



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. 2894/2016*, **, ***

<i>Communication submitted by:</i>	A.D.-N. (represented by counsel, W.G. Fischer)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Kingdom of the Netherlands
<i>Date of communication:</i>	30 May 2016 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 14 December 2016 (not issued in document form)
<i>Date of adoption of decision:</i>	22 March 2023
<i>Subject matter:</i>	Inhumane living conditions in a shelter for unlawful immigrants
<i>Procedural issues:</i>	Exhaustion of domestic remedies; insufficient substantiation of claims
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment or punishment
<i>Article of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is A.D.-N., a national of Somalia born on 20 October 1973. He does not have any identity and travel documents, and is homeless in the Kingdom of the Netherlands. He claims that the State party has violated his rights under article 7 of the Covenant. The Optional Protocol entered into force for the State party on 11 March 1979. The author is represented by counsel.

1.2 On 29 May 2018, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteurs on new communications and interim measures, denied the

* Adopted by the Committee at its 137th session (27 February–24 March 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobayyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 of the Committee's rules of procedure, Yvonne Donders did not participate in the examination of the communication.

*** An individual opinion by Committee member Hélène Tigroudja (dissenting) is annexed to the present decision.



State party's request to examine the admissibility of the communication separately from its merits.

Facts as submitted by the author

2.1 The author was born on 20 October 1973 in Mogadishu. He fled Somalia because of the civil war and requested asylum in the Kingdom of the Netherlands on 16 November 1992. The Kingdom of the Netherlands denied his initial application for asylum, as well as subsequent applications, in 2008 and 2013. The author has been living on the streets since 1992, has become addicted to alcohol and khat, and has been arrested multiple times, mostly for shoplifting. Because of this, the Kingdom of the Netherlands declared the author an "unwanted alien" on 4 January 2010 and ordered him to leave the country within 24 hours. The author has not returned to Somalia, despite being detained several times. As an unwanted alien, he is not eligible for asylum.

2.2 In December 2013, the author found shelter in a garage, known as the "Vluchtgarage", a squat run by We Are Here, a collective of undocumented migrants living on the streets of Amsterdam. The author cites reports and letters from Amnesty International, Human Rights Watch, Doctors of the World and the Netherlands Institute for Human Rights attesting to the dangerous, inhumane and inadequate living conditions in the Vluchtgarage, and requesting that the Government improve the situation. The author states that he has suffered psychological problems since leaving Somalia; he claims that he was so confused at the time of filing his asylum application in 1992 that he left the reception centre before his first interview. He was diagnosed with post-traumatic stress disorder and a depressive disorder by Equator Foundation, which runs a treatment programme for traumatized refugees. The author alleges that he was violently assaulted several times while living on the streets in the Kingdom of the Netherlands, and consequently suffers from knee problems and nightmares. Furthermore, he has developed a cognitive disorder as a result of alcohol abuse.

2.3 The author submits that, according to the law of the Kingdom of the Netherlands, undocumented migrants are not eligible for social assistance. The only two ways of receiving support are to apply for assistance with the State Secretary for Security and Justice or apply for assistance from the local municipality. The author claims that he has exhausted both options.

2.4 On 13 August 2014, the author applied to the Housing and Social Support Department of the City of Amsterdam for access to community shelter and basic assistance, pursuant to the Social Support Act. On 22 September 2014, the City of Amsterdam rejected his application and suggested that he apply to the State Secretary for Security and Justice, who could provide him with shelter in a "freedom-restricting location" (*vrijheidsbeperkende locatie (VBL)*). Such shelters are only available on the condition that the undocumented migrants seeking assistance declare their willingness to cooperate in their deportation. On 26 September 2014, the author filed an objection to the negative decision issued by the City of Amsterdam on 22 September 2014. His objection was declared unfounded by decision of the municipal authority on 26 January 2015. The author filed an application for judicial review of that decision with the District Court of Amsterdam, which granted the application and heard the author on 8 May 2015. The author argued that the City of Amsterdam's primary decision not to admit him to a crisis shelter was unlawful. Referring to the views of the European Committee of Social Rights in *Conference of European Churches (CEC) v. the Netherlands*¹ and *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*,² the District Court rejected the municipality's argument that a shelter was not needed because the author could report to the freedom-restricting facility. The District Court also decided that the author had the right to unconditional shelter, which he could receive in a "bed, bath and bread" (*bed-bad-broodregeling (BBB)*) facility. However, the District Court denied the author compensation in the form of a living allowance.

¹ Complaint No. 90/2013, Decision on the merits, 1 July 2014.

² Complaint No. 86/2012, Decision on the merits, 2 July 2014.

2.5 Both the author and the City of Amsterdam appealed the District Court's judgment before the Administrative High Court. On 26 November 2015, the Administrative High Court found that the municipality was right to deny the author's application for community shelter services as it had no obligation to assist the author, and that the author could apply to the State Secretary for Security and Justice for accommodation in a freedom-restricting facility.³ This decision was final.

