

**Mandates of the Working Group of Experts on People of African Descent; and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance**

REFERENCE:  
AL NLD 1/2019

15 February 2019

Excellency,

We have the honour to address you in our capacities as Working Group of Experts on People of African Descent; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 36/23 and 34/35.

We have the honour to address you in our capacities as Working Group of Experts on People of African Descent; and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, pursuant to Human Rights Council resolutions 36/23 and 34/35. We write in response to your letter of 25 October 2018, responding to our initial communication of 21 September 2018 (ref. AL NLD 1/2018)<sup>1</sup> regarding the forcible removal and continued separation of seven children of African descent from their parents, Mr. Jude Kasangaki and Ms. Anita Mavita, refugees of African descent living in the Netherlands.

As an initial matter, we wish to thank the government of the Netherlands for its thorough and coordinated response and consideration, as well as its expressed serious attention to human rights complaints such as these. We write at this time to raise some matters unaddressed by your letter of 25 October and to clarify our mandates and standards in regard to issues raised within that communication.

The Appropriate Standard of Review

As the Dutch government notes, in response to these allegations, the involuntary removal of these children from their home was judicially authorized and extended. However, we wish to highlight an important distinction between mere authorization and meaningful oversight. In our mandates, we see that racial injustice often proceeds with the imprimatur of the courts and the law. In our initial communication, and in line with our mandates, we specifically requested information as to:

- (1) what checks on discretion and decision-making exist to ensure children are removed based solely on risk and not racial bias; and
- (2) what steps have been taken with respect to judicial and non-judicial officials in the child welfare system to ensure widespread understanding and prevention of racial discrimination.

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<sup>1</sup> <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24097>

In part, this reflects our concern that the legal process may be used, at times, to endorse or facilitate rather than to prevent, racial discrimination. Technical procedural legitimacy may not always guarantee or protect a substantive right, and we share the role and responsibility to promote and protect the substantive human rights of those under our jurisdictions.

In this case, significant indicia suggest judicial involvement in this case has been more like mere authorization than genuine oversight. The court refused the request to appoint a guardian *ad litem* or other counsel (*bijzondere bewaarder*) to ensure adequate consideration of the children's interests. Despite allegations of corporal punishment, no services or training or supervised visits have occurred to assist the parents in addressing parenting concerns – even given the court's mandate that services should have occurred months ago. In addition, the lack of visitation, the lack of adequate translation (including mis-identifying the relevant language), the lengthy interrogation of the children (spanning hours), the court's inability to proceed at times on procedural grounds, and the lack of a clear plan for reunification of this family all raise serious questions as to whether meaningful judicial involvement and oversight exists. In addition, there are ongoing cultural concerns, with respect to the children being barred from communicating with their parents in their own language, or accessing their culture that the supervising court has failed to protect.

Clearly, terminology like 'judicial oversight' ought to realize some minimum standards in its use and deployment. As important, the human rights frameworks should not facilitate *de facto* injustice via *de jure* legitimacy of process. Particularly as our mandates relate to racial justice and recognize the impact of historical racism on present-day institutions, the formal satisfaction of due process - even involving judicial intervention - may not be adequate where intervention takes the form of mere judicial authorization and consent, rather than meaningful judicial engagement, review and supervision. Here, we consider it specifically important to ensure the ways in which we define and articulate meaningful judicial intervention reflect minimum standards in our use of language, i.e., prevent language (or technical procedural legitimacy) to overwhelm or displace substantive human rights. We would welcome additional information that demonstrates the judicial intervention was meaningful and cognizant of the children's best interests, including in having access to their parents.

#### The Best Interests Standard

We note, with appreciation, the concern expressed by the Dutch government for the privacy of the children. However, we have an equal or greater concern for these children's psychological health, given the severe and ongoing trauma to which they have been subject directly as a result of this unnecessary forcible removal from their parents.

Firstly, it appears the court and/or child welfare authorities found imminent risk to the children due to allegations of corporal punishment in the home but has not construed the children's "best interests" to include mandatory, ongoing, and immediate services to

assist the parents in developing and perfecting appropriate parental behaviour. Habituating parents (particularly with different cultural contexts) to new disciplinary behaviours requires more support, intervention, and training to intact families under real-life conditions – not less (or nothing, as is the case here). Instead, it appears that all connection to these children’s parents and their culture has been severed traumatically.

Second, despite psychological protocols recognizing the vulnerability and suggestibility of children witnesses, the children were interviewed in school, over the course of hours, until they provided the answers the examiners were seeking. In contrast, the local family doctor found no evidence of abuse, maltreatment, or injury. Any social influence in questioning witnesses is traumatizing and renders subsequent information unreliable.

