



International Covenant on Civil and Political Rights

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Human Rights Committee

Ninety-ninth session

12 to 30 July 2010

Decision

Communication No. 1609/2007

<u>Submitted by:</u>	Chen, Zhi Yang (represented by counsel, Michel Arnold Collet)
<u>Alleged victim:</u>	The author
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	21 May 2007 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 October 2007 (not issued in document form)
<u>Date of adoption of decision:</u>	26 July 2010

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Deportation of the author, [who was a minor at the time of his asylum application] to China
<i>Procedural issues:</i>	Non-exhaustion of domestic remedies; claim inadmissible <i>ratione materiae</i>
<i>Substantive issues:</i>	Inhuman or degrading treatment or punishment; arbitrary or unlawful interference with privacy and family life; measures of protection due to a child
<i>Articles of the Covenant:</i>	7, 17, and 24
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (b)
	[ANNEX]

Annex

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political rights (ninety-ninth session)

concerning

Communication No. 1609/2007**

Submitted by: Chen, Zhi Yang (represented by counsel, Michel Arnold Collet)

Alleged victim: The author

State party: The Netherlands

Date of communication: 21 May 2007 (initial submission)

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

Meeting on 26 July 2010,

Adopts the following:

Decision on admissibility

1. The author of the communication, dated 21 May 2007, is Mr. Chen, Zhi Yang, a Chinese national from the Sichuan Province, born in 1988. He claims violations by the Netherlands of articles 7, 17, and 24 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as presented by the author

2.1 On 22 July 2003, upon his return from the market, the author found both his parents lying dead in the garden.¹ The author thought that they were killed because of his father's debts. After he buried his parents, the author approached the neighbours, but they could not help him. He did not find it necessary to go to the police, as he did not have money to pay them, and the police would only help people with the means to pay large bribes. Four days later, a man approached the author and informed him that he had "bought" him from his late father, as a payment for his debts. This individual beat the author, locked him up, and finally abducted him to the Netherlands, where he arrived in August 2003. The author was able to escape from his abductor, and submitted an asylum application on 20 August 2003 at Schiphol Airport.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli and Mr. Krister Thelin.

¹ The author does not give indications on the place where he used to live with his parents.

2.2 The first interview took place on 21 August 2003, followed by a second one on 26 February 2004. Both interviews were carried out in Mandarin, with the assistance of an interpreter. On 14 December 2004, in reaction to the delay in adoption of a decision on his asylum demand, the author applied for judicial review before the Hague District Court sitting in Zwolle. By decision of 5 July 2005, the Immigration and Naturalisation Office rejected the author's application for a temporary asylum residence permit and for the issuance, *ex proprio motu*, of a temporary regular residence permit, mainly on the ground that his account of facts was not credible, notably as he could not satisfactorily explain why he failed to seek the assistance and protection of the Chinese authorities. The Immigration and Naturalisation Office also found that there were sufficient institutions dedicated to the protection of minors in China, where the author could have sought refuge. On 5 December 2006, the Hague District Court confirmed the Immigration and Naturalisation Office decision. By judgement of 11 January 2007, the Administrative Jurisdiction Division of the Council of State rejected a further appeal by the author as inadmissible.

The complaint

3.1 The author claims that should it deport him to China, the State party would breach articles 7, 17 and 24 of the Covenant. Concerning article 7, he claims that he would be exposed to inhumane treatment or degrading treatment or punishment if returned to China, as he left China at the age of 15 years old, without a *Hukou* registration,² which is obtained by adults. While it is possible to obtain an identity card at the age of 16, the *Hukou* is a prerequisite. As he will not be able to establish his identity, and cannot afford to pay the necessary bribes to public officials, the author claims that he will be denied access to education, health care, as well as any other social assistance in China, in violation of article 7 of the Covenant. The author adds that the person who abducted him and "bought" him may threaten him again and expose him to risks for his safety, as he will not be in a position to pay off his father's debts.

3.2 The author further claims that his deportation to China by the State party would be in breach of article 17, as he has been living in the Netherlands since the age of 15 years, where he currently goes to school, has developed a social life, and "feels at home".³ He adds that he does not have family in China, and claims that his return to China would entail a breach of his right to privacy and his family life, in violation of article 17.