2.6 In a second set of proceedings, on 26 September 2014, the author filed an application with the State Secretary for Security and Justice for adequate reception facilities and a subsistence allowance. On 13 October 2014, the State Secretary informed the author that reception was available at a freedom-restricting facility, subject to the condition that he cooperate in his deportation. On 31 October 2014, the author filed an objection, which was declared unfounded by the State Secretary on 1 December 2014. The author filed an application for judicial review of this decision with the District Court of The Hague. On 17 July 2015, the District Court declared his application manifestly inadmissible, as there was no interest in bringing an action, noting that the author had been provided with reception facilities in the municipality in which he resided. As the City of Amsterdam had recently opened the bed, bath and bread facility, the author could not gain a more favourable position through assessment of the merits of his application for judicial review, because he had already been awarded the reception that he had requested. The author claims that, since he would not have gained a materially improved position by further appealing the District Court's decision of inadmissibility, he did not appeal the decision to the Administrative Jurisdiction Division.⁴

2.7 Following the decision of the Administrative High Court of 26 November 2015 in the first set of proceedings, the author's only option for shelter was the freedom-restricting facilities. He therefore presented himself to the facility in Ter Apel on 26 April 2016 and agreed to cooperate in his deportation. However, he was informed that there was no prospect of deportation within 12 weeks, which is a second condition for entry to the freedom-restricting facility. He was therefore denied entry.

2.8 On 28 April 2016, the author filed an objection to the refusal to admit him to the freedom-restricting facility in Ter Apel. On 3 June 2016, the State Secretary declared the author's objection unfounded. The author filed an application for judicial review of this decision with the District Court of The Hague, sitting in Amsterdam. The author asked the court to postpone the review hearing scheduled for 15 December 2016. The request was granted on 13 December 2016. The review hearing was postponed indefinitely.⁵

2.9 The Repatriation and Departure Service asked the author's counsel whether the author would like to discuss possible placement in a freedom-restricting facility. On 3 March 2017, the author was scheduled for an interview by the Service to determine whether he should be admitted to a freedom-restricting facility.⁶

Complaint

3.1 The author claims that the State party has violated his rights under article 7 of the Covenant by failing to provide him with unconditional accommodation and support, and by subjecting him to inhumane conditions in the Vluchtgarage. He claims that access to shelter in a freedom-restricting facility (*vrijheidsbeperkende locatie (VBL)*) is not available to him.

3.2 He refers to the jurisprudence of the European Committee of Social Rights, which found that failure by the Kingdom of the Netherlands to provide unconditional basic assistance to anyone in its territory violates articles 13 and 31 of the revised European Social

³ The court noted that the State Secretary for Security and Justice was solely responsible for undocumented migrants, and that any provisions that municipalities made for such migrants were extralegal.

⁴ Since the court found that, under the law, the freedom-restricting facility was the sole legal shelter for undocumented migrants, the author claims that a further appeal would not have allowed him to gain a materially improved condition or to avoid the irreparable harm that he consequently suffers. Therefore, such remedy would have been ineffective in the circumstances of his case.

⁵ No further information has been made available.

⁶ No further information has been made available.

Charter, as did withholding those provisions in order to bolster immigration policies. The author also cites a report in which the Commissioner for Human Rights of the Council of Europe explicitly condemns the conditions in the Vluchtgarage and reaffirms the duty of the State to provide adequate shelter for undocumented migrants. Furthermore, the author notes the joint urgent appeal by three special rapporteurs to the Kingdom of the Netherlands, requesting it to provide emergency assistance to homeless, undocumented migrants, as failure to do so violated articles 11 (1) and 2 (2) of the International Covenant on Economic, Social and Cultural Rights.⁷ Lastly, the author cites three communications, in which the Netherlands Institute for Human Rights, the National Ombudsman and the Advisory Committee on Migrant Affairs, respectively, urged the Government to provide shelter and medical care to undocumented migrants.

3.3 The author argues that, while article 7 was not invoked in the domestic proceedings regarding his case, its substance was a central part of those proceedings, as was article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). He notes that his living conditions in the Vluchtgarage in Amsterdam were dire and similar to those of the applicant in *M.S.S. v. Belgium and Greece* before the European Court of Human Rights, which found that the applicant's situation amounted to a violation of article 3 of the European Convention on Human Rights.⁸

3.4 The author states that he is currently living as a squatter in various abandoned buildings in Amsterdam.

State party's observations on admissibility

4.1 On 28 February 2017, the State party submitted its observations on the admissibility of the communication. It argues that the communication should be found inadmissible as the author has not exhausted all available domestic remedies and has failed to substantiate his claims.

4.2 The State party refers to the Committee's inadmissibility decision in the case of *G.E. v. the Netherlands*,⁹ which concerned an alien who was residing in the country unlawfully, and who did not have access to shelter or social assistance while waiting for his application for a residence permit on medical grounds or for continued residence to be processed. The author in that case refused the offer of a shelter provided by the authorities since it would have entailed a restriction on his liberty.¹⁰ The State party also refers to *Hunde v. the Netherlands*,¹¹ which concerned complaints under articles 2 and 3 of the European Convention on Human Rights regarding the denial of shelter and social assistance, including inhuman conditions in the Vluchtgarage. In that case, the European Court of Human Rights concluded, inter alia, that, in the circumstances, the Government had not fallen short of its obligations under article 3 of the European Convention on Human Rights by remaining inactive or indifferent.

