of the

[21] Referring to parliamentary documents, the authors indicate that the Linkage Act pursues two aims: to prevent "illegal aliens" from continuing their unlawful residence by obtaining provisions and benefits without being required to present a valid resident permit; and to prevent "illegals" and unlawful residents from acquiring the appearance of lawful residents.

[22] The authors refer to a definition provided by the United Nations Educational, Scientific and Cultural Organization, according to which "absolute poverty" is defined in relation to the amount of money necessary to meet such basic needs as food, clothing and shelter.

[23] The authors refer the following cases in which the Committee considered the rights of children under article 24 of the Covenant, in the context of immigration policies: *Winata et al v. Australia*; *Madafferi et al v. Australia* (CCPR/C/81/D/1011/2001); *Bakhtiyari et al v. Australia* (CCPR/C/79/D/1069/2002); and *X.H.L. v. Netherlands* (CCPR/C/102/D/1564/2007).

[24] The authors submit that the principle is supported by the Committee's Views in *Derksen v. Netherlands* (CCPR/C/80/D/976/2001), paras. 9.2–9.3. The authors also refer to European Court of Human Rights, *Nunez v. Norway*, paras. 79–85.

[25] The authors refer to the Committee's general comment No. 17 (1989) on the rights of the child, paras. 2–5. They also refer to European Court of Human Rights, *Moser v. Austria* (application No. 12643/02), judgment of 21 September 2006, paras 68–69. They indicate that, in the judgment, the Court held that the State had a duty to assist parents who were unable to provide for their children, without derogation from the parents' obligation to care for their children.

Supreme Court, indicating that, in a judgment of 21 September 2012,[26] the Court considered that the State party was obligated under international law to provide for the subsistence needs of children whose parents were unable to provide for them.[27]

3.8 Referring to a report of the Commissioner for Human Rights of the Council of Europe regarding his visit to the Netherlands from 20 to 22 May 2014,[28] the authors maintain that, when determining whether to grant a residence permit to children of illegal immigrants, a primary consideration of the State party should be the children's best interests. They also affirm that the State party should consider the children's long-term residence as a factor in favour of granting a residence permit. Although the mentioned report concerns the issue of granting a residence permit, the authors submit that the principles are equally applicable to the issue of granting the general child benefit. The authors refer to a decision taken by the European Committee of Social Rights in 2014, in which it determined that the Netherlands was in breach of its international obligations to offer food, clothing and housing to its residents, including those without a valid residence permit.[29] From that decision, the authors infer that they are entitled to a minimum subsistence standard in accordance with European and international law.

State party's observations on admissibility and the merits

4.1 On 10 July 2015, the State party submitted its observations on the admissibility and merits of the communication.

4.2 The State party describes the relevant law and policy, including the General Child Benefit Act, the Aliens Act and the Linkage Act. Regarding the General Child Benefit Act, the State party indicates that the general child benefit was established to help parents who are raising children and that therefore it is a benefit given to the parents, not to the children. In addition, it affirms that the benefit is not intended to be an "income support scheme". The State party further indicates that it is a basic principle under the latter Act that everyone who is a resident in the Netherlands is insured. However, aliens who have not been "admitted" into the country are not insured. The exception stems from the principle of linking social entitlements to residence status, as provided for in the Linkage Act, the aim of which was to put an end to the situation by which many aliens who were residing illegally in the Netherlands managed to prolong their de facto residence partly because they were able to claim social benefits. It established a basic principle according to which an alien without an "unconditional residence permit" could not claim entitlement to public benefits. Therefore, an alien who has been admitted for a temporary stay in the State party cannot claim public benefits.

4.3 The State party indicates that the system established in the Linkage Act is not rigid, denying benefits only to aliens who have not been admitted into the country, regardless of their circumstances, and that there are exceptions to the principle of linking social entitlements to residence status. First, it refers to the general exceptions in the fields of education, health care and legal aid. Everyone under 18 years of age is admitted into the education system, regardless of their residence status, health care is provided to everyone in cases of life-threatening situations and in cases of risk to third parties, pregnancy and childbirth, and everyone has the right to legal aid. Second, it refers to the following specific exceptions: (a) certain categories of aliens are entitled to social assistance, including victims of trafficking, and aliens engaged in family reunification; (b) aliens who are awaiting the decision on their residence application, despite not being entitled to receive any social assistance under the regular social security system, can obtain certain benefits

[26] The authors quote as the source, Supreme Court judgement of 21 September 2012 (ECLI: BW 5328).

