



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-sixth session
13-31 March 2006

DECISION

Communication No. 1289/2004

<u>Submitted by:</u>	Farangis Osivand (represented by counsel)
<u>Alleged victims:</u>	The author and her two daughters, Soolmas Mahmoudi and Maral Mahmoudi
<u>State party:</u>	The Netherlands
<u>Date of communication:</u>	14 April 2004 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 1 June 2004 (not issued in document form)
<u>Date of decision:</u>	27 March 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Expulsion of family from Netherlands to Iran to face alleged risk of death, torture or imprisonment

Procedural issues: Submission of same matter to another international procedure — Exhaustion of domestic remedies — Review of decision on admissibility

Articles of the Covenant: Articles 6, 7 and 9

Articles of the Optional Protocol: Article 5, paragraphs 2 (a) and (b)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL
PROTOCOL TO THE INTERNATIONAL COVENANT ON
CIVIL AND POLITICAL RIGHTS

Eighty-sixth session

concerning

Communication No. 1289/2004*

Submitted by: Farangis Osivand (represented by counsel)

Alleged victims: The author and her two daughters,
Soolmas Mahmoudi and Maral Mahmoudi

State party: The Netherlands

Date of communication: 14 April 2004 (initial submission)

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

Meeting on 27 March 2006

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication, initially dated 14 April 2004, is Ms. Farangis Osivand, an Iranian national born on 18 February 1959. She presents the communication on her own behalf and on behalf of her two daughters, Soolmas Mahmoudi, an Iranian national born on 23 December 1983, and Maral Mahmoudi, an Iranian national born on 15 April 1989. The author contends that the expulsion of the three alleged victims to Iran would violate articles 6, 7 and 9 of the Covenant. The author is represented by counsel.

1.2 On 24 November 2004, the Committee's Special Rapporteur on New Communications decided to separate the consideration of the admissibility and merits of the communication.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Factual background

2.1 Ms. Osivand attended the University of Teheran from 1978 to 1979. During this period, she attended demonstrations against the Shah and was a member of the Fedayan Khalq Aghaliat opposition group. She acted as a contact person for the organization in her faculty and attended meetings on the work of Bijan Djazani, then a very influential leader in Iran. Although the organization was involved in violent activities, she was not herself involved in such actions.

2.2 In 1981, Ms. Osivand married Ahmad Mahmoudi. Around that time, she was asked by a member of the Fedayan Khalq Aghaliat organization to hide weapons in her house. Both she and her husband agreed and hid weapons in an underground cache constructed of brick, wood and iron under their house, which was under construction at the time. The same year, Ms. Osivand was forced to leave university. Around 1988, she could have recommenced her studies but refused, as she would only be admitted on condition that she informed on anti-revolutionary students.

2.3 From the time she left university, Ms. Osivand was required to report to the authorities at the Islamic Society of the University. This continued until the time of her flight to the Netherlands in late August 1998. She remained an active member of the Fedayan Khalq Aghaliat after leaving university, and became a courier for the organization, picking up and distributing leaflets and publications including for the programme with the goal of overthrowing the Islamic Republic of Iran.

2.4 On 13 August 1998, Ms. Osivand received a call from another member of the Fedayan Khalq Aghaliat, informing her that the authorities had found out that weapons had been hidden in her house and advising her and her family to leave Iran immediately. She was informed by a neighbour that agents of the (unspecified) "Komiteh" had called at her house, taken some goods and her father. She presumes that they found the abovementioned weapons, publications and leaflets. In late August 1998, she fled Iran with her two daughters. Because of lack of money, her husband stayed in hiding in Iran and followed her to the Netherlands two years later.

2.5 On 2 and 18 September 1998, Ms. Osivand was interviewed by the competent Dutch authorities about her asylum request. On 30 June 1999, her request for asylum was denied and her appeal was similarly rejected on 11 December 2000. On 11 February 2003, the District Court of 's-Hertogenbosch reviewed her case, and on 25 March 2003 denied her appeal, contending that Ms. Osivand had not provided her entire asylum account at the second interview. It did not accept that weapons would be hidden in the elaborate way suggested by Ms. Osivand and did not find her account credible.

2.6 On 10 June 2003, the same Court dismissed the appeal of Mr. Mahmoudi. On 25 November 2003, since the judgement of the District Court, a declaration was allegedly published by the Fedayan Khalq Aghaliat, confirming that Ms. Osivand is an opponent of the Islamic Republic of Iran, that she is blacklisted by the regime due to her political

activities and her sympathies for their organization. It claims that her life would be in danger if returned to Iran and that she risks long imprisonment or even the death penalty.

2.7 On 15 December 2003, Ms. Osivand's lawyer received a letter from the president of the Society of Iranian Women in the Netherlands, in which the writer claims that she had known Ms. Osivand in Iran after the revolution and had known her to be a member of the Fedayan Khalq Aghaliat. The writer adds that Ms. Osivand has remained an active member of this organization to the present day. On 18 December 2003, the Dutch Ministry of Justice refused an application for a humanitarian exception for the family.

The complaint

3.1 The author claims a violation of the alleged victims' rights under articles 6, 7 and 9 of the Covenant by the Netherlands, for not recognizing them as political refugees and threatening to remove them to Iran where their life and freedom would be at risk because of Ms. Osivand's involvement with and membership in the Fedayan Khalq Aghaliat, her hiding of weapons on the organization's behalf, and her failure to inform the Iranian authorities of her acts.

3.2 Without citing any articles of the Covenant, the author alleges that from the beginning to the end of the asylum procedure, she never had an opportunity to give a complete chronological account of her life in Iran. She also contends that the nature of the Dutch asylum procedure is such that asylum seekers are not heard in a chronological and systematic way, adding that the District Court of 's-Hertogenbosch did not pose any questions to her during the proceedings in early 2003.

