



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Ninety-third session
7 July -25 July 2008

DECISION

Communication No. 1494/2006

Submitted by: Ms. Arusjak Chadzjian (represented by counsel,
Mr. Michel Arnold Collet)

Alleged victims: Arusjak Chadzjian and her children, Sarine,
Meline and Edgar Barsegian

State party: The Netherlands

Date of communication: 20 July 2006 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted
to the State party on 3 October 2006 (not issued
in document form)

Date of adoption of Decision: 22 July 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Deportation to Armenia

Substantive issues: Right not to be subjected to cruel, inhuman or degrading treatment or punishment – Right to a fair and public hearing by an independent and impartial tribunal Right not to be subjected to arbitrary or unlawful interference with one's privacy – Protection of the family- Right of the child to protection

Procedural issues: Substantiation – Exhaustion of domestic remedies

Articles of the Covenant: 7; 14; 17; 23 and 24

Articles of the Optional Protocol: 2; 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-third session

concerning

Communication No. 1494/2006*

<u>Submitted by:</u>	Ms. Arusjak Chadzjian (represented by counsel, Mr. Michel Arnold Collet)
<u>Alleged victim:</u>	Arusjak Chadzjian and her children, Sarine, Meline and Edgar Barsegian
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	20 July 2006 (initial submission)

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

Meeting on 22 July 2008,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Arusjak Chadzjian, an Armenian national, born on 1 August 1955, who has submitted the communication on her own behalf and on behalf of her children, Sarine, Meline and Edgar Barsegian born in 1989, 1990 and 1993, respectively. She claims that her deportation to Armenia with her children would violate their rights under articles 7, 14, 17, 23 and 24 of the International Covenant on Civil and Political Rights. The author is represented by counsel, Mr. Michel Arnold Collet.

1.2 On 12 December 2006, the Special Rapporteur for New Communications, acting on behalf of the Committee, confirmed to the State party that the admissibility of this case would not be considered separately from the merits.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

The facts as presented by the author

2.1 The author's husband, Zjora Basegian, born on 8 December 1950, had actively participated in the Nagorno-Karabakh conflict. After the conflict, foreign aid did not reach the local people and was diverted by the local authorities. The author's husband, together with two friends and a Member of Parliament, Armenak Armenakian, wrote letters to foreign aid

agencies claiming that aid was being used for private matters by Parliament. Armenak Armenakian was shot dead on 27 October 1999 together with several other members of Parliament.

2.2 The author's husband was continuously harassed by "henchmen" of President Kotsjarian, but continued to make similar claims in letters to foreign aid agencies. On 24 May 2002, the author's husband came back home from work, took some documents and left the house, saying that he would be gone for two days. A couple of hours later, two men came to the house looking for him and left. They came back the next day and assaulted the author. They searched the house and found a letter which they took. They also threatened to kill her. From several remarks made by the men, the author concluded that they were President Kotsjarian's "henchmen". They took the author to the police station where she was accused of having collaborated with her husband by writing the letter in question. She was assaulted, threatened and raped by the two men.

2.3 On 28 May 2002, some friends of the author's husband came to pick her up at the police station and told her that her husband had been killed the day before and that their house had been set on fire. Together with her children and these friends, the author left the country on the same day. On 6 June 2002, she and her children arrived in the Netherlands where she reported to the authorities.

2.4 On 13 June 2002, the author and her children applied for asylum. On 17 September 2002, the Immigration and Naturalisation Department (IND) rejected the application. On 10 October 2002, the author appealed and the IND decision was withdrawn on 14 August 2003. The Dutch Foreign Affairs Department issued a report on the author's case on 19 March 2003. On 13 May 2004, the IND issued a second negative decision on the author's application. On 4 June 2004, the author appealed the decision and on 25 August 2005, the Court of The Hague residing in Groningen rejected her appeal. The author appealed the decision and on 18 January 2006, the Council of State, the highest court in immigration affairs, rejected her appeal.