[27] The authors indicate that the Supreme Court based its decision on directive 2003/9/EG of the Executive Council of 27 January 2003 laying down minimum standards for the reception of asylum-seekers and directive 2008/115/EG of the European Parliament and the Executive Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals, as well as on the case law of the European Court of Human Rights.

[28] Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, "Report following his visit to the Netherlands from 20 to 22 May 2014". Available at https://rm.coe.int/16806db830.

[29] European Committee of Social Rights, *Conference of European Churches v. Netherlands* (complaint No. 90/2013), decision of 1 July 2014.

under specific provisions, such as the orders on asylum seekers and other categories of aliens and on certain categories of aliens. The former order establishes reception facilities, a weekly financial allowance and other financial provisions and the latter provides aliens who are not asylum seekers with the necessary means of subsistence, including a financial allowance and coverage of medical expenses. The State party indicates that asylum seekers who are lawfully living in the Netherlands and awaiting the outcome of asylum proceedings are provided with accommodations, a weekly financial allowance for food, clothing and other personal expenditure, public transportation tickets relating to attendance at asylum proceedings, recreational activities, coverage of medical expenses, third-party liability insurance and coverage of exceptional expenses.

4.4 The State party recalls the key facts of the authors' communication. It indicates that, while their first asylum request was considered (see para. 2.5), the authors had access to accommodations, educational activities, a weekly allowance, a medical benefits scheme and third-party liability insurance. It refers to their applications for residence permits and the general child benefit.

4.5 The State party submits that the authors have failed to establish that the denial of their application for the general child benefit constitutes a violation of articles 23, 24 (1) and 26 of the Covenant. Regarding the authors' claim under article 23, the State party considers that such provision does not give rise to a positive obligation to provide any financial assistance to families, such as child benefits,[30] and that therefore the issue of government interference or failure to act with respect to the authors' family life does not arise. The State party reiterates that a child benefit is not a general income support scheme and is not paid as a way of providing families with children with a minimum level of subsistence. Furthermore, it submits that, insofar as article 23 may give rise to positive obligations, such obligations concern measures to protect family unity and family reunification.[31] It indicates that the authors' analogy with the case of *Winata et al v. Australia* is therefore invalid[32] and rejects their argument that a positive obligation to provide financial assistance to families may be derived from that decision.

4.6 Regarding the authors' claim under article 24 of the Covenant, the State party observes that, in accordance with the Committee's general comment No. 17, article 24 (1) is aimed at protecting children against harm to their physical or psychological well-being and gives rise to an obligation to provide children with greater protection than adults. In general comment No. 17, the Committee indicates that the primary responsibility for protecting children lies with the parents, and the State is obliged to step in where the parents fail to do so. It reiterates that the general child benefit is not aimed at providing families with a minimum level of subsistence and that basic benefits are available to all unlawful residents in the Netherlands. It adds that the obligation under article 24 of the Covenant does not extend to providing a child benefit, even considering the needs and interests of the child. The State party disagrees with the authors' assertion that the cases referred to offer any basis for the notion that indirect consequences of government decisions regarding the parents give rise to specific rights for children under article 24 of the Covenant. It reiterates that a child benefit is a financial contribution to the costs incurred by the parents, to which the child is not entitled. The State party affirms that it made a reservation to article 26 of the Convention on the Rights of the Child, because it considers that such a provision does not imply that a child has an independent entitlement to social security, including social insurance such as a child benefit.

4.7 Regarding the author's claim under article 26 of the Covenant, the State party observes that it is not unusual for human rights treaties to make distinctions on the basis of

[30] The State party refers to *Oulajin and Kaiss v. Netherlands*, communications Nos. 406/1990 and 426/1990.

[31] The State party refers to *Winata et al v. Australia*, and *Sahid et al v. New Zealand* (CCPR/C/77/D/893/1999).

