HUMAN RIGHTS COMMITTEE

Toala et al v. New Zealand

Communication No. 675/1995

10 July 1998

CCPR/C/63/D/675/1995 *

ADMISSIBILITY

Submitted by: Toala and Tofaeono et al (represented by Olinda Woodroffe of Woodroffe & Keil a law firm from Auckland, New Zealand)

Alleged victim: The author and his family

State party: New Zealand

Date of communication: 19 October 1995

Date of present decision: 10 July 1998

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The authors of the communication are Mr. Simalae Toala, Mrs. Fa'ai'u Toala, and their adopted child, Eka Toala, born in 1984, Mr. Pita Fata Misa Pitoau Tofaeono and Mrs. Anovale Tofaeono, all currently residing in New Zealand. The authors claim to be victims of violations by New Zealand of articles 2 (1), 2 (3), 12 (4), 14 (3), 17 and 26 of the International Covenant on Civil and Political Rights. They are represented Mrs. Olinda Woodroffe, of the New Zealand law firm, Woodroffe & Keil.

The facts submitted by the authors

2.1 The authors were all born in Western Samoa: Mr. Toala was born in 1932, Mrs. Toala in 1934, and their adopted child, Eka Toala, in 1984 1/, Mr. Tofaeono in 1934 and Mrs. Tofaeono in 1933. The families are currently residing in New Zealand, where deportation orders were recently issued against them. The families have gone into hiding in New Zealand, so as to avoid deportation. The

authors claim that they are New Zealand citizens, and that the acts of the New Zealand Government which seek to remove them from New Zealand violate the Covenant.

2.2 Mr. Toala arrived in New Zealand in January 1979, and was granted a visitor's permit. He returned to Western Samoa in July 1979. In March 1980, he was convicted of the offence of "carnal knowledge" in Western Samoa, and sentenced to two years' imprisonment. He served nine months and was then released. He again entered New Zealand in December 1986, and applied on several occasions for a permanent residence permit; his applications were denied. In March 1992, a deportation order was issued against him in New Zealand, pursuant to the provisions of the New Zealand Immigration Act of 1987 (as amended). He appealed this order in April 1992, invoking humanitarian reasons. In August 1993, his appeal was dismissed by the Removal Review Authority, and he went into hiding so as to avoid deportation.

2.3 Mrs. Toala arrived in New Zealand in June 1986 and was granted a visitor's permit which expired in September 1989. She applied several times for permanent residence status. Of her eight children three are New Zealand citizens and four have permanent residence status in New Zealand. Deportation orders were issued against her and her adopted son in April 1992. She appealed the orders in May 1992, on her own and her son's behalf, invoking humanitarian reasons. In August 1993, the appeal was dismissed by the Removal Review Authority. It is stated that Mrs. Toala has been informed that she cannot stay in New Zealand because of her husband's conviction in Western Samoa. Mrs. Toala and her son have also gone into hiding to avoid deportation.

2.4 Mr. and Mrs. Tofaeono arrived in New Zealand in May 1993, and were granted residence permits valid until June 1995. They have 10 children, give of whom are residing lawfully in New Zealand. It is stated that Mr and Mrs. Tofaeono qualify for "family reunion" status in New Zealand but that they have been denied this status for alleged health problems 2/. The couple has appealed the deportation order issued against them to the Removal Review Authority. At the time of submission of the communication the case had not yet been decided by the authorities.

2.5 The authors claim that they are New Zealand citizens pursuant to the decision of the Judicial Committee of the Privy Council in Lesa v. the Attorney-General of New Zealand [1983] 2 A.C. 20 3/. In this case, the Privy Council held that by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, persons born in Western Samoa between 13 May 1924 and 1 January 1949 (and their descendants) are New Zealand citizens.

2.6 Section 7 (1) of the 1928 Act states: "Subject to the provisions of this section, this Act shall apply to the Cook Islands and to the Western Samoa in the same manner in all respects as if those territories were for all purposes part of New Zealand; the term "New Zealand" as used in this Act shall, both in New Zealand and in the said territories respectively, be construed accordingly as including the Cook Islands and Western Samoa." The Privy Council held in the "Lesa" case that: "... there is no escaping that section 7 (1) ... means what it ... says: a person born [between 13 May 1924 and 1 January 1949] or resident in Western Samoa is to be treated in the same manner in all respects for all the purposes of the Act of 1928 as if he had been born or resident in New Zealand proper". The Privy Council held that the applicant, Ms. Lesa, on her birth in Western Samoa in 1946, had become a British subject and was entitled to a declaration to that effect.