The Complaint

3.1 The author argues that the IND decision is solely based on the report of the Foreign Ministry and the lack of identity papers. This led the IND to conclude that the author's account was not credible and to dismiss the application without examining the merits. She refers to a case in which the European Court of Human Rights ruled on admissibility that an account of an asylum seeker cannot immediately be deemed as unbelievable if the story at first hand seems logical¹. Subsequently, the European Court found on the merits² a violation of article 3 of the

¹ See *Said against the Netherlands*, application No. 2345/02, decision of 5 October 2004

² See *Said against the Netherlands*, application No. 2345/02, judgment of 5 July 2005, at para. 51

European Convention of Human Rights which is, according to the author, comparable to article 7 of the Covenant. She argues that sending her and her children back to Armenia would constitute a violation of article 7 of the Covenant. She further claims that sending them back would also constitute a violation of article 23, as the State party would violate its duty to protect family life. It would further also constitute an interference with the private life of the family and constitute a violation of article 17.

3.2 The author further claims a violation of article 14, because the IND decision was mostly based on the report of the Foreign Ministry, which is considered as an expert opinion. Details of the individuals who provided the information for the report are kept confidential, which the author regards as understandable, but leads to an unfair situation, as the author cannot challenge the credibility of the report. The IND simply sent a letter on 25 March 2004 to the Foreign Ministry, stating that it had seen the background information which forms the basis of the report, and concluded that the preparation of the report had been correct and just. This statement cannot be verified since the background information is not available publicly. There is no remedy and the author has not had a “fair trial”. According to the author, the report is based on statements made by “(scared) inhabitants of the area and of a Government agency that is part of a regime of which Chadzjian fled from in the first place” (sic).

3.3 Finally, the author claims a violation of article 24. Her children are young and they have been living in the Netherlands for four years, have learnt Dutch and are integrated into Dutch society. They have no close connection with Armenia. Sending them back would not be in their best interests. According to the author, this has not been taken into account by the IND.

Additional information from the author

4. The author submitted medical evidence on 26 July 2006 from a doctor and a psychologist. The doctor’s medical report, dated 28 November 2005, concluded that the author needs medical treatment which is very unlikely to be found in Armenia and that, apart from her fear of death, it is anticipated that her health will deteriorate rapidly after a forced return. The psychiatric report, dated 6 July 2005, states that the author is suffering from post-traumatic stress disorder (PTSD) because of what happened to her in Armenia, but also because of the anxiety linked to her impending expulsion.

State party’s observations on admissibility and merits

5.1 On 1 December 2006, the State party challenged the admissibility of the communication. With regard to the allegations in respect of article 7, that the Dutch authorities were wrong in failing to examine the author’s asylum application on its merits because they deemed it to be implausible, and with regard to the alleged violation of article 14, the State party argues that the Dutch authorities carefully investigated the author’s asylum application. Her account in support of her asylum application was heard twice on 13 June 2002 and 8 July 2002. An investigation in Armenia was initiated by the Ministry of Foreign Affairs on the basis of the author’s statements, the results of which are set out in the report itself. The State party contends that it was only after a careful investigation that the author’s account was declared implausible, the author having failed to provide any documentation substantiating her identity, her nationality or her reasons for requesting asylum. There was therefore no reason to examine the merits of the application. The State party further contends that the European Court of Human Rights’ findings in the case of

Said v. the Netherlands does not suggest otherwise. In this case, the European Court took into account the author's persuasive argument rebutting the Government's claim that his account lacked credibility³. No comparable situation exists in the case under consideration. The official report indicates that the investigation in Armenia found no evidence to support the author's account, including her claims that her house had burnt down, and that neither the authorities nor her alleged neighbours knew of anyone of her identity at the home address she gave. The State party adds that the author did not provide any objective evidence that the information in the official report was unreliable. In light of the above, the author's claims under article 7 and 14 are inadmissible on the grounds that they are not sufficiently substantiated.