4.3 The State party notes that the author's counsel took legal action regarding the same matter before the two highest administrative courts in the State party, namely the Administrative Jurisdiction Division of the Council of State and the Central Appeals Court for Public Service and Social Security Matters. The State party claims that, in principle, the author's counsel is now requesting the Committee to ignore its previous Views in a similar case, as well as the decisions of the European Court of Human Rights, the State party's Administrative Jurisdiction Division and the Central Appeals Court, and to rule differently.

4.4 The State party argues that the author has not exhausted all available domestic remedies. The author's counsel has conducted legal proceedings at several courts and has

⁷ Special Rapporteur on extreme poverty and human rights, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, and Special Rapporteur on the human rights of migrants, joint urgent appeal to the Kingdom of the Netherlands, 12 December 2014.

⁸ European Court of Human Rights, Application No. 30696/09, Judgment, 21 January 2011.

⁹ [CCPR/C/118/D/2299/2013](#).

¹⁰ The author in that case did not explain how such a restriction negatively affected his medical treatment for HIV so that his health or life were at serious risk.

¹¹ European Court of Human Rights, Application No. 17931/16, Judgment, 5 July 2016.

argued that the facilities provided by the Government for aliens residing in the country unlawfully are not sufficient in the light of various treaty obligations. The State party asserts that the author has not exhausted all available domestic remedies: he did not appeal the judgment of the District Court of The Hague of 17 July 2015 and his application for judicial review, filed with the District Court of The Hague against the State Secretary's decision of 3 June 2016 regarding his objection, is still pending. Domestic remedies were available to the author and they related to the complaint before the Committee, namely the author's claim that the living conditions in the Vluchtgarage and the condition for access to the freedom-restricting shelter are contrary to article 7 of the Covenant.

4.5 Regarding the author's failure to appeal the District Court's judgment of 17 July 2015, the author argued that he was no longer interested in the proceedings because, by that time, the City of Amsterdam was providing night shelter. The author's complaint of dire living conditions in the Vluchtgarage cannot be considered separately from the Government's offer of shelter in the freedom-restricting facility. The fact that the author had found another form of shelter and did not continue the proceedings does not detract from this. The consequences of a litigation strategy must be borne by the author. Had the proceedings continued, they might have resulted in a judgment on the merits regarding the facilities offered by the State Secretary, and they might have answered the question as to whether a freedom-restricting facility was the most suitable form of shelter. Had it been confirmed, the author would not have had to seek shelter in the Vluchtgarage.

4.6 The State party disputes the author's claim that the Government's decision not to appeal the District Court's judgment of 17 July 2015 could be understood as confirming that the Government endorses the view that the responsibility for providing shelter to aliens residing in the Kingdom of the Netherlands unlawfully lies with the municipal authorities. The author's counsel was aware of the Government's opinion that shelter for aliens residing in the country unlawfully should be provided in a freedom-restricting facility (*vrijheidsbeperkende locatie (VBL)*), and that municipal bed, bath and bread (*bed-bad-broodregeling (BBB)*) shelters were merely a temporary provision. The judgment handed down by the District Court rendered the State Secretary's decision of 1 December 2014 final. Consequently, the State Secretary did not have a demonstrable interest, as required by the law, in filing an appeal as it would not have resulted in a more favourable position. This does not detract from the argument that the author should have exhausted all available remedies as the interest in bringing proceedings with regard to the provision of shelter rests with the author.

4.7 The author's application for judicial review of the State Secretary's decision of 3 June 2016, in which the author's objection to the refusal to grant him admission to the freedom-restricting facility was declared unfounded, is still pending before the District Court of The Hague. An appeal against the District Court's decision in this case would also be an option. Accordingly, not all domestic remedies have been exhausted. The authorities have not had the opportunity to assess the author's situation and establish if he meets the criteria for admission to a freedom-restricting facility.

4.8 The State party argues that the right to social assistance is linked to lawful residence, and the author did not exhaust the available remedies to obtain a residence permit. He could have applied for a temporary no-fault residence permit, pursuant to section 3.48 of the Aliens Act 2000. At no stage of the domestic proceedings did the author contend that he, through no fault of his own, could not leave the country. On 5 August 2011, the author applied for his departure to be deferred on the basis of section 64 of the Aliens Act. This application was denied by a decision of 5 October 2011. His notice of objection of 26 October 2011 was declared unfounded by a decision of 16 August 2012. However, the author did not apply for a judicial review of that decision. The State party holds that the author has not convincingly demonstrated that, if he had undertaken any of the above-mentioned procedures, the proceedings would have been unreasonably prolonged or unlikely to bring relief, and therefore would not have constituted an effective remedy.