2.7 The decision of the Privy Council in this case concerned the old status of recognition as a natural-born British subject. Between 1948 and 1977, any New Zealander had the status of British National and New Zealand citizen. The modern status of New Zealand citizens, i.e. New Zealand citizenship alone without the addition of "British National" came into force in 1977.

2.8 The authors invoke historical grounds in support of the Privy Council's interpretation of the 1928 Act in the Lesa case; they claim that Western Samoans were considered to be natural-born British subjects at the time of the adoption of the Act. In this context, they quote Sir Francis Bell, then the leader of the Legislative Council in New Zealand: "... [Samoans] are subjects within the sovereignty of His Majesty now and are as much British subjects as anybody". The authors also refer to the British Nationality and Status of Aliens (in New Zealand) Act of 1923, which was virtually identical to the 1928 Act, and state that these acts were regarded as ratifying a situation that already existed. Furthermore, the authors contend that "no one in New Zealand today" denies that Cook Islanders are New Zealand citizens, and contend that this buttresses their claim, as no different treatment was envisaged as regards the Cook Islands and Western Samoa in the 1928 Act.

2.9 It is stated that there was considerable adverse reaction in New Zealand to the Lesa judgment, which was delivered by the Privy Council in July 1982. It was estimated that some 100, 000 Samoans out of a total population of 160,000 would be affected by the decision.

2.10 The response of the New Zealand Government was to negotiate a Protocol to the Treaty of Friendship between New Zealand and Western Samoa. The Protocol was ratified on 13 September 1982 by the two parties. Within one month, the New Zealand Government passed into law the Citizenship (Western Samoa) Act of 1982, which gave effect to the Protocol in New Zealand, and nullified the effect of the "Lesa" decision, except for Ms. Lesa herself and a very limited number of persons.

The complaint

3.1 The authors claim that the Citizenship (Western Samoa) Act 1982 has created a situation of mass denationalization of about 100,000 Samoans, in violation of articles 12, paragraph 4, and 26 of the Covenant, and denies them their lawful New Zealand citizenship.

3.2 The authors claim that the 1982 Protocol is void under article 53 of the Vienna Convention on the Law of Treaties, to the extent that it authorizes the enactment of the 1982 Act, because it violates a norm of jus cogens, insofar as it allows New Zealand to practice racial discrimination against Samoans.

3.3 In this context, the authors refer to statements made by the New Zealand Human Rights Commission in 1982, to the effect that "the Human Rights Commission considers that the Citizenship (Western Samoa) Bill involves the denial of basic human rights in that it seeks to deprive a particular group of New Zealanders of their citizenship on the basis that they are Polynesians of Samoan descent. ... The Bill as it stands has an unfortunate racist implication. ... There appears to be a confusion between the principle of citizenship rights, and the practical consequences of large-scale entry of people from Western Samoa...".

3.4 The authors furthermore invoke the parliamentary debates which preceded the adoption of the 1982 Act in support of their claim that the Act has racist implications. They quote from the debates: "... We have many other citizens with dual citizenship, I would say, the greatest number being from the U.K. ... almost all the people to whom the Bill relates are nonwhites." and: "The Human Rights Commission drew attention to article 12 of the International Covenant on Civil and Political Rights. That Covenant provides that no person shall be arbitrarily deprived of the right to enter his own country. I should be surprised if New Zealand were not in breach of that right in refusing to allow free entry to New Zealand of Western Samoans deemed to be, and always to have been, New Zealand citizens."

3.5 The authors also refer to a statement of the Chief Justice of New Zealand, Justice Ryan: 4/ [The legislation] clearly discriminates against persons who were declared by the highest New Zealand Court to be citizens of New Zealand." The authors further invoke the discussion concerning New Zealand's Initial Report to the Human Rights Committee dated 11 January 1982, where the representatives of the state, in connection with the Lesa case referred, inter alia, to the Mandate created by the League of Nations. They note that it was declared that the inhabitants of mandated territories could not become citizens of the State which administered the Mandate.

