



International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2567/2015*, **

<i>Communication submitted by:</i>	A.U. and H.R. (represented by counsel, John Petris)
<i>Alleged victims:</i>	The authors
<i>State party:</i>	New Zealand
<i>Date of communication:</i>	11 February 2014
<i>Document references:</i>	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 12 February 2015 (not issued in document form)
<i>Date of adoption of decision:</i>	3 November 2016
<i>Subject matter:</i>	Denial of entry visa to spouse
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issues:</i>	Interference with the family; protection of the family
<i>Articles of the Covenant:</i>	17 (1) and 23 (1)
<i>Article of the Optional Protocol:</i>	5 (2) (b)

1.1 The authors of the communication are A.U., a national of Afghanistan born in 1971, and H.R., a national of Afghanistan and New Zealand born in 1986. They claim that the State party has violated their rights under articles 17 (1) and 23 (1) of the Covenant. They are represented by counsel, John Petris. The Optional Protocol entered into force for the State party on 26 August 1989.

* Adopted by the Committee at its 118th session (17 October-4 November 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez Rescia, Fabián Omar Salvioli, Yuval Shany and Margo Waterval.



1.2 On 11 November 2015, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the question of the admissibility of the case separately from the merits.

Factual background

2.1 The authors purportedly got married in Afghanistan on 27 April 2004 under sharia law.

2.2 In September 2004, H.R.'s brother obtained refugee status in New Zealand. On 2 November 2006, H.R. applied for a residence visa to join her brother under the refugee family reunion policy. As a result of this application, H.R. was interviewed by an officer of the International Organization for Migration (IOM) in Kabul, on behalf of the Government of New Zealand. During the interview, H.R. was asked about her marital status. She claims to have responded that she was married but that her husband was missing and that his whereabouts were unknown to her. According to the interview report, however, H.R.'s marital status was marked as "engaged". Moreover, the report indicated that H.R. said "Yes" in response to the question "Is your spouse/partner wanting to migrate with you?".

2.3 On 14 May 2007, H.R. obtained a residence visa entitling her to travel to New Zealand and apply for a residence permit. H.R. arrived in New Zealand on 9 July 2007 and on 1 September 2012 she was granted citizenship.

2.4 On 16 July 2012, A.U. applied for a temporary entry work visa under the "partnership category" while still in Afghanistan. His application was rejected on 5 February 2013 on the basis that A.U. did not meet the requirements set out in the work visa instructions concerning: (a) being a "bona fide applicant", because H.R. had not declared her marriage in her residence application; (b) being in a "genuine and stable relationship with H.R."; and (c) having a "clear pathway to eventual residence", as his partner had not declared her marriage to him, triggering the application of immigration policy F2.5 (e).¹ According to that policy, applicants for residence under the "partnership" category may be rejected if the principal applicant has not declared his or her spouse in his or her own application, unless the immigration officer dealing with the case is satisfied that the non-declaration occurred with no intention to mislead and would not have affected the outcome of the first applicant's visa application.²

2.5 On 4 June 2013, A.U. wrote to the Associate Minister of Immigration seeking a "special direction and the grant of residence as an exception to immigration instructions". On 9 June 2013, the Associate Minister declined to intervene because "A.U. had not exhausted all possible options". The author was advised to apply for residence through the normal procedure and, if that application were unsuccessful, to appeal to the Immigration

¹ In the letter rejecting A.U.'s visa application, the immigration officer wrote: "While the outcome of your future residence application is not certain at this stage, we remain unsatisfied that you are a bona fide applicant. Should you not be granted a subsequent New Zealand visa, we consider you likely to seek to remain in New Zealand."

² Policy F2.5 (e) of the *Immigration New Zealand Operational Manual* (April 2016) reads as follows:
Applications for residence under Partnership Category will also be declined if the principal applicant was a partner to the eligible New Zealand partner but not declared on the eligible New Zealand partner's application for a residence class visa (if applicable), unless an immigration officer is satisfied the non-declaration occurred with: (i) no intention to mislead; and (ii) would not have resulted in a different outcome in the eligible New Zealand partner's application. If both of these clauses are met, an immigration officer should continue to assess the application and may approve it if all other requirements are met.

and Protection Tribunal.³ On 5 July 2013, A.U. wrote to the Associate Minister again noting that he had no pathway to residence because of immigration policy F2.5 (e) and that the process would be unnecessarily prolonged. On 16 July 2013, the Associate Minister advised again that she would not intervene until A.U. had submitted a residence application and tested himself against immigration instructions.

2.6 On 20 September 2013, A.U. filed a complaint with the New Zealand Ombudsperson requesting investigation into policy F2.5 (e), which he said constituted a de facto absolute prohibition against a spouse or partner obtaining residence.

2.7 H.R. left New Zealand on 6 August 2014 and returned to Afghanistan, allegedly to join her spouse.

2.8 The authors allege that domestic remedies have been exhausted as there is no opportunity to appeal to a court or review proceedings in respect of a declined visa to enter New Zealand, according to section 186 of the New Zealand Immigration Act.⁴ They note that an appeal to the Immigration and Protection Tribunal would not result in being granted residence but merely in a recommendation to the Associate Minister of Immigration that residence be granted as an exception to the residence policy. In any case, such an appeal would take at least five years and does not constitute an effective remedy because it is unreasonably prolonged.

The complaint

3.1 The authors submit that, by rejecting A.U.'s application for a visa to enter New Zealand, the State party violated the authors' right to family unity under article 23 (1) of the Covenant.