3.3 He further claims that his deportation to China would be in breach of the State party's obligations under article 24 of the Covenant.⁴ He notes that he arrived in the Netherlands at the age of 15 as an unaccompanied minor, and while he is no longer a minor, he spent a crucial period of his development in the Netherlands, where he has proved to be integrated, and has learned the Dutch language. He claims that in their decisions, the immigration authorities did not take into account the author's best interest as a minor. Moreover, the author contends that during the asylum procedures, the burden to prove that he would not have an orphanage available in China was wrongly placed on him. He further reiterates that he does not have family in China, as well as the difficulties which would derive from his inability to prove his identity, thereby forcing him to live on the streets.

² A *Hukou* appears to refer to the system of residency permits prevailing in China, where household registration is required by law, and which officially records and identifies a person as a resident of an area. The *Hukou* includes identifying information such the name of the person, date of birth, the names of parents, and name of spouse, if relevant.

³ The author refers to Communications No. °930/2000, *Winata and Li v. Australia*, Views adopted on 26 July 2001, and No. °1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003.

⁴ The author also alleges a violation of art. 3 of the Convention on the Rights of the Child.

3.4 On 29 May 2007, the author informed the Committee that he was not receiving financial support in the Netherlands and that he was not legally entitled to work, rent a place to live and benefit from medical care. He had been deprived of his identity card by the State party's authorities at the end of the negative asylum procedure. In addition, he was unable to obtain a passport since he could not prove his Chinese origin and did not have a valid *Hukou* registration. The author therefore pointed to the difficulty of the situation, whereby he was not legally allowed to stay in the Netherlands, but could not return to China for lack of ability to establish his identity.

State party's observations on the admissibility and merits

4.1 On 27 November 2007, the State party raises the fact that the author's allegations under article 17 and 24 of the Covenant were not addressed before the State party's jurisdictions, and should as such be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

4.2 On 7 May 2008, the State party further states that the author's allegation that he will be denied access to social advantages in China, for lack of a *Hukou* registration, was not raised before the Courts of the State party. As far as his claim under article 7 of the Covenant is based on this factual element, the State party claims that this allegation should also be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for non-exhaustion of domestic remedies.

4.3 On the merits, the State party claims that concerning his allegations under article 7 of the Covenant, the author failed to raise sufficient information indicating that there is an inevitable and predictable consequence that he will be exposed to treatment contrary to article 7 should he be returned to China. The State party affirms that based on information from its Ministry of Foreign Affairs, every family in China has a *Hukou Ben*, which is a household booklet reflecting information such as birth, civil status, marriage and death. Any Chinese national can be registered under the *Hukou* system, even at an advanced stage in life, and even after a protracted stay abroad, even though bureaucratic obstacles may sometimes delay the process of registration. The author was once registered on his father's passport, and as he claimed in his asylum interviews that he went to school in China, his name must be recorded in the population register. He has not submitted any official document supporting his allegations, and did not ask the Chinese diplomatic representation in the Netherlands about his *Hukou* registration, so as to be able to credibly establish that he would not be able to prove his identity in China and, as a result, be denied the associated social benefits. The State party adds that upon his return to China, the author, who is now 22 years old, will be like any other young adult of his age, and, as such, presumed to be capable of supporting himself. He did not adduce evidence to the contrary. The State party further notes that the scope of article 7 of the Covenant does not extend to allowing the author the right to stay in the Netherlands so as to be able to access social benefits. Regarding his allegations that the person who once "bought" him may threaten him, the State party contends that the author failed to show that the Chinese authorities are unwilling or incapable of offering him protection. The State party concludes that the author's allegations under article 7 of the Covenant are ill-founded.