3.6 The authors have close ties to New Zealand in that both families have part of their children living in New Zealand. Mr. and Mrs. Toala have eight children, three are New Zealand citizens and four have permanent residence status in New Zealand. Mr and Mrs Tofaeono have ten children of which five are living in New Zealand. Both are close-knit families. Counsel claims that the denial of citizenship to the authors constitutes a violation of their right to family reunification under article 17 of the Covenant.

3.7 Concerning the requirement of exhaustion of domestic remedies the authors claim that there is no remedy available in New Zealand to someone whose rights have been infringed by Statutes which violate or are said to violate the Covenant. A Statute duly enacted by Parliament cannot be declared invalid by any New Zealand Court or other tribunal. The authors refer to the New Zealand Bill of Rights Act 1990, where it is stated that "[N]o court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) Hold any provision of the enactment to be implied repealed or revoked, or to be in any way invalid or effective; or (b) Decline to apply any provisions of the enactment - by reasons only that the provisions are inconsistent with any provisions of this Bill of Rights." The authors contend that this section has been interpreted as meaning that any statute, whether enacted before or after the passage of the Bill of Rights Act 1990, shall be superior to that Act. Since there are references, in the title of the Bill of Rights Act, to "New Zealand's commitment to the International Covenant on Civil and Political Rights", any statute (whether enacted before or after the Bill of Rights Act 1990) has precedence over any Covenant protection as reflected in the Bill of Rights Act 1990.

3.8 The authors claim that since there are no domestic remedies to exhaust where an author is aggrieved by a Statute which violates the Covenant, the State party has violated article 2 (3) of the Covenant.

3.9 Furthermore, the authors claim that the fact that there is no provision for legal aid for the preparation of communications to the Human Rights Committee, under the New Zealand Legal

Services Act of 1991, amounts to the violation of article 14, paragraph 3 (d), of the Covenant

3.10 Finally, the authors request the Committee to adopt interim measures of protection so as to prevent irreparable damage, and, in particular, to request the New Zealand Government not to take any steps to deport the authors, pending the Committee's determination of the merits of the communication.

State party's comments and counsel's observation thereon

4.1 In a submission dated 6 June 1996, the State party contends that the communication should be declared inadmissible for non exhaustion of domestic remedies. It contends that Mr Toala, his wife and son have indicated their intention to apply to the Courts to seek judicial review of the removal orders, while the other two authors Mr. and Mrs. Tofaeono are engaged in domestic proceedings. With respect to the allegation made by the authors that there are no domestic remedies available to them in violation of the Covenant the State party contends that the reason the authors can find no remedies available for their claims is because these do not fall within the scope of the Covenant, rather than because New Zealand does not provide remedies for possible violations of the Covenant.

4.2 The State party contends that the communication should be declared inadmissible ratione temporis since the Optional Protocol came into force for New Zealand on 26 August 1989 and the events complained of by the authors occurred in 1982. It further contends that the only circumstances under which the Committee would be competent to consider this case would be if there were continuing effects, which in themselves constituted a violation of the Covenant, the State party categorically denies that continuing effects exist.

4.3 The State party further contends that the communication should also be declared inadmissible ratione materiae as incompatible with the provisions of the Covenant. With respect to the allegations under article 12, paragraph 4 of the Covenant, the State party contends, that the authors complaint is in fact a challenge to the non concession of a residence permit the authors to stay in New Zealand and the deportation order, but instead of this what the authors have done is to challenge the 1982 Act. The State party rejects that the authors have in any way been deprived of the possibility to enter their own country since they have always been Western Samoans and they have no restriction to enter Western Samoa.

4.4 With respect to the allegation of a violation of article 17 and the right to family life in the cases of Mr. and Mrs. Toala and their son, the State party notes that indeed it did take into consideration, family issues, when deciding on the authors' application for residency. However as the principal applicant was a prohibited migrant, residency was denied to the family.

4.5 With respect to the allegation of violation of article 14, paragraph 3, of the Covenant in respect of the failure of the State party to provide legal aid to pursue their claim before the Human Rights Committee, the State party notes that article 14, paragraph 3, refers to criminal charges only. Furthermore, there is no requirement under the Optional Protocol or its rules of procedure for the provision of legal aid to a communicant.