4.9 Referring to the Committee's general comment No. 20 (1992), regarding the definition of acts prohibited by article 7 of the Covenant, the State party recalls that the aim of the article is to protect both the dignity and the physical and mental integrity of the individual. The State party considers that article 7 does not give rise to the right to shelter

and/or social assistance for individuals who are not lawfully residing in the State party. The State party asserts that this view could be further elaborated in its observations on the merits.

4.10 The State party also recalls that the Committee's Views in *G.E. v. the Netherlands* and the European Court of Human Rights' judgment in *Hunde v. the Netherlands* support the fact that facilities for aliens residing in the State party unlawfully, including the State-run freedom-restricting facilities, do not contravene the Covenant or the European Convention on Human Rights. The author has not demonstrated in any way how the conditions incurred through denial of access to shelter in a freedom-restricting facility was a violation of article 7 of the Covenant.

4.11 Regarding the author's claim that his stay in the Vluchtgarage resulted in cruel, inhuman or degrading treatment or punishment, the State party reiterates that the author could have sought shelter in a freedom-restricting facility. The State party disputes the author's claim that it was responsible for his decision to stay in the Vluchtgarage. The author's claim that he was refused admission to the freedom-restricting facility does not detract from this because admission to such facilities is only granted to aliens who are prepared to cooperate in their return to their country of origin. As of the date of submission of these observations, the author had not given the national authorities the opportunity to assess whether he was actually willing to cooperate in that regard. As stated earlier, the national procedure regarding the author's access to a freedom-restricting facility was suspended by the District Court so that the national authorities could hear the author and assess whether he should be admitted to such a facility; the interview was scheduled for 3 March 2017. Since the author did not indicate to the national authorities his willingness to cooperate in his departure, it should be concluded that the author's communication is also insufficiently substantiated.

4.12 The State party notes that the author has also not sufficiently substantiated his argument that the conditions of his stay in the Vluchtgarage were a violation of article 7 of the Covenant. Although the author refers to reports by the Netherlands Institute for Human Rights and other bodies regarding the situation in that shelter, those reports do not show that the author, as an individual, faced such a situation. In particular, the author does not explain in what respect he believes that the Government failed to comply fully with its obligations towards him under article 7. As the European Court of Human Rights indicated in *Hunde v. the Netherlands*, there are various ways in which an alien who is not lawfully residing in the Kingdom of the Netherlands can obtain assistance and support. The author did not sufficiently substantiate his complaint under article 7 of the Covenant for the purpose of admissibility.

4.13 The State party concludes that the communication should be declared inadmissible under article 2 and/or article 5 (2) (b) of the Optional Protocol.

Author's comments on the State party's observations on admissibility

5.1 On 5 April 2017, the author submitted that he had exhausted all domestic remedies. This was demonstrated by the decision of 26 November 2015 of the Administrative High Court, which found that the State party had no obligation to relieve the author's destitute situation. That judgment was final and could not be appealed.

5.2 The sole remedy that the author is seeking is recognition that his treatment while living in the Vluchtgarage constituted a violation of article 7 of the Covenant. Instead of indifference, the State authorities should have helped him. The author notes that, in the case of *Hunde v. the Netherlands*, referred to by the State party, the European Court of Human Rights reiterated that there was no right to social assistance under the European Convention. The European Court of Human Rights considered that the circumstances of that case, in the context of the applicant's article 3 claims, would have required that the State party take action to mitigate the situation of extreme poverty. However, the Court noted that the authorities had already addressed the problem in practical terms: approximately 60 municipalities had set up a scheme, in the form of so-called bed, bath and bread facilities, to help irregular

migrants like Mr. Hunde. The Court therefore ruled that the Netherlands had not violated article 3 of the European Convention on Human Rights.¹²

5.3 The author recalls the State party's argument in *Hunde v. the Netherlands*, in which the authorities admitted that they had been indifferent about providing housing for undocumented migrants, which prompted them to find a solution with the involvement of the municipalities. However, the author claims that the State party has since reneged on those commitments as the State Secretary has ordered the schemes referred to by the European Court of Human Rights to be closed.¹³ Therefore he cannot rely on the findings in the *Hunde* case to establish that there has not been a violation. The author also claims that such a reversal is contrary to Directive 2008/115/EC of the European Parliament and the Council of Europe of 16 December 2008, which requires that member States address the situation of third-country nationals who are staying illegally in their territory, but who cannot yet be removed. Insofar as there was no implementing legislation in place that could deal with basic living conditions, the author's situation could not have been solved. The author was obliged to file new requests for assistance and try to find new avenues for accommodation. However, this does not imply that he had not exhausted domestic remedies.

5.4 The author submits that he filed new applications to seek shelter following the Administrative High Court's decision of 26 November 2015, but he did not refer to the time that he spent in the Vluchtgarage in any of them; therefore they are not relevant to the present communication. He also submits that those applications do not alter the fact that the Administrative High Court decided that the situation in which he was obliged to live was not a violation of article 7 of the Covenant. The actions subsequently taken by the municipality resulted in the author's situation no longer being eligible for consideration under article 7.