[32] The State party recalls that that case concerned a decision to deport the child's parents, resulting in the child also being forced to leave the country in the interests of maintaining family ties, even though there was no need for the child to leave.

residence status.[33] It indicates that such a distinction is made in the European Convention on Human Rights[34] and that the scope and content of article 26 of the Covenant are similar to the relevant provisions of the Convention.[35] The State party submits that such treaties do not prohibit all forms of unequal treatment, only the discriminatory ones.[36] It observes that, in accordance with the case law of the European Court of Human Rights, there must be "very weighty reasons" to justify a distinction based only on nationality.[37] The State party submits that the distinction in the authors' case is based primarily on residence status and that there is sufficient justification for making such a distinction.[38] It refers to a number of elements in assessing that justification.[39] First, the State party recalls that the Linkage Act links the granting of social entitlements to residence status to prevent aliens who are unlawful residents, or those who are lawful residents but only because they are awaiting the decision on their residence applications,[40] from acquiring the appearance of having lawful residence or from establishing such a strong legal position that, once the proceedings are concluded, it becomes impossible to expel them. Second, it observes that aliens who are lawful residents under the Aliens Act are entitled to certain provisions, benefits and payments and that the authors benefitted from those entitlements. Third, the State party informs that, in relation to social security, the national legislature generally exercises discretion in determining the question of whether or not there is an objective and reasonable justification for making a distinction.

4.8 The State party submits that an unqualified obligation to treat aliens without lawful residence status as equal to nationals and those who have been admitted to the country would deprive it of the ability to pursue an immigration policy that protects the country's economic well-being.[41] In line with the case law of the European Court of Human Rights, it observes that States have the right under international law to control the entry, residence and expulsion of aliens.[42] The State party noted that none of the United Nations human rights treaties protect an entitlement to a child benefit.[43] It indicates that excluding the authors from receiving the general child benefit is reasonable and proportionate in relation to its legitimate aim, and therefore sufficiently justified, and that the fact that the authors have resided in the Netherlands for a long time with the authorities' knowledge does not change that conclusion. In addition, the State party rejects the authors' argument that the Supreme Court applied the incorrect test by not assessing whether their differential treatment was justified by "very weighty reasons"[44] and argues that the authors' interests

[33] The State party refers to article 1 of the European Convention on Social and Medical Assistance and article 1 (1) of the appendix to the revised European Social Charter, available at www.coe.int/en/web/conventions/full-list/-/conventions/treaty/014 and https://rm.coe.int/168007cde4, respectively.

[34] The State party indicates that, under article 1 (1) of protocol No. 7 to the European Convention on Human Rights, an alien is not considered a lawful resident if he or she is awaiting admission to the relevant country.

[35] The State party cites as relevant provisions article 14 of the European Convention on Human Rights and article 1 of protocol No. 12 thereto, and informs that that was confirmed by the decision of the Supreme Court of 23 November 2013 regarding the authors' case.

[36] The State party submits that discrimination arises in the absence of a sufficiently objective and reasonable justification, that is, the unequal treatment must service a legitimate aim and the means for achieving that aim must be reasonable and proportionate in relation to the aim.

[37] The State party refers to European Court of Human Rights, *Gaygusuz v. Austria* and *Andrejeva v. Latvia*.

[38] The State party recalls that the Supreme Court referred to the decision of the European Court of Human Rights in *Niedzwiecki v. Germany*, para. 33, in its decision of 23 November 2013.

[39] The State party refers to European Court of Human Rights, *Weller v. Hungary* (application No. 44399/05), judgment of 31 March 2009, para. 28.

[40] The State party refers to section 8 (f), (g) and (h) of the Aliens Act.

[41] The State party refers to European Court of Human Rights, *N v. United Kingdom* (application No. 26565/05), judgment of 27 May 2008.

[42] The State party refers to European Court of Human Rights, *Nacic and others v. Sweden*, para. 79.

[43] The State party submits that the authors' reference to the cases *De Souza Ribeiro v. France* and *Nunez v. Norway* are irrelevant.