5.2 With regard to the alleged violation of article 14, the State party further points out that the author was given, at her request, copies of the documents underlying the official report. Information concerning the sources and methods of investigation were omitted pursuant to a decision taken in conformity with section 10, subsection 2 of the Government Information (Public Access) Act, which allows information to be withheld for various reasons, including protection of sources and of investigative methods and techniques. The State party notes that the author did not exercise her right to ask an independent court to assess the legitimacy of the decision to withhold information concerning investigative sources and methods. It therefore concludes that the author failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b) of the Optional Protocol.

5.3 The State party takes note of the additional information provided by the author on 26 July 2006, by which the author claims that she requires medical treatment unlikely to be available in Armenia, and that her health will deteriorate rapidly without such medication. It interprets this as a claim that due to the author's medical condition, there is a real risk that her rights under article 7 will be violated if she is forcibly expelled to Armenia. With regard to this claim, as well as the claims under articles 17 and 23, the State party notes that the author has not brought any of these matters before the domestic courts and that, as a consequence, the State party was denied the opportunity to respond to them. The State party concludes therefore that these aspects of the communication are inadmissible under article 5, paragraph 2 (b) of the Optional Protocol for non-exhaustion of domestic remedies.

5.4 Similarly, the State party submits that the claims under article 24 were not brought before the domestic courts. The author's only contention during the domestic proceedings was that by finding her account of events implausible and thus not evaluating it on the merits, the Dutch authorities risk exposing her children to danger in Armenia. These claims are therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust domestic remedies.

5.5 In its observations dated 27 March 2007, the State party indicated that its observations on admissibility may be regarded as equally pertaining to the merits of the communication.

Author's comments on the State party's submissions on admissibility and merits

6.1 In her comments dated 2 May 2007, the author responds to some aspects of the State party's submissions. She reiterates that she had to flee Armenia with her children after her

³ Application No. 2345/05, para. 51

husband and the father of her children was shot dead and their house burn down by the Armenian authorities. This explains why she arrived without her documents. The explanation why no-one in the neighborhood, nor the Armenian authorities, said anything to the Dutch authorities investigating the case in Armenia can be explained by the author's and her children's background, as associated with her husbands political activities. She further contends that by applying Dutch standards to this investigation, the State party arrived at the wrong conclusions. Those conclusions, which were used to deny the author a decision on the merits of her asylum claim, will lead to a violation of article 7 should the author and her children be returned to Armenia.

6.2 Regarding the State party's argument that the author did not take advantage of the opportunity to ask an independent court to assess the legitimacy of the decision to withhold information concerning investigative sources and methods, the author submits that this procedure would not be effective, as there is no possibility for an asylum seeker to obtain more information. The author further submits that asylum proceedings, in which the investigation conducted by Dutch authorities in Armenia played an important role, have been exhausted which, by itself, is enough for admissibility of the communication.

6.3 In support of her claim under article 24, the author reiterates that sending her children back to Armenia would put them in danger. She claims that she raised this argument several times throughout the proceedings, and refers to the Committee's jurisprudence in which it held that the children's interests were of primary importance⁴.

Additional submissions by the author

7.1 On 7 February 2008, the author provided the Committee with a summary of the Dutch ombudsman's report concerning reports by the Ministry of Foreign Affairs based on investigations conducted in the countries of origin of asylum seekers. According to the ombudsman's report, the reliability of these investigations has decreased and it is unrealistic to expect from people interrogated that they will report what they know since those people are enemies of the state they still live in. The author argues therefore that the State party's authorities should not have based their decision not to examine the author's asylum claim on the merits on such unreliable investigations.

7.2 By letter of 18 February 2008, the author submitted drawings by her children, which she claims represents in detail the neighbourhood they used to live in Armenia. She argues that those maps establish the veracity of her account and that, combined with the information provided on 7 February 2008, demonstrate that the investigation carried out by the State party's authorities are not trustworthy.