5.5 The author further submits that, while the living conditions in the Vluchtgarage were the same as in the case of the applicant in *Hunde v. the Netherlands*, his circumstances were different. The author claims that he needed medical treatment, but that was not possible because of the living conditions in the Vluchtgarage.¹⁴ He asserts that he was only able to start the medical treatment, including a programme for alcohol addiction, after the scheme had been developed by the municipality. He states that his medical problems were known to the court and were attested to by his psychiatrist who, on 29 September 2015, stated that an abandoned parking garage was not a place to live in for someone with post-traumatic stress disorder, alcohol dependency and a depressive disorder. While the author admits that the national law provides for medical assistance to undocumented migrants in the Kingdom of the Netherlands, he claims that he was suffering from a situation that was rife with malnutrition, disease and violence in the Vluchtgarage. He claims that these factors contributed to the violation of article 7. When the municipal authority stepped in for the national authorities and offered shelter, the alleged violation ceased.

5.6 The author submits that, given the State party's reneging on its obligations, there is a renewed risk that, should the municipalities' shelters be closed, he would be left again in a destitute situation, in violation of article 7. The author therefore invites the Committee to decide in favour of the continuation of measures taken by the municipalities to prevent similar violations in the future.

State party's additional observations

6.1 On 28 September 2018, the State party submitted additional observations in which it reiterated its previous arguments regarding the inadmissibility of the communication and elaborated upon the facts and applicable domestic law and policy.

¹² European Court of Human Rights, *Hunde v. the Netherlands*, Application No. 17931/16, Judgment, 5 July 2016, para. 59.

¹³ The author refers to the correspondence, dated 21 November 2016 and addressed to the Parliament, in which the State Secretary states that he has put a hold on plans for setting up State-owned facilities and would immediately forbid all municipalities from offering support to undocumented migrants. The related documentation on file is in Dutch.

¹⁴ The author does not explain exactly why he could not start the programme in such living conditions.

6.2 In principle, the author claims that access to shelter in a freedom-restricting facility is not available to him unconditionally, and that his living conditions in the Vluchtgarage violated his rights under article 7 of the Covenant.

6.3 In the context of the legal framework of the Kingdom of the Netherlands, the right to social assistance is linked to lawful residence. Under the Social Support Act, aliens are eligible for individual services or benefits only if they are lawfully resident in the country. Aliens who are lawfully residing in the State party and awaiting a decision on their residence application are not denied social assistance or benefits. Although they cannot benefit from the regular social security system, alternative support is 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 monetary allowance and other financial assistance; they are also entitled to medical care.

6.4 In addition, the Kingdom of the Netherlands has a system for the reception and housing of current and former asylum-seekers, which ensures that no migrant is forced to live on the street. Besides providing a basic yet acceptable level of support, the system aims to ensure that asylum-seekers can participate in the asylum procedure or, if their application is denied, the return process. The same applies to persons who do not have an asylum-related background. The option of staying in a freedom-restricting facility is available to unlawful residents, provided that they are willing to cooperate in returning to their country of origin. In exceptional circumstances, for example, if it transpires that the persons concerned cannot be held responsible for their refusal to cooperate on account of their mental state, the condition of cooperation in departure may not be linked to the offer of accommodation. Unlawful residents have the right of access to medically necessary care.

6.5 As to the facts, the author entered the State party on an unknown date and is residing in the country unlawfully. Regarding his application for admission to the freedom-restricting facility, on 3 March 2017, the author spoke with two staff members of the Repatriation and Departure Service about admission to the facility and his willingness to cooperate in his return. The author indicated that he would actively cooperate to enable his return to Somalia. On the basis of this discussion, the State Secretary for Migration decided, on 13 July 2017, to revise the decision of 3 June 2016, and declared the author's objection to the earlier decision well founded. The author was notified that he would be admitted to the facility, and he responded on 8 August 2017.

6.6 On 24 October 2017, the District Court of The Hague heard the author's application for judicial review of the decisions of 3 June 2016 and 13 July 2017. The author argued before the court that it had not been made clear what conditions he would have to meet in order to have access to the State-run freedom-restricting facility. Therefore he did not report to the facility in Ter Apel to take up the place that he had been granted. He argued that he wanted access to the facility so that he could have accommodation and benefit from medical care for alcoholism, equivalent to that which he was receiving, at the time, from Jellinek (an institution offering a treatment programme for adults with addiction problems) in Amsterdam. According to the author, the access that he had been granted to the State-run facility did not include such care. By judgment of 5 December 2017, the District Court of The Hague declared the author's application for review of the 13 July 2017 decision inadmissible on the grounds of absence of interest in an assessment of the merits of the application. In the District Court's view, the conditions for admission to a State-run freedom-restricting facility were sufficiently clear. According to the court, the author failed to sufficiently establish that he had a direct, personal interest in a more detailed explanation of precisely what form his willingness to actively cooperate in his departure should take. The court notes that medically necessary care is available in the facility. Incidentally, the court did not mention that the care the author claimed to be in need of constituted medically necessary care. On 21 December 2017, the author filed an appeal against this judgment with the Administrative Jurisdiction Division of the Council of State. No judgment has yet been handed down on the appeal.