[44] The State party considers that it is not its role to assess the merits of a Supreme Court judgment.

were weighed sufficiently against the public interest.[45] It recalls that the fact that an alien has resided in the Netherlands for a long time without obtaining a valid residence permit is not an inherent and immutable personal characteristic, but contains an element of choice. Given that element of choice, the State party claims that the justification required should not be as weighty as in the case of a distinction based on nationality.[46] In that context, the State party rejects the authors' analogy with the Committee's Views in *Derksen v. Netherlands*, because the authors' case merely refers to a distinction based on residence status.

4.9 The State party indicates that the authors' reference to the decision of the European Committee of Social Rights in *Conference of European Churches v. Netherlands* is irrelevant to the authors' case, given that it has nothing to do with the granting of social security benefits.

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 18 November 2015, the authors submitted their comments on the State party's observations. They claim that the State party, by denying their application for the general child benefit on the sole basis of their residence status, disregarded the fact that, at the time of the application, R was a 4-year-old vulnerable child with special needs living in conditions of extreme poverty and destitution, which was not contested by the State party. They submit that R's circumstances warranted a more flexible application of the Linkage Act and government policy and observe that the State party's observations did not consider those circumstances, in particular her interests as a child.

5.2 Responding to the State party's argument that aliens without a residence permit have access to education for minors, to health care in cases of life-threatening situations and to legal aid services, the authors submit that the State party failed to demonstrate how providing those benefits fulfils the State party's obligations to protect the interests of children. They reiterate that R's medical condition was caused by the situation of the family, which lived on an income far below the "minimum threshold," and that requesting the general child benefit was aimed at reaching such a threshold. Responding to the State party's argument that R's migratory status involved an element of choice, the authors indicate that R did not have a choice in determining her migratory status and that she was born in the Netherlands.

5.3 The authors indicate that the European Commission recognizes the importance of the State's obligation to protect the interests of children.[47] They therefore submit that the State party's reasoning cannot be upheld, given that neglecting the independent interests of children is not in accordance with its obligations under international law.

Additional submissions from the State party

6.1 On 12 January and 24 March 2016, the State party provided additional submissions to the Committee. It submits that the authors' comments appear to be submitted from the perspective of R, who is not one of the authors of the communication. The State party notes that it is aware of the relevance of R's interests to the present proceedings, however, it submits that her interests cannot be considered the sole or primary point of reference under the Covenant. In addition, it highlights that the authors had the obligation to leave the Netherlands following the denial of their asylum request.

[45] The State party defines the public interest as eliminating the possibility of claiming benefits in the absence of a valid residence permit, which may create an opportunity to prolong unlawful residence.

[46] The State party refers to European Court of Human Rights, *Bah v. United Kingdom*, para. 47.

[47] The authors refer to Court of Justice of the European Union, *H.C. Chavez-Vilchez and others v. Board of Directors of the Social Security Bank and others* (case No. C-133/15), in which the Central Administrative Court requested a preliminary ruling from the European Commission. The Commission indicated that the deployment of the applicable rules concerning family law and welfare by the national authorities was bound by national and international law, with inclusion of the European Convention on Human Rights and the Convention on the Rights of the Child, and on those grounds offered a fitting protection of the right to respect of family life and the interests of the child.

6.2 Regarding the authors' claim that R was forced to live and grow up in a destitute situation, the State party indicates that the authors were provided with the necessary assistance in the relevant period between 1 October 2006 and 31 March 2008. It recalls that, between January and September 2007, they received a monthly allowance in the form of a payment under the Payments to Certain Categories of Aliens Regulation (see para. 2.6 above), while awaiting a decision on their second application for a residence permit. It notes that juvenile care was provided for R; she attended medical day care four days per week, and the authors lived in a house rented by a foundation, Voice in the City, which was subsidized by the Municipality of Haarlem.

6.3 The State party recalls that, in the relevant period, R and her family were awaiting a decision on their application for a residence permit. It submits that the situation cannot be considered a state of destitution, nor can the denial of a child benefit lead to such a state.

