



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 – 28 July 2006

DECISION

Communication No. 1175/2003

<u>Submitted by:</u>	Mrs. Soo Ja Lim; her daughter, Seon Hui Lim, and her son, Hyung Joo Scott Lim (represented by counsel, Ms. A. O'Donoghue)
<u>Alleged victim:</u>	The authors
<u>State Party:</u>	Australia
<u>Date of communication:</u>	24 January 2003 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 May 2003 (not issued in document form)
<u>Date of adoption of decision:</u>	25 July 2006

Subject matter: Expulsion of mother and daughter, but not son, from Australia to Republic of Korea

Procedural issues: Exhaustion of domestic remedies - substantiation, for purposes of admissibility

Substantive issues: Interference with family life - protection of the family unit

Articles of the Optional Protocol: 2 and 5, paragraph 2(b)

* Made public by decision of the Human Rights Committee.

Articles of the Covenant: 17 and 23

ANNEX

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

Eighty-seventh session

concerning

Communication No. 1175/2003*

<u>Submitted by:</u>	Mrs. Soo Ja Lim; her daughter, Seon Hui Lim, and her son, Hyung Joo Scott Lim (represented by counsel, Ms. A. O'Donoghue)
<u>Alleged victim:</u>	The authors
<u>State Party:</u>	Australia
<u>Date of communication:</u>	24 January 2003 (initial submission)

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

Meeting on 25 July 2006,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication, dated 24 January 2003, are Mrs. Soo Ja Lim, a national of the Republic of Korea born 15 January 1948, her daughter, Seon Hui Lim, a Korean national born 28 August 1971, and her son, Hyung Joo Scott Lim, a Korean national born 20 July 1977 and at the time of submission of the communication also a naturalised Australian national. The authors claim to be victims of violations by Australia of their rights under articles 17 and 23 of the Covenant. They are represented by counsel, Ms. A. O'Donoghue.

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

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

Factual background

2.1 On 14 March 1987, Mr. Ha Sung Lim arrived in Sydney, Australia on a visitor's visa. In 1988, he was diagnosed with cancer. On 6 April 1989, his wife, Mrs. Soo Ja Lim, and son, Hyung Joo Scott Lim, arrived in Sydney on temporary entry permits for a stay of 6 months. On 14 September 1989, his daughter, Seon Heui Lim, also arrived in Sydney with the same type of permit. The following day, Mr. Lim died.

2.2 On 6 October and 14 November 1989, respectively, the permits of the surviving members of the family expired. In January 1990, Mrs. Lim's brother, Mr. Woo Ki Park, returned to the Republic of Korea. On 19 March 1991, Mrs. Lim lodged an application on behalf of her family to remain permanently in Australia 'under concessions for persons illegally in Australia' (Form 903). On 13 January 1993, the family was advised that the application was rejected due to not providing a so-called "nominator".

2.3 On 9 February 1993, Mrs. Lim lodged another Form 903 application which included a nominator. On 16 August 1993, the application was rejected as inadmissible. On 18 August 1993, the Department of Immigration ("the Department") advised the family of its intention to seek a deportation order against them. On 3 December 1993, the family received a further letter advising them of Department's intention to deport.

2.4 On 17 December 1993, the daughter lodged a transitional permanent visa application with her partner, Mr. Jung Hee (Anthony) Lee, as nominator. On 21 December 1993, the son wrote to the Minister for Immigration and Multicultural Affairs ("the Minister") requesting residency on compassionate grounds. On 8 February 1994, the Minister replied that he could only intervene in cases which had been reviewed by the Migration Review Tribunal. He noted that the Lim family had not applied for review by the Tribunal, and that it had become too late to do so.

2.5 On 1 September 1994, the Lim family was granted a "Bridging Visa E". In 1995, Mrs. Lim's parents in the Republic of Korea died suddenly. On 27 September 1995, the daughter was advised that her transitional permanent visa application had been refused due to a lack of change in her personal circumstances. On 13 December 1996, she received a letter from the Department with formal notice of its intention to cancel the bridging visas.

2.6 On 23 and 27 December 1996, respectively, the son and the daughter wrote to the Department in response to the letter advising of intention to cancel their bridging visas. On 26 May 1997, the Department wrote advising of the cancellation of bridging visas as the application for permanent residency had been found inadmissible.