6.7 On 15 December 2017, the author requested the Government to place him in a protected living environment with a view to obtaining access to medical care. The Government informed the author on 2 January 2018 that he could apply to the municipality for access to a protected living environment and that medically necessary care was also available in the freedom-restricting facility. The author's objection to this decision was

declared unfounded on 24 May 2018. The author applied for review of this decision to the District Court of The Hague. No judgment has yet been handed down. As far as the State party knows, since 19 August 2015, the author has been staying in the Walborg, a bed, bath and bread shelter run by the municipality of Amsterdam. The shelter provides overnight accommodation, seven days a week, and is accessible from late afternoon to the following morning.

6.8 The State party reiterated its observations of 28 February 2017 on the admissibility of the communication. Regarding the author's claim of ill-treatment during the period that he spent in the Vluchtgarage, the State party argues that the communication is inadmissible because the author failed to exhaust domestic remedies in the procedures relating to access to a government-run shelter. This claim cannot be viewed separately from the other options of shelter offered by the Government, including the freedom-restricting facility. Such alternative options were available to the author, meaning that he was not obliged to stay in the Vluchtgarage. In addition, the State party argued that the author has failed to substantiate how his stay in the Vluchtgarage constituted a violation of article 7. The author did not sufficiently substantiate his claims under article 7 of the Covenant for the purpose of admissibility.

6.9 Furthermore, with regard to the merits, the State party argues that there has been no violation of article 7 of the Covenant and that the communication as a whole is unfounded. It observes that article 7 does not give rise to the right to shelter and/or social assistance for persons who are not lawfully resident in the Kingdom of the Netherlands. Moreover, the author's situation does not constitute a level of treatment that would amount to treatment prohibited under article 7. The State party observes that the author's basic needs and medical care are covered, in that he has access to accommodation in a freedom-restricting facility, where he would also have access to medical care. As the European Court of Human Rights indicated in *Hunde v. the Netherlands*, there are various ways in which an alien who is not lawfully residing in the country can get assistance and support.

Additional comments from the author

7.1 On 11 April 2020, the author's counsel submitted that the State party did not exclude that the lack of social assistance to aliens without a residence status might constitute cruel, inhumane or degrading treatment. At the same time, the State party questioned whether the author did, in fact, live in the Vluchtgarage. The author requested assistance from the Government in August and September 2014, and stated that he lived in that shelter. There was no reason to doubt that statement.

7.2 The State party has submitted that it was the voluntary decision of the author to live in degraded living conditions, as he had the option of entering a government-run freedom-restricting facility. The author disputes this argument because he did not have the option of entering such a facility as access was denied to him on 26 April 2016.

7.3 It was only on 13 July 2017 that the State Secretary decided that the author had demonstrated his willingness to cooperate in his departure and could be admitted to the government-run facility. However, the author did not accept this offer because he did not want to interrupt the treatment that he had already started in Amsterdam, and his medical doctor had advised him that a stay in the government-run facility would increase the chance of a relapse in his alcohol abuse and psychiatric conditions.

7.4 The State party responded that other facilities were available for vulnerable persons and to avoid medical emergencies. However, the author does not meet the criteria set forth in the Asylum Seekers and Other Categories of Aliens (Provision) Order, and his medical conditions do not constitute an emergency. Although some vulnerable persons residing unlawfully in the State party can claim such shelter, the author was not offered such an alternative to living in the Vluchtgarage.

7.5 The State party also referred to the no-fault residence policy. According to the country information on Somalia used by the State party's asylum authorities when evaluating asylum applications, return to all parts of Somalia is possible. Therefore, the author could not seek a no-fault residence permit in the State party.

7.6 The author argues that the State party has acknowledged that an alien might have to live in dire circumstances for a while, but seems to assume that this is not contrary to its treaty obligations because the situation can be addressed in court. The State party noted that the author has had access to a municipal shelter since 19 August 2015. Indeed, the City of Amsterdam decided to grant the author shelter, but it was not because of a legal remedy sought by the author. The author has no legally enforceable right to be sheltered by the municipality. The fact that the municipality decided to assist the author on 19 August 2015 does not annul the situation in which he was living before that.

7.7 The municipal shelter scheme was abolished on 1 July 2019. Shelter facilities are now part of the nationwide facilities for aliens (*landelijke vreemdelingen voorzieningen (LVV)*). This shelter scheme is run by several municipalities, but falls under the responsibility of the State Secretary, who sets the criteria for admission. Access to shelter in the facilities for aliens is dependent upon the alien's willingness to ultimately leave the country and is granted for a maximum period of 18 months.

7.8 The State party noted that the author has been eligible for necessary medical care at all times. On 13 December 2017, Jellinek – an institution that deals with addiction – reported that treatment for author's alcohol abuse and post-traumatic stress disorder had been completed. However, as the author did not have health insurance to cover the costs, he did not qualify for aftercare. Jellinek advised that he be offered 24-hour shelter with guidance and structure to prevent a relapse. Sheltered accommodation is provided under the Social Support Act. The Central Court of Appeal ruled on 18 March 2020 that the author could not claim assistance under the Social Support Act, because it was the responsibility of the State Secretary to guarantee the author's human rights.