6.4 The State party agrees with the authors that the communication is about the general child benefit. It reiterates, however, that the child benefit is not intended as a general income support scheme and is not paid to families with children as a way of providing them with a minimum level of subsistence. It also reiterates that the purpose of the general child benefit is to contribute to the costs of caring for and raising children and that need is not a criterion for granting it.

6.5 Regarding the authors' comments on Voice in the City (see para. 7.1), the State party affirms that, in indicating that Voice in the City receives government support, its intention was merely to point out that the authors were provided with shelter, housing costs and living expenses during the relevant period between 1 October 2006 and 31 March 2008.

Author's comments on the additional submissions from the State party

7.1 On 15 February 2016, the author provided comments on the additional submissions from the State party. They welcome the State party's recognition of their need for a minimum standard of subsistence. They maintain however that families, in particular those with vulnerable children, cannot be left in a destitution state, as they were with regard to R. They recall that their state of destitution was created by the State party and that Voice in the City intervened to provide shelter for the family by renting a "slum [dwelling] listed for demolition". The authors submit that the State party is falsely portraying Voice in the City as government supported; they indicate that the charity was not directed by the Municipality of Haarlem to assist the family and is primarily funded by local churches and individual donations.[48]

7.2 Regarding the State party's submission that the family was provided with enough money to cover their basic needs because they received payments under the Payments to Certain Categories of Aliens Regulation from 1 January 2007 to 4 September 2007, they indicate that there are periods, such as the period from their arrival in the State party in 2005 to 1 January 2007 and subsequent to 4 September 2007, that are not covered by the State party's submission. The authors reject the State party's argument that the family was "in the habitual situation for asylum seekers" in the relevant period, given that they did not receive a payment for the majority of the time between "being put on the street", on 17 March 2005, and receiving a residence permit, on 22 January 2009. They indicate that, this right entitled them to a monthly allowance of approximately €215 for R, which is only a "fraction" of the minimal living standards for a family in the Netherlands.

7.3 The authors recall that their communication relates only to child benefits. They submit that such benefits are important to reaching the minimum standard of subsistence, of which the family was deprived. They consider that the quarterly allowance of €186 would have been a significant step towards the minimum threshold.

7.4 The authors reiterate that the child benefit can only be requested by the parent, is payable to the parent and can only be litigated by the parent. Therefore, although R is not the author of the communication, her position and human rights have always been the focal point of the court proceedings. The authors affirm that, as her parents, they are obliged by

[48] The authors indicate that, in recent years, government subsidies have amounted to between 9 and 13 per cent of the Voice in the City budget.

law to provide for R; however, the family as a single entity was affected by the lack of a minimum standard. They submit that the fact that R could not apply for benefits herself does not change that conclusion.

7.5 Responding to the State party's comments on their claims under articles 23 and 24 of the Covenant, the authors submit that such claims cannot be assessed without considering R's perspective. They indicate that the State party's actions have violated R's rights as a child. They submit that the State party's obligations under the Covenant are not affected by their obligation to leave the Netherlands and that the State party cannot, in pursuit of its immigration policy, disregard its human rights obligations under articles 23 and 24 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

8.3 The Committee takes note of the authors' claim that they have exhausted all effective domestic remedies available to them. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee considers that the authors' have sufficiently substantiated their claims under articles 23, 24 (1) and 26 of the Covenant, for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

9.1 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.

9.2 The Committee takes note of the authors' claim that the general child benefit can be considered as a measure of protection required owing to the child's status as a minor, on the part of the child's family, society and the State, as provided for under article 24 of the Covenant, and that by rejecting their application for the general child benefit, the State party failed to provide R with the measures of protection required, given her status as a minor, under article 24 (1) of the Covenant. The Committee notes the authors' affirmation that, when determining whether to grant a child benefit, a primary consideration of the State party should be the children's best interests. In the present matter, the Committee is not called upon to decide generally on the obligations of States parties to the Covenant to provide child benefits, nor does it decide the extent to which it is justified to limit entitlement to such benefits on the basis of residency status. Rather, the Committee limits itself to the question of whether, in the particular circumstances of the present case, the denial of the authors' application for the general child benefit violated R's rights under article 24 (1) of the Covenant.