⁴ See Communication No. 930/2000, *Hendrick Winata and So Lan Li v. Australia*, views adopted on 16 August 2001, at para. 7.3; Communication No. 1069/2002, *Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v. Australia*, views adopted on 6 November 2003, at para. 5.15 and 9.7

Issues and proceedings before the Committee

8.1 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.

8.2 The Committee notes that the State party challenges the admissibility of the entire communication. With regard to the author's claim under article 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering another country by way of their extradition, expulsion or refoulement⁵. It notes that the IND considered and rejected the author's asylum application for lack of credibility on two occasions, on the second occasion after having received the findings of an investigation that its authorities had undertaken in Armenia itself. It further notes that the author's appeal was considered and rejected by the Court of the Hague residing in Groningen and then subsequently rejected by the "Raad van State", the Highest Administrative Court of the Netherlands. The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice⁶. It also recalls that the same jurisprudence has been applied to removal proceedings⁷. The material before the Committee is insufficient to show that the proceedings before the authorities in the State party suffered from any such defects. The Committee accordingly considers that the author has failed to substantiate her claims under article 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.3 With respect to the alleged violation of article 7, in so far as it relates to the author's medical condition, the Committee notes the State party's argument that the author did not make this claim before the domestic courts. The Committee recalls its jurisprudence, according to which 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. Noting that the author has failed to raise the alleged violation of article 7, in so far as it relates to the author's medical condition, before domestic courts, the Committee concludes that this part of the communication is inadmissible pursuant to article 2, and article 5, paragraph 2 (b) of the Optional Protocol.

8.4 As to the author's allegation under article 14 that she was not afforded an effective remedy to challenge the credibility of the investigative report of the Foreign Ministry, the Committee

⁵ See Communication No.1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4. and Communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, para. 7.2.

⁶ See for example Communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2 and *P.K. v. Canada*, inadmissibility decision of 20 March 2007, para. 7.2.

⁷ See Communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision adopted on 20 March 2007.

notes the State party's argument that the author could have exercised the right to ask a court to review the legitimacy of the decision taken under article 10, subsection 2 of the Government Information (Public Access) Act to withhold information concerning investigative sources and methods employed for writing the report. The Committee refers to its jurisprudence that deportation proceedings did not involve either, "the determination of any criminal charge" or "rights and obligations in a suit at law" within the meaning of article 14⁸. It notes that, in the present case, the author was not charged or convicted for any crime in the State party and her deportation and that of her children to Armenia does not constitute a sanction imposed as a result of a criminal proceeding. The Committee further notes that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties⁹. In the present case, the proceedings relate to the author's right to receive protection for herself and her children in the State party's territory. The Committee considers that proceedings relating to aliens' expulsion, the guarantees in regard to which are governed by article 13 of the Covenant, do not fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article 14, paragraph 1.¹⁰ The Committee therefore concludes that the author's claim under article 14 is inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

8.5 As to the author's claim under articles 17 and 23, the Committee notes that the author did not challenge in her comments dated 2 May 2007 the state party's argument that the author had not brought this issue before the domestic courts. Given the author's failure to do so, the Committee considers that this part of the communication is also inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

8.6 As to the author's claim under article 24, the Committee considers that the author has not substantiated, for purpose of admissibility, the reasons why sending her children back to Armenia with her, would amount to a violation of this provision. The Committee therefore considers this claim inadmissible as unsubstantiated within the meaning of article 2 of the Optional Protocol.

9. 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.

⁸ See Communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, para. 7.4 and 7.5

⁹ Communication No. 112/1981, *Y.L. v. Canada*, inadmissibility decision adopted on 8 April 1986, para.9.1 and 9.2; Communication No.441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para.5.2; Communication No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para.8.3.

¹⁰ See Communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, para. 7.4 and 7.5.

[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.]