Third, the children were forcibly removed from their parents and it appears that the state has allowed no visitation, supervised or unsupervised, between the parents and their children in the months since the removal (and only scant visitation among the siblings). Claims that the children are declining to see their parents have even been applied to the youngest child, a toddler who was a breastfeeding infant at the time of removal, and have disregarded the predictable anger and abandonment children feel when deprived of their parents irrespective of the fact the removal was involuntary. Apparently, there has also been no reunification planning – specifically, the parents do not have a clear plan with specific steps to regain custody of their children agreed to by the state.

While allegations of corporal punishment in the home appear to have prompted the removal, it is less clear what factors, if any, justify the wholesale deprivation of these children from their parents and their cultural connection to their place of origin. Reportedly, one of the children emailed the Court to request *daily* visits with her parents. Clearly, child welfare officials should have set adequate conditions to permit the children to interact with their parents in supervised or unsupervised visitation settings, but it is alleged that no such visitation planning has taken place. Apparently the child welfare authority and the court oppose visitation in advance of evaluations of the children for trauma – although the children have not been permitted to see their parents in months and have endured *de novo* trauma *per se* – in the removal and deprivation of their parents and siblings. Similarly situated children often experience anger and abandonment at their parents, even where their parents lacked agency or influence to reunite their family, *i.e.*, trauma that interferes with assessment of historical trauma related to corporal punishment.

Fourth, throughout the period of this removal, it also appears that the children have been placed in homes that do not permit the use of their native language, Luganda, and instead require that they speak only Dutch. While a demand for assimilation may be well-intended, the denial of language is a denial of culture, family, and familiarity to children who have already endured significant risk and danger to escape violence in their original homeland. Cultural erasure is both an act of violence and contrary to any child’s best interests.

The predictable psychological trauma attendant to the complete severing of the bond between parent and child and cultural erasure (including language, community, foods, and norms) cannot be overstated. It is difficult to imagine the circumstances that could warrant such extreme efforts and the basis to avoid mitigating efforts, including visitation and the provision of services to promote family reunification. Nor, according to our information, is this an ordinary and usual occurrence for Dutch families in the child protection system. Of course, these children are entitled to have their best interests adhered to by all parties, and that includes rights to be free from racial discrimination as well as rights to their culture and their parents, as is indicated by the Convention on the Rights of the Child.

As requested in our previous communication, we would ask the Dutch government to provide information as to what steps have been taken to ensure checks on discretion and decision-making that may be subject to racial bias (as well as to acknowledge and investigate the possibility of racial bias in child welfare decision-making). In addition, what steps have been taken to ensure sufficient understanding of non-discrimination and the best interests of the child, as well as a primary duty to prohibit racial discrimination by judges and child welfare personnel in the Netherlands?

#### Systemic Bias and Racial Discrimination

We also note the assertion in the Dutch response that there are no indications that the Dutch child protection system is racially discriminatory and that adequate controls and protections exist to ensure there is no discrimination in individual cases. This is contrary to the information we have received and fails to respond to a central concern of our initial allegation letter. Specifically, we have received information that parents of African descent are more likely to be reported, investigated, and deprived of their children within the Dutch child protection system. Even after removal, we understand that (white) Dutch families have greater access to their children, routine visitation, no language restrictions, and that police are not routinely deployed in courts and meetings. In addition, it appears that white Dutch families receive services to promote reunification more frequently and that the child protection system makes better efforts to reunify these families.

If, as the Dutch response suggests, this systemic bias may occur unintentionally or unknowingly by the child welfare professionals, it is particularly important to ensure that adequate checks on discretion and subjective decision-making exist to protect children and parents from racial bias. In this case particularly, the fact that child welfare personnel felt the need to have police present at all interactions with the parents suggests preconceived conclusions about these parents' fitness, compliance with authority.

We would ask to be provided with data or information (de-identified data is acceptable) that examines whether there is a racial disparity in treatment within the child protection system. Specifically, we would like a greater understanding of the number of parents of African descent (a) reported, (b) investigated, and (c) subject to child removals in the Dutch system, as well as (d) allowances of visitation (supervised or unsupervised),

(e) family reunification efforts (counselling, services, and other efforts at assistance after removals), (f) routine use of police in meetings and court appearances, and (g) eventual reunifications of parents and children - as compared to the overall numbers for all parents involved in the system. ***If these data are unavailable disaggregated by race, providing this information organized by national origin, citizenship, or other relevant criteria may offer a proxy in this context in the meantime.*** We would welcome either snapshot of data (e.g., at the current time) or ongoing data throughout the relevant period.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting website. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Michal Balcerzak  
Chair-Rapporteur of the Working Group of Experts on People of African Descent

E. Tendayi Achiume  
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia  
and related intolerance