3.2 The authors further submit that immigration policy F2.5 (e) constitutes arbitrary interference in the family and is, therefore, contrary to article 17 (1) of the Covenant. They argue that the policy establishes an absolute prohibition on a spouse to join his or her partner in New Zealand, does not provide for any discretion or time limit in its application and is disproportionate as it has the effect of permanently separating a couple.

State party's observations on admissibility

4.1 On 26 May 2015, the State party contested the admissibility of the communication for failure to exhaust domestic remedies. A.U. did not submit an application for residence that could be assessed against the relevant immigration policies, including policy F2.5 (e).

³ The Immigration and Protection Tribunal is composed of 18 members, administered by the Ministry of Justice and chaired by a district court.

⁴ The Immigration Act of 2009, sect. 186, reads as follows:

Limited right of review in respect of temporary entry class visa decisions

(1) No appeal lies against a decision of the Minister or an immigration officer on any matter in relation to a temporary entry class visa, whether to any court, the Tribunal, the Minister, or otherwise.

(2) Subsection (1) applies except to the extent that section 185 provides a right of reconsideration for an onshore holder of a temporary visa in the circumstances set out in that section.

(3) A person may bring review proceedings in a court in respect of a decision in relation to a temporary entry class visa except if the decision is in relation to the —

(a) Refusal or failure to grant a temporary entry class visa to a person outside New Zealand;

(b) Cancellation of a temporary entry class visa before the holder of the visa arrives in New Zealand.

An application for residence is more comprehensive than an application for a temporary entry work visa. In a residence application, the immigration officer must consider all circumstances, including whether the applicant is bona fide. The State party has established specialist teams that are familiar with applications submitted by Afghans on the basis of partnership status.

4.2 The State party notes that A.U. was given reasons for the refusal to grant him a temporary entry work visa and was advised that, while the outcome of a future residence application was uncertain, the authorities were not satisfied at that point that he was a bona fide applicant. That advice did not imply that all future applications would be declined. On the contrary, an immigration officer would consider in good faith any submissions from A.U., including information on his marital status and any humanitarian issue that he may wish to raise.

4.3 The State party challenges the authors' submission that policy F2.5 (e) does not contain an element of discretion. If A.U. were to apply for a residence visa, the Government would, in assessing whether F2.5 (e) applied, consider whether H.R.'s non-declaration of marriage occurred with no intention to mislead and whether the declaration might have affected the outcome of her own residence application.

4.4 The State party argues that immigration authorities have not yet had the opportunity to consider information supplied by the authors after A.U.'s work visa was refused, including H.R.'s information to the Associate Minister of Immigration stating that she had informed the authorities in 2007 that she was married but that her husband's whereabouts were unknown. Ultimately, it is up to the Government to grant A.U. a resident visa. The Government's immigration system is highly discretionary when accounting for individual circumstances. In particular, immigration instructions may be dispensed with by special directions when considering residence visa applications.

4.5 If a residence visa is refused, there are further domestic remedies that should be exhausted before submitting a communication to the Committee, including an appeal to the Immigration and Protection Tribunal, which may, inter alia, reverse any refusal decision, thereby clearing the way for the granting of a visa, or cancel the refusal decision and refer the matter back for reconsideration on the basis of additional information provided to the Tribunal.⁵

⁵ The State party cites section 188 of the Immigration Act:

Determination of appeal in relation to residence class visa

(1) In determining an appeal under section 187, the Tribunal may —

...

(b) Reverse the decision as having been incorrect in terms of the residence instructions applicable at the time the application for the visa was made by the appellant; or

(c) Note the correctness of the original decision in terms of the residence instructions applicable at the time the visa application was made on the basis of the information provided to the Minister or the immigration officer before the time of the decision, but reverse that decision on the basis of any information properly made available to the Tribunal that reveals that the grant of the visa would have been correct in terms of the applicable residence instructions; or

(d) Note the correctness of the original decision in terms of the residence instructions applicable at the time the visa application was made on the basis of the information provided to the Minister or the immigration officer before the time of the decision, but determine the appeal by cancelling the decision and referring the matter back to the Minister, if he or she made the decision, or the chief executive, in any other case, for consideration under those residence instructions as if a new visa application had been made that included any additional information properly provided to the Tribunal; or

4.6 The State party submits that domestic remedies are not unreasonably prolonged. The average time for processing a residence application from Afghanistan is between six and eight months. According to the Immigration and Protection Tribunal's 2014 annual report, as at 30 June 2014 the average number of days from receipt of appeal to decision is 364. Such delays are reasonable in the circumstances, which include A.U.'s non-residence status, the complexity of the facts, the value of residence visas generally and the Government's legitimate need to ensure that visas are granted on the basis of the applicant's true situation, expert decision makers having full information before them, the principled application of in-built policy discretions, the proper use of regular immigration processes and impartial and authoritative appeal procedures.

4.7 On the facts, the State party argues that H.R. did not declare to the IOM officer who interviewed her that she was married and that, "although the notes from her interview were unclear, they may show that she declared that she was engaged and that her partner/spouse was willing to accompany her to New Zealand".

Authors' comments on the State party's observations on admissibility

5.1 In their submission of 24 June 2015, the authors insist that there is no possible appeal in respect of A.U.'s declined work visa application. Filing an application for residence is very difficult while the author is in Afghanistan. The usual practice is to allow a spouse to enter New Zealand and lodge a residence application while there. In addition, the immigration officer who rejected