9.3 The Committee recalls that, under article 24, every child has a right to special measures of protection owing to her or his status as a minor.[49] It also recalls that the principle that, in all decisions affecting a child, the child's best interests should be a primary consideration forms an integral part of every child's right to measures of protection

[49] See general comment No. 17, para. 4; see also *Mónaco de Gallicchio v. Argentina* (CCPR/C/53/D/400/1990), para. 10.5.

required under article 24 (1) of the Covenant.[50] 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) of the Covenant.

9.4 The Committee notes that the authors filed an initial request for asylum on 15 August 2001, which was denied on 24 February 2003, and that such decision became final by the decision of the Council of State of 8 February 2005. The Committee also notes that the authors lived in a shelter operated by the Central Agency for the Reception of Asylum Seekers from the time of their arrival in 2001 until 17 March 2005, when they were requested to leave, following the rejection of their asylum request. The Committee further notes that, during that period, the authors were entitled to a weekly financial allowance for food, clothing and other personal expenditure, recreational activities and coverage of medical expenses, under the order on asylum seekers and other categories of aliens. The Committee notes that the authors submitted two applications for a residence permit, on 21 December 2005 and 19 September 2006, and that, on 13 October 2008, they submitted a request to postpone implementation of the deportation order, owing the fact that Ms. Hashemi was pregnant with their second child. The Committee takes note of the postponement granted by the Secretary of Justice on 2 November 2008, allowing the authors to stay from 11 November 2008 until the end of January 2009 and entitling them to lawful residence during that period.

9.5 The Committee considers that, under article 24 (1) of the Covenant, the State party has a positive obligation to ensure that children's physical and psychological well-being is protected, including through guarantee of subsistence under circumstances in which their parents have no other income or assistance. The Committee takes note of the affirmation by the State party, which is not contested by the authors, that between January and September 2007, the authors received a monthly allowance under the Payments to Certain Categories of Aliens Regulation and that R was provided with medical care four days per week. The Committee notes that the authors benefited from receipt of the monthly allowance again, from 11 November 2008, and that R had access to medical care in cases of life threatening situations and to education, regardless of her residence status.

9.6 The Committee notes the authors' allegation that the State party should have taken into account their specific circumstances, in particular R's situation as a vulnerable child with special needs, and their extreme poverty and destitution, which they consider to be the main cause of R's medical condition. However, in the specific circumstances of the case, the Committee considers that the authors have not established a link between R's medical condition and the authors' exclusion from receiving the general child benefit, given that they have not demonstrated that the alternative financial assistance available to them placed R at a material disadvantage with regard to her health, when compared with the assistance available under the general child benefit scheme.

9.7 In the light of the totality of the aforementioned circumstances, the Committee concludes that the facts before it do not constitute a violation of the rights of the authors' daughter under article 24 (1) of the Covenant.

9.8 In view of the foregoing, the Committee does not deem it necessary to further examine the authors' claims concerning the same matter, under articles 23 and 26 of the Covenant.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it does not disclose a violation by the State party of the authors' or their daughter's rights under articles 23, 24 or 26 of the Covenant.

[50] *Bakhtiyari et al. v. Australia*, para. 9.7.

Annex

Individual opinion of Committee member José Santos Pais (dissenting)

1. I regret not being able to share the Committee's conclusion that the State party did not violate the authors' rights under article 24 (1) of the Covenant.

2. The authors are Jamshed Hashemi and Maryam Hashemi, nationals of Afghanistan, submitting the communication on their own behalf and on behalf of their two children born in the Netherlands, R, born in 2002, and Q, born in 2008.

3. The authors arrived in the Netherlands in 2001, fleeing the Taliban. They filed an initial request for asylum in 2001, which was denied in 2003. They appealed the decision to the Regional Court of The Hague, an appeal which was also rejected. In 2005, the Council of State confirmed the decision of the Regional Court (see para. 2.1).

4. Following that decision, the authors were required to leave the asylum seekers' centre in which they were living, in March 2005. In November 2005, they moved into an emergency shelter provided by a charity, Voice in the City, in Haarlem, since they had no income, and they received €62 per week from the charity.