2.7 On 4 June 1997, the Lim family applied for protection visas. On 5 June 1997, a Bridging Visa was granted. On 13 June 1997, the applications for protection visas were rejected. On 1 July 1997, the son lodged an application to remain in Australia on the basis of being an innocent illegal. On 2 July 1997, the Lim family applied to the Refugee Review Tribunal for review of the decision to refuse protection visas. On 6 March 1998, Mrs. Lim and her daughter became parties to a class action suit in Federal Court, entitled Macabenta v

Minister for Immigration & Multicultural Affairs.¹ On 31 March 1998, they both applied for “Resolution of Status” visas. On 1 April 1998, the Department responded that they did not meet the requirements for making a valid application under the Resolution of Status visa class.

2.8 On 15 April 1998, the son was granted permanent residency on the basis that he lived independently from his family. On 21 April 1998, the Federal Court dismissed the class action suit. On 22 October 1998, the Refugee Review Tribunal heard the application for review of denial of protection visas. On 23 November 1998, the Tribunal refused the application.

2.9 On 18 December 1998, a Full Bench of the Federal Court dismissed an appeal against the first instance decision on the class action suit. On 18 June 1999, the High Court of Australia rejected an application for special leave to appeal in the same case. On 25 June 1999, Mrs. Lim and her daughter were advised to join another representative class action in the High Court regarding the decisions of the Refugee Review Tribunal. On 16 July 1999, the bridging visa provided for the original class action application expired. On 26 July 1999, Mrs. Lim and her daughter were advised that they could not join the class action regarding the Refugee Review Tribunal, as the Tribunal had had before it all relevant information for its decision on their application by the Lim family.

2.10 On 31 August 1999, Mrs. Lim and her daughter requested the Minister to exercise his discretion under section 417 of the *Migration Act 1958*. On 2 September 1999, Mrs. Lim and her daughter applied for a bridging visa (Class E) whilst their submission to the Minister was being considered. On 15 May 2000, the Minister decided not to exercise his discretion.

2.11 On 17 May 2000, the family’s solicitors advised of the Minister’s decision and noted that there did not appear to be any other options available to them. On 24 May 2000, Mrs. Lim requested an extension of one month from her scheduled departure on 7 June 2000. On 24 May 2000, Mrs. Lim was granted a bridging visa until 6 June 2000. On 6 June 2000, Mrs. Lim’s bridging visa expired. On 16 August 2000, the son acquired Australian citizenship, and in 2001 he completed university.

¹ [1998] 385 FCA (21 April 1998): On 13 June 1997, the Minister for Immigration and Multicultural Affairs announced the Government’s decision to resolve the uncertainty surrounding the future status of certain groups of people who, for humanitarian reasons, had been allowed to remain in Australia as long term temporary residents. This was to be effected by creating new visa classes to cover persons from Sri Lanka, countries in the former Yugoslavia region, Iraq; Kuwait; Lebanon, and the People’s Republic of China. These categories of visas came to be known as Resolution of Status Visas (850 and 851) and were given statutory effect through Statutory Rule (SR) 279 of 1997. An application was brought by Ms. Macabenta as a representative party in respect of a group of 690 applicants, comprising nationals of a number of countries. The applicant sought a declaration under s 10 of the *Racial Discrimination Act 1975* (Cth) that, by reason of provisions of Statutory Rule No 279 of 1997, the group members did not enjoy a right enjoyed by persons of other national origins.

The complaint

3.1 The authors invoke the Committee's Views in Winata v Australia,² and argue on that basis that the present communication discloses violations of articles 17 and 23 of the Covenant. On article 17, they argue that the removal of Mrs. Lim and her daughter from Australia would amount to an 'interference' with the Lim family. They contend that for the son to leave Australia with Mrs. Lim and her daughter, to relocate to the Republic of Korea would not be in accordance with the provisions, aims and objectives of the Covenant, nor be reasonable in the particular circumstances. They argue that they have developed into a highly cohesive and interdependent family after the death of Mr. Lim, the location of his grave being also in Australia. His daughter pledged to her father to look after the family in Australia, and the family unit itself is therefore inextricably linked to their residence in Australia. For the same reasons, the authors argue that removal of Mrs. Lim and her daughter from Australia would amount to a violation of article 23(1) of the Covenant.

3.2 On exhaustion of domestic remedies, the authors submit that the communication relates only to the possible break-up of the family and, as such, it is only in relation to this aspect of their various applications that they would be required to exhaust domestic remedies, or alternatively show that such remedies would be futile.

State party's submissions on admissibility and merits

4.1 By submission of 3 February 2004, the State party argued that the communication should be declared inadmissible, on grounds of failure to exhaust available domestic remedies, as an abuse of the right of submission, and as insufficiently substantiated. On the merits, the State party argues that there has been no violation of the Covenant.