7.9 The author has thus not been eligible for necessary medical aftercare. Indeed, his alcohol abuse has relapsed. As a result of this, the author was suspended from the municipal shelter facilities on 25 March 2019. Nonetheless, he was readmitted on 18 July 2019.

7.10 On 8 December 2020, the author submitted annexes to complement his comments of 11 April 2020, namely the decisions of the State Secretary of 13 July 2017 and the Central Court of Appeal of 18 March 2020, and the psychiatric report from Jellinek of 13 December 2017.

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 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

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 another procedure of international investigation or settlement.

8.3 The issue before the Committee is whether the lack of access to unconditional shelter for the author as an unlawful immigrant, and the living conditions during his stay in the Vluchtgarage, amounted to a violation of his rights under article 7 of the Covenant.

8.4 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.¹⁵ The Committee notes the State party's objection that the author has not exhausted all available remedies, given that, during the second set of proceedings, the author did not appeal the District Court's judgment of 17 July 2015, which

¹⁵ *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2; *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.2; *Gilberg v. Germany* (CCPR/C/87/D/1403/2005), para. 6.5; *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4; and *H.S. et al. v. Canada* (CCPR/C/125/D/2948/2017), para. 6.4. See also *B.P. and P.B. v. the Netherlands* (CCPR/C/128/D/2974/2017), para. 9.3.

denied him access to the freedom-restricting facility, and various avenues for seeking access to shelter and social assistance are interdependent. The Committee also notes the author's argument that he has lived as an unlawful immigrant in the State party since 1992, mostly on the streets; that he was declared an "unwanted alien" on 4 January 2010, which made him ineligible for asylum; that he preferred access to a municipal bed, bath and bread (*bed-bad-broodregeling (BBB)*) facility as it would not require him to cooperate in his removal to his country of origin; that he suffers from alcohol addiction and a generally fragile health condition; and that he accepted to be sheltered in the freedom-restricting (*vrijheidsbeperkende locatie (VBL)*) facility in 2019, but changed his mind as, ultimately, he prefers to stay in the State party, even if undocumented. The Committee observes that the author was initially denied shelter in the bed, bath and bread facility in 2014; that he has stayed in the municipal bed, bath and bread facility run by the City of Amsterdam since 19 August 2015; and that, while invoking article 7 claims before the domestic courts only indirectly, the Administrative High Court's judgment of 26 November 2015, which denied the author's application for community shelter as it had no obligation to assist the author, was final. The Committee considers that the author has exhausted all available domestic remedies in the first set of proceedings with regard to access to a bed, bath and bread facility and the living conditions in the Vluchtgarage. Accordingly, the Committee concludes that the examination of this part of the author's claim is not precluded by the requirements of article 5 (2) (b) of the Optional Protocol. However, the Committee notes the State party's argument that article 7 does not guarantee, as such, a right to shelter or social assistance and that it was the author's choice to stay in the Vluchtgarage, as he decided to decline the offer to stay in the government-run freedom-restricting facility. In this context, the State party requested the Committee to consider this part of the author's claim inadmissible for lack of sufficient substantiation. In the circumstances of the present case, the Committee considers that the author was not obliged to stay in the Vluchtgarage, which is operated as a non-State shelter, and that it was the author's choice to stay in substandard conditions for a limited period of time, and that he failed to substantiate how his stay in that shelter constituted a violation of article 7. The author was entitled to stay in the freedom-restricting facility with a higher standard of living but declined to accept that offer of accommodation because it required his cooperation in his return to the country of origin. Therefore, the Committee concludes that this part of the author's claim is inadmissible owing to insufficient substantiation under article 2 of the Optional Protocol.

8.5 Regarding the second set of proceedings, the Committee notes the State party's argument that the author could have accepted the offer to stay in the freedom-restricting facility since 13 October 2014, but he declined to do so to avoid removal; that he did not appeal the District Court's decision of inadmissibility of 17 July 2015, following which the applications for judicial review remained pending until 2019; and that he again refused access to the freedom-restricting facility, following the offer of 13 July 2017, subsequent to which his alcohol abuse relapsed. The Committee also notes that, while the author was suspended from the bed, bath and bread shelter on 25 March 2019, owing to alcohol abuse, he was readmitted on 18 July 2019. The Committee observes that the author did not pursue the available remedies to secure accommodation in the freedom-restricting (*vrijheidsbeperkende locatie (VBL)*) facility, under the State authority, with the same diligence as he did in relation to the bed, bath and bread (*bed-bad-broodregeling (BBB)*) shelter, under the municipal authority; and that he seems to have used the remedies selectively in order to regularize his stay in the State party. In the light of the above, the Committee considers this part of the author's claim, with regard to unconditional access to shelter, to be inadmissible owing to non-exhaustion of available domestic remedies, pursuant to article 5 (2) (b) of the Optional Protocol.