4.6 With respect to the discrimination claim on the basis of race in violation of articles 26 juncto

article 2, paragraph 1, of the Covenant because the 1982 Act only applied to Western Samoans, the State party points out that the Act was enacted to resolve the anomaly in New Zealand legislation revealed by the Privy Council in the Lesa decision, related solely to individuals born in Western Samoa between 1924 and 1949. The State party holds that, had the Privy Council found that some other group of people with no genuine and effective link with New Zealand, also inadvertently been given the status of New Zealand citizens, they too would have been treated in the same manner.

5. Counsel reiterates the claims submitted in the original communication regarding denial of access to their own country, deprivation of citizenship, discrimination with regard to obtaining a possible residence permit and the denial of the right to family reunion.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 With regard to the allegation that the authors have been denied a fair trial, in violation of article 14, paragraph 3, since New Zealand does not make legal aid available in order to submit a communication to the Human Rights Committee, the Committee notes that article 14 refers to domestic procedures only and there is no separate provision in the Covenant or the Optional Protocol dealing with the obligation to provide legal aid to complainants under the Optional Protocol. In the instant case the Committee considers that the authors have no claim under article 3 of the Optional Protocol, and accordingly this part of the communication is inadmissible.

6.3 The authors claim that they are, pursuant to the Lesa ruling, New Zealand citizens and consequently, have the right to freely enter and reside in New Zealand territory, despite the 1982 Act which stripped them of their New Zealand citizenship. The legislation in question was enacted in 1982 after New Zealand had ratified the International Covenant on Civil and Political Rights, but before it ratified the Optional Protocol in 1989. The Committee considers, however, that the legislation in question may have continuing effects which in themselves could constitute a violation under article 12, paragraph 4, of the Covenant. The issue of whether these continuing effects are in violation of the Covenant is one which should be examined on the merits. The Committee considers therefore that it is not precluded ratione temporis from declaring the communication admissible.

6.4 With respect to the authors' claims under articles 17 and 26 of the Covenant, that they have a right to remain in New Zealand despite the deportation orders and a right to family reunification without discrimination, the Committee notes the State party's contention that the communication should be declared inadmissible for non exhaustion of domestic remedies. It is not apparent to the Committee that any remedies that might still be available to the authors would be effective to prevent their deportation. These claims therefore, may raise issues under article 17 and 26 of the Covenant as well as under article 23, which should be considered on the merits. They may also raise issues under article 16 of the Covenant in respect of Mrs. Toala and her son, Eka Toala since they were not treated as persons in their own right but rather as addenda to Mr. Toala who was considered a prohibited migrant, for a criminal offence in Western Samoa; these issues should be

considered on the merits. The Committee does not find itself precluded from considering the communication under article 5, paragraph 2 (b) of the Optional Protocol.

7. The Committee therefore decides:

(a) that the communication is admissible;

(b) that the State party and the authors counsel are requested to inform the Committee whether any remedies that might be or have been available to the authors would have suspensive effects in respect to their deportation

(c) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(d) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the author, with the request that any comments which she may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(e) that this decision shall be communicated to the State party and the authors and to their counsel.

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*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ It is stated that Eka Toala is adopted by Mr. and Mrs. Toala, and as a descendent to them entitled to all rights that they are entitled to; reference is made to the New Zealand Adoption Act 1955, Section 16 (2): "The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock."

2/ A copy of a letter from the New Zealand Immigration Service, Department of Labour, of 10 April 1995, addressed to Mr. and Mrs. Tofaeono, is enclosed, where it is stated, inter alia: "... to be accepted for Residence in New Zealand, you must be in good health. ... You both have a number of health problems, including enlarged hearts, which together with your excess weight, means that you are at risk of heart failure. We can consider a waiver of the medical requirements, if an applicant can show that they hae exceptional humanitarian circumstances. ... I could not find that you had exceptional humanitarian circumstances of such a degree that you would suffer serious emotional or physical harm if you returned to Western Samoa." In an annex to the State party submission, dated 6 June 1996, a further justification is presented that "both were considered obese with a Body mass Index (Zuetelt) of over 40".

3/ Judgement delivered on 28 July 1982. A copy of the decision is kept in the case file.

4/ Constitutional Reference: In re: Application by Father Ioane Vito and Others [1988], S.P.L. R. 429 at 435. A copy is kept in the case file.