5. In December 2005, the authors, on their daughter's behalf, owing to her medical condition, applied for a residence permit, which was denied and ultimately rejected in 2008 by the Council of State (see para. 2.2). R suffered from "chronic stress disorder" as a result of the "traumatic experiences" of her past, "stagnating speech development", "stagnating social-emotional development", detachment from her parents and "regression because of the traumatic situation" of the family. From July 2007, several health-care organizations were assisting with R's health issues (see para. 2.7).

6. Between January and September 2007, the authors had access to reception facilities and received a monthly assistance payment from the Central Agency for the Reception of Asylum Seekers of approximately €213.72, addressed to R, in accordance with the Payments to Certain Categories of Aliens Regulation (see para. 2.6). From December 2007, the authors lived in a property provided by Voice in the City, which paid the electricity and water bills and provided them with a weekly assistance payment of €80 (see para. 2.5).

7. The present communication concerns the denial by the State party of the application submitted in November 2007 by the authors, on behalf of R, to the Social Security Bank for the general child benefit, which is granted to all parents with young children to assist with the costs of upbringing, covering the period from the fourth quarter of 2006 until the first quarter of 2008. To receive the general child benefit, a person must be insured; an alien not residing lawfully in the Netherlands cannot be considered an insured person (see para. 2.8). Accordingly, the Social Security Bank denied the authors' application because they did not have a valid residence permit (see para. 2.9). The authors appealed the decision, but the Council of State confirmed it (see paras. 2.10–2.11).

8. The first issue is, given the denial of the authors' application for the general child benefit, whether the authors and their children were compelled to survive at "sub-subsistence levels", obliging them to live in absolute poverty. Although the general child benefit is not ordinarily considered a subsistence benefit, in the authors' case it acquired such a character, because it was necessary to prevent them from living under the poverty line and to ensure a minimum subsistence standard for their children. During the period concerned, the authors received a monthly assistance payment from the Central Agency for the Reception of Asylum Seekers of only approximately €213.72, addressed to R (for just 9 months), and a weekly assistance payment of €62 provided by Voice in the City, a charity primarily funded by local churches and individual donations, the State party only contributing 9 to 13 per cent of the charity's budget (see para. 7.1). Subsequently, the family received a weekly assistance payment of €80, also from Voice in the City (see para. 3.5). Such financial conditions hardly meet a minimum subsistence threshold standard for children, let alone for an entire family. In such destitution, to receive a quarterly allowance

of €186 would indeed have been a significant step towards the minimum threshold (see para. 7.3).

9. Another issue is whether R's medical condition was worsened by the family's situation of "acute poverty", which was tremendously stressful (see para. 3.5). In that regard, the dire legal and financial situation of the family had a significant impact on the child's medical condition (see paras. 5.1–5.2), although she was able to receive some medical care (see para. 6.2).

10. In its denial of the general child benefit, intended to be a child benefit scheme and to contribute to the costs of caring for and raising children (para. 6.4), the State party did not take duly into account the protection of the children's best interests. In that respect, a State party should be obliged to provide for minimum subsistence needs of children whose parents are unable to provide for them (para. 3.7), helping them to reach a minimum subsistence threshold level. It is particularly relevant in the case of the authors, who had been living in the Netherlands since 2001 and who could not return to Afghanistan.

11. Contrary to the Committee's findings, I would have therefore concluded that, by denying the authors' application for the general child benefit, the State party violated R's rights under article 24 (1) of the Covenant, according to which every child has a right to special measures of protection owing to her or his status as a minor. Indeed, the State party did not, in the present case, respect the principle that, in all decisions affecting a child, the child's best interests should be a primary consideration. As the Committee rightly points out (see paras. 9.3 and 9.5), States parties to the Covenant have a positive obligation to protect children from physical and psychological harm, including by guaranteeing minimum subsistence, under circumstances in which their parents have no other income or assistance. It is my view that, in the present case, that positive obligation was not met.[1]

[1] See also *Abdoellaevna and Y v. Netherlands* (CCPR/C/125/D/2498/2014), para. 7.4, in particular the observation of the Committee that the absence of social protection for children may in certain circumstances adversely affect their physical and psychological well-being.