4.2 As to the admissibility of the claims both under articles 17 and 23, the State party argues that domestic remedies have not been exhausted, detailing a series of remedies available to the Lim family. Firstly, the State party notes that the family had not exercised in timely fashion its right to apply for review by the Migration Review Tribunal (MRT) of the decision to deny permanent residence, as the Minister's letter of 8 February 1994 had noted. The State party refers to the Committee's jurisprudence requiring compliance with time-limits, and thus argues that the authors failed to make a reasonable effort to exhaust all available domestic remedies at the time when it was appropriate for them to do so.

4.3 Even if the MRT had not decided the application in favour of the Lim family, they could have sought review in the Federal Court of Australia. If unsuccessful, the family could have appealed to the Full Federal Court and applied for special leave to appeal to the High Court of Australia (the High Court) if they received an adverse decision from the Full Federal Court. As an alternative to seeking review by the Federal Court, the Lim family would have been entitled, under the Australian Constitution, to seek judicial review of the decision of the Migration Review Tribunal's decision by the High Court of Australia in its original jurisdiction.

4.4 Secondly, the State party notes that decisions of the Refugee Review Tribunal (RRT) are also subject to judicial review in the Federal Court and High Court. The authors did apply

² Case No.930/2000, Views adopted on 26 July 2001.

to the Federal Court, but as parties to a class action regarding ‘Resolution of Status visas (850 and 851)’ on the grounds that the visa class was discriminatory. Yet they chose not to seek judicial review of the decision of the Refugee Review Tribunal relating to their application for protection visas, when it was open for them to do so.

4.5 Thirdly, the State party observes that although the current claim refers to the possible future separation of the family unit, the author noted that this was referred to in their claims for a protection visa – the State party submits that they are therefore related. Both the Form 903 application and the protection visa application raised the current issues before the Committee. The author notes that the decision maker clearly acknowledged the issues surrounding the possible future separation of the family unit. These issues were raised also in the application made to the Minister under section 417 of the *Migration Act* 1958. An appeal to the higher courts on both grounds was therefore an available domestic remedy, when these applications were submitted, and both mechanisms offered a reasonable prospect of redress.

4.6 The State party further argues that both claims constitute an abuse of the right of submission, as the Covenant is designed to ensure and protect the basic human rights of all persons, not to assist persons whose rights are in no way being breached but who wish to obtain a preferred migration outcome. The Lim family is not currently experiencing any interference with their human rights in Australia, where it continues to live. There is no evidence that the family (or members of it) would suffer a breach of their rights if they return to the Republic of Korea. It is clear that the Lim family would prefer to remain in Australia, but the Covenant does not guarantee a right to choose a preferred migration outcome.

4.7 The State party concedes that the family has been in Australia for many years, but argues that this is principally because they remained in Australia without lawful authority for approximately fourteen years. It would be manifestly unfair on the State Party if the Lim family were able to rely on this fact as the basis for their claim. The State party denies that it is seeking to break up the family unit. While the Lim family remains in Australia lawfully, there is nothing to prevent them remaining together as a family unit. If Mrs. Lim and her daughter are to return to the Republic of Korea, there is nothing to prevent her son from returning to the Republic of Korea with his family. Mr. Lim,, as an independent adult, may also choose to remain in Australia and maintain contact with his family by various means. That would be his choice and not a consequence of any action by the State party. It is conceded by the Lim family that it would not face persecution or other forms of personal danger if they returned to the Republic of Korea.

4.8 In the State party’s view, the authors’ submissions show little more than that the family would prefer to remain in Australia and that they would experience a level of disruption to their lives if they are required to move back to the Republic of Korea. The apparent motivation for this submission is not concern over interference with family life or other breach of rights guaranteed by the Covenant - it is the Lim family’s concern to ensure that they achieve their preferred migration outcome. The State party submits that in these circumstances, the communication should be rejected as an abuse of the right of submission.

4.9 On the claim under article 23, the State party argues that the claim is insufficiently substantiated, for purposes of admissibility. It notes that the authors argue that a breach of article 17 necessarily gives rise to a breach of Article 23(1), for in breaching article 17, the State Party has consequently failed to provide the protection under article 23(1) to which all

families are entitled. The State party points out that the authors' submissions provide arguments that appear to be directed towards establishing an alleged interference with the family, under article 17, but which provide no argument whatsoever as to why or how the State party would be in breach of article 23(1) if it were to remove Mrs. Lim and her daughter from Australia.