4.4 Regarding article 17, the State party observes that the author was never granted a residence permit, nor was he given any assurance that he would be granted one. It is therefore at his own risk that he developed a social network and personal ties in the Netherlands. He has lived in China for most of his life, speaks Chinese, and is familiar with Chinese customs. He has not adduced evidence showing that he could no longer adapt to life in China. The State party adds that the author's references to previous jurisprudence of

the Committee are irrelevant as, contrary to the facts in that case, the author does not have family in the Netherlands, and has already reached the age of majority.⁵

4.5 With regards to the author's allegations that his return to China would lead to a breach of the State party's obligation to provide measures of protection to minors under article 24, the State party notes that under Dutch asylum law⁶ and practice, due account is taken of the applicant's age when conducting interviews and assessing their account of the facts in support of their application. Unaccompanied minors whose asylum applications were denied must in principle return to their country of origin, or another country where they can reasonably be expected to go. Such minors may be granted a temporary residence permit, but are in principle required to return to their country of origin when adequate care and protection are deemed available in the country of return. The applicant can however adduce evidence showing that no such protection is available in the country of return, or that it is not adequate by local standards. In the author's case, the State party determined, based on various country reports, that adequate care is available in China for unaccompanied minors. The author did not adduce any evidence to the contrary. The State party reiterates that upon his return to China, the author, who is an adult, is presumed to be capable of supporting himself. The State party therefore concludes that his allegations under article 24 are ill-founded.

Author's comments to the State party's observations

5. On 21 July 2008, the author reaffirms that it was not in his best interest as a child to be sent back to a country where he no longer has relatives and a familiar social environment. This is *a fortiori* the case since, over the years, he has developed strong ties with the Netherlands. He adds that having left China illegally, it will be impossible for him to register again upon return without paying a fine. The author further claims that while it is possible to prove that one's name is registered by the authorities, the opposite is impossible to establish. The *Hukou* system is based on the household, and is regularly updated when people no longer live in the country or die. As he left the country as a minor, he did not have a *Hukou* of his own, and since his father died, his name must therefore have disappeared from all registers. As such, he cannot count on any protection from the police. The author claims that deporting him to China would be in violation of his right to his private life, as he is no longer familiar with the Chinese culture, and does not have family or friends on whom he can rely.

Issues and proceedings before the Committee

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

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

6.3 Regarding his allegations under article 7 of the Covenant, the Committee takes note of the author's allegation that if deported to China, he would face a risk of torture or cruel, inhuman or degrading treatment or punishment prohibited by article 7 of the Covenant, as a result of his inability to prove his identity to the Chinese authorities. The State party contends that the author failed to exhaust domestic remedies on that count, and the author

⁵ *Winata v. Australia*, (note 3 above).

⁶ Aliens Act of 2000, Aliens Decree of 2000, Regulations on Aliens of 2000, and the Aliens Act Implementation Guidelines of 2000.

did not contest this. The Committee observes that before the State party's jurisdictions, the author's asylum claim was mainly based on his contention that, if returned to China, he would face a risk of persecution by the individuals who allegedly abducted him. Recalling that the requirement of exhaustion of domestic remedies, which allows the State party to remedy an alleged violation before the same issue is raised before the Committee, obliges authors to raise the substance of the issues submitted to the Committee before domestic courts, the Committee declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 With regard to the author's allegation under article 7, that the individual who allegedly abducted him may threaten or harm him should he return to China, the Committee observes that these acts are attributed to a non-State actor, and the author has not demonstrated, for admissibility purposes, that the Chinese authorities are unable or unwilling to protect him from such private acts.⁷ The Committee hence declares this part of the communication inadmissible under article 2 of the Optional Protocol.

6.5 Concerning articles 17 and 24, the Committee takes note of the State party's contention that these claims were not raised before the domestic courts. The author does not contest this. The Committee thus declares this part of the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.6 The Committee further observes, concerning article 24, that the author, who was born in 1988, is at the present time no longer a minor. As a result, any future removal would not touch upon any right under this article. The author's claim under article 24 is therefore also inadmissible *ratione materiae* under article 3 of the Optional Protocol, as incompatible with the provisions of the Covenant.⁸

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2, 3 and 5, paragraph 2 (b) of the Optional Protocol;

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

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

⁷ See communication No.1302/2004, *Khan v. Canada*, decision on admissibility adopted on 25 July 2006, para. 5.6.

⁸ See *Benali v. the Netherlands*, decision on inadmissibility of 23 July 2004, para. 6.2.