9. Accordingly, the Committee considers that the author has not exhausted all available domestic remedies and that the communication is insufficiently substantiated for the purposes of admissibility and declares it inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol.

10. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the author.

Annex

Individual opinion of Committee member H el ene Tigroudja (dissenting)

1. I disagree with the Committee’s finding that the present communication is inadmissible for lack of substantiation of the claims under article 7 of the Covenant and partial non-exhaustion of domestic remedies.

2. In this case, the Committee has ignored the regional and universal criticisms about the lack of policy and action by the State party with regard to the situation of undocumented and homeless migrants. On the contrary, the Committee has treated the complaint as if it were the choice of the author not to accept the offer of shelter made by the authorities (para. 8.4), thereby implicitly shifting the responsibility of his desperate situation to the author.

3. First of all, I would like to recall the report of the Commissioner for Human Rights of the Council of Europe following his visit to the State party in 2014:

As a result [of the Government’s policy on irregular migration], today an unidentified number of irregular immigrants end up in the streets in destitution. Some of them have been living for several years in legal limbo, particularly when they cannot be returned for whatever reason. In reaction, some of these immigrants have initiated protests and encampments in public places in order to make their living conditions and precarious status known to the general public with the hope that the Dutch authorities reconsider their policy or, at least, the situation of the most vulnerable irregular immigrants.¹

4. In its decision, the Committee did not consider the author’s special vulnerability, and its position is at odds not only with the above-mentioned report but also with the joint urgent appeal of three special rapporteurs² and with the decisions adopted by the European Committee on Social Rights concerning the Kingdom of the Netherlands in the same factual and legal contexts. In paragraph 8.4 of the present communication, the Committee implicitly endorsed the position of the State party that article 7 of the Covenant does not provide a legal basis for a right to a shelter. However, as clearly stressed by the European Committee on Social Rights, “the fact of living in a situation of poverty and social exclusion violates the dignity of human beings”.³ The author did not argue that article 7 provides a right to a shelter, but claimed that the living conditions in the Vluchtgarage were contrary to human dignity, which falls within the scope of the Covenant (see paras. 3.2 and 3.3 of the present communication).

5. The Committee dismissed the claim and treated the author’s situation as being his choice. This is highly problematic and contrary to the long-standing interpretation of the absolute nature of human dignity. As stated above, the Committee’s position overlooked the structural problem in the Kingdom of the Netherlands, and was also totally disconnected from international criticism and concerns about the State party’s policy on irregular migrants, which was the subject of the above-mentioned joint urgent appeal.

6. To assess whether living conditions in a certain location met the standards of human dignity, the Committee decided to frame it as a question of choice: the author was offered the possibility of staying elsewhere, but he decided to stay in that particular place, so the claims lack substantiation under article 7. The legal reasoning of the Committee is far from clear, and the lack of substantiation ground is not explained. Does it mean that, because the author

¹ CommDH(2014)18, para. 108.

² Special Rapporteur on extreme poverty and human rights, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, and Special Rapporteur on the human rights of migrants, joint urgent appeal to the Kingdom of the Netherlands, 12 December 2014.

³ European Committee on Social Rights, *FEANTSA v. the Netherlands*, Complaint No. 86/2012, Decision on the merits, 2 July 2014, para. 219.

decided to stay in this place, he lost his right to be protected by article 7 of the Covenant? Again, if so, it would be totally contrary to the interpretation of dignity as an absolute right.

7. In addition, if the argument that it was the author's choice is taken seriously – as it was by the Committee, what sort of choice does an undocumented migrant living in a situation of extreme poverty have? Endorsing the State party's narrative, which was severely criticized by three special rapporteurs, the European Committee on Social Rights and the Commissioner for Human Rights of the Council of Europe, the Committee considered that the author indeed had a choice whether or not to accept the offer that was made to him, namely shelter in a place with better living conditions than the Vluchtgarage, on condition of cooperation in his deportation.

8. Without opening a philosophical debate on the concept of liberty, I do not consider that as a free choice. From a human rights perspective, that is a breach of the enjoyment and exercise of a right that is supposed to be absolute: how can access to accommodation that would meet the standards protected under article 7 be conditioned by acceptance to be removed from the territory? I reiterate that this is contrary to the absolute and preemptory nature of article 7. I add that the fact that the Vluchtgarage was privately owned is irrelevant when dealing with States' obligations under article 7, as stressed by this Committee in its general comment No. 20 (1992) (para. 2).

9. Therefore, rejecting the State's narrative on the author's repeated refusals to accept its offers of shelter, I consider that the author's complaint raises important questions as to his dignity, and that it was well substantiated and submitted to the domestic authorities, who had the chance to fix a well-known and universally condemned policy, legislation and practices, but failed to do so. In my opinion, the communication should have been declared admissible, and the conclusion on its merits should have amounted to a violation of article 7.

10. In the regressive context of discrimination based on poverty and anti-migration policies and discourses, I consider this inadmissibility decision a missed opportunity for the Committee to recall the significance of the State's obligations under article 7 of the Covenant.