4.10 The State party argues that while the two articles are related, they remain distinct obligations. While, article 17 is an essentially negative protection, aimed at prohibiting arbitrary or unlawful interference with the family, article 23(1) involves positive obligations with regard to the institution of the family. Information directed at establishing a breach of article 17 will not necessarily establish claims under article 23(1). The family, as a "natural and fundamental group unit of society" and as an institution under private law, receives special institutional protection in article 23. On the other hand, article 17 is limited to the protection of the privacy of individual family members, as expressed in family life, against unlawful or arbitrary interference. As no part of the communication provides any expansion on the claim that the State party would be in violation of article 23(1), this claim should accordingly be declared inadmissible as insufficiently substantiated.

4.11 On the merits of the article 17 claim, the State party disputes that there has been the necessary "interference" with a "family", which is either unlawful or arbitrary. The authors themselves concede that the removal of Mrs. Lim and her daughter would be lawful under its domestic law, by reason of the operation of the *Migration Act 1958*. Even if the removal of Mrs. Lim and her daughter was considered to be 'interference' within the meaning of article 17(1), such interference would not be arbitrary. Australia's immigration laws and policies seek to strike a reasonable balance between the need to allow people to come and go from Australia and other aspects of the national interest. That immigration control is a legitimate purpose for States to pursue consistent with their obligations under the Covenant is clear from articles 12 and 13 of the Covenant. The removal of Mrs. Lim and her daughter, in accordance with Australian immigration law, is a reasonable and proportionate way of achieving that purpose.

4.12 On the merits of the claim under article 23, it is argued that this provision concerns protection of the family as an institution, as set out in the Committee's general comment No.19. The State party contends that article 23, like article 17, must be read against the background of the State party's acknowledged right, under international law, to control the entry, residence and expulsion of aliens. It protects families within its jurisdiction, but such protection must be balanced against the need to take reasonable measures to control inward immigration. Australia clearly meets the obligation under article 23(1). At the federal level, there is a comprehensive system of family law which covers a wide range of issues, from marriage to custody of children and divorce. The State and Territories all have rigorous child protection laws, all backed up by State and Territory Government departments and specialist units.

Authors' comments on the State party's submissions

5.1 On 6 April 2004, the authors responded, disputing the State party's submission on both admissibility and merits. To their additional reasoning on domestic remedies, the authors add that the initial visa application – which under Australian law is most likely to succeed – was made by Mrs. Lim on behalf of the family on the incorrect advice of a migration agent who

can no longer be located. As the family did not qualify, it would not have been possible for the MRT to find in their favour. The authors also note that they could not pay the application fee for a review application. They note that the request for Ministerial intervention was made by the son, aged 14, and thus was insufficiently persuasive and legally founded.

5.2 In arguing that their removal was disproportionate to its aim, the authors argue that in this case there is an unusually high level of interdependence between the family members, which would make removal particularly cruel. Despite family difficulties, they have always supported themselves financially and have contributed to the Australian community. The family has deep emotional ties to Australia, as Mr. Lim's grave is there.

5.3 In response to the State party's contention that they had remained unlawfully in Australia for fourteen years, the authors note that they enjoyed a number of bridging visas. Their unlawful status resulted from the absence of domestic remedies available appropriately to protect the family unit. The family had to remain in Australia in order to satisfy the wishes of their dying father.

5.4 As to the son's ability to move to the Republic of Korea with the rest of his family, the authors note that he arrived in Australia at the age of 11, graduated there from high school and university and has established himself there as a solicitor. He would need to seek permission from the Minister of Justice for reinstatement of Korean nationality and would have to renounce Australian citizenship. Return to the Republic of Korea, in order to preserve the family unit, would be impractical and difficult for him.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As to the issue of exhaustion of domestic remedies, the Committee notes that the authors did not apply for review by the Migration Review Tribunal of their applications for permanent residence, and thus became time-barred. They also attribute responsibility for the failure of the permanent residency process to the incorrect advice of a migration agent, whose location could no longer be determined. The Committee observes that, according to its jurisprudence, an author is required to abide by reasonable procedural requirements such as filing deadlines, and that the default of an author's representative cannot be held against the State party, unless in some measure due to the latter's conduct. In this communication, there is no indication of any such State responsibility. The Committee also notes that the authors did not pursue subsequent judicial review of the adverse determination of the Refugee Review Tribunal. While in the case of Winata the Committee did not require this course, in that instance the authors' refugee claims were wholly distinct from the claims before the Committee. In the present case, by contrast, it is uncontested that the family circumstances at issue before the Committee were advanced in the application for a protection visa, and thus were made a live issue before the State party's authorities and tribunals. In these circumstances, therefore, the communication must be declared inadmissible for failure to exhaust domestic remedies, as required by article 5, paragraph 2(b), of the Optional Protocol.

7. The Human Rights Committee therefore decides that:
 - (a) The communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol;
 - (b) This decision shall be communicated to the authors and 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.]