State party's submissions on admissibility and counsel's comments

4.1 By submission of 11 November 2004, the State party argued that the communication was inadmissible for concurrent examination of the same matter under another international procedure and for failure to exhaust domestic remedies.

4.2 As to the former objection, the State party observed that the author's husband, Ahmad Mahmoudi, had lodged an application with the European Court of Human Rights on 8 December 2003. According to the State party, this application "apparently also relates to the problems the Osivand-Mahmoudi family would face upon return to Iran on account of the difficulties the husband and wife experienced as sympathizers or members of the prohibited Mojahedin-e-Khalq party, for which party they claim to have been activists". Examination of the documents submitted in both applications made it "abundantly clear" that the subject matter of both claims was identical. Both applications invoked human rights instruments in order to contest the family's expulsion, and it could be assumed that each spouse spoke for the other when submitting the respective application. The application before the European Court was still pending and, therefore, the communication was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

4.3 As to the latter objection, the State party observed that the author made a number of unspecified critical comments about Dutch asylum proceedings. In domestic proceedings,

neither the author nor her representative had submitted specific objections against the procedures followed, thus denying the domestic courts the opportunity to respond to those objections. The author had thus failed to exhaust domestic remedies on this aspect of the communication. The State party added that this complaint was an impermissible *in abstracto* allegation about legislation and practice. The author had not submitted any specific complaint about the asylum procedure in relation to article 7 of the Covenant, let alone substantiated such a complaint.

5.1 By letter of 10 January 2005, counsel responded to the State party's submissions. He pointed out that no part of the family was advanced as co-victim(s) in the application presented by the other part to an international instance. Each part of the family claimed breaches of their own rights before the respective instance, and it was incorrect to suggest that each spouse spoke for the other in the respective applications. He argued that he addressed Mr. Mahmoudi's case to the European Court "for reasons of subsidiarity", as because of the six-month time limit for filing cases at the European Court he could no longer submit the author's case to that instance.

5.2 He contended that as the cases of the mother and daughters on the one hand and that of the father on the other were treated separately by the Dutch authorities — the father having arrived later — there was no objection for submission of the family's case to two separate instances. He argued that the State party's reference to the Mojahedin-e-Khalq was erroneous, and maintained that the claim under article 7 was sufficiently substantiated, in light of the declaration and letter of 25 November 2003 and 15 December 2003, respectively.

Decision on admissibility

6.1 At its 84th session, the Committee considered the admissibility of the communication. It recalled that article 5, paragraph 2 (a), of the Optional Protocol precluded it from considering any communication where the same matter was being examined under another procedure of international investigation or settlement. The Committee recalled its jurisprudence that the "same matter" implied that the same claims had been advanced by the same person.¹ While the scope of the European Convention on Human Rights and the Covenant insofar as they related to the present facts were substantially equivalent (see *Rogl v Germany*),² the application of those norms to two different persons of the same family might well raise differing issues, in particular if, as in the present case, the facts relating to different members of the family were not identical and were dealt with in different and unrelated domestic proceedings. As two separate persons were contesting differing sets of proceedings, and thus also differing facts, before the European Court of Human Rights and the Committee, the Committee thus found that the "same matter" was not currently before a parallel instance of international

¹ *Fanali v Italy* Communication No. 75/1980, Views adopted on 31 March 1983, and *Sánchez López v Spain* Communication No. 777/1997, Decision adopted on 25 November 1999.

² Communication No. 808/1998, Decision adopted on 25 October 2000.

investigation or settlement. It followed that the Committee was not precluded by article 5, paragraph 2 (a), from considering the communication.

6.2 As to the procedural complaints which raised issues under article 7, read in conjunction with article 2, of the Covenant, the Committee observed that, according to the uncontested arguments of the State party, these matters were not advanced before its domestic courts. It followed that these aspects of the communication were inadmissible, under article 5, paragraph 2 (b), of the Optional Protocol, for failure to exhaust domestic remedies.

6.3 Accordingly, on 5 July 2005, the Committee found the communication admissible to the extent that the return of the author and her two daughters to Iran raised issues most appropriately addressed in combination under article 7 of the Covenant, without separately giving rise to additional issues under articles 6 and 9 of the Covenant.

Request for review of the decision on admissibility

7.1 By Note of 15 November 2005, the State party advised that the author had lodged a second request for asylum on 25 May 2005, which remained pending. As a result, the State party requested the Committee to review its decision on admissibility.

7.2 By letter of 2 December 2005, the author responded, confirming that a second request had been lodged, though noting unspecified “difficulties”.

Issues and proceedings before the Committee

8. The Committee is requested to re-examine the admissibility of the communication in light of the new facts advanced by the State party. The Committee observes that the author has conceded that she has lodged a fresh application for asylum before the Dutch authorities. The Committee recalls its constant jurisprudence that where an author has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the author must be considered to have failed to exhaust domestic remedies, as required by article 5, paragraph 2 (b), of the Optional Protocol.³ As in the communication of *Benali v The Netherlands*,⁴ the author has re-seized the State party’s authorities with an application which directly concerns the subject matter before the Committee. It follows that the author has not exhausted domestic remedies, and that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

³ *Benali v The Netherlands*, Case No. 1272/2004, Decision adopted on 23 July 2004, *Romans v Canada*, Case No. 1040/2001, Decision adopted on 9 July 2004, and *Baroy v The Philippines*, Case No. 1045/2002, Decision adopted on 31 October 2003.

⁴ *Ibid.*

9. Accordingly, the Committee decides:

(a) that the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol; and

(b) that this decision will be transmitted to the author and, for information, to the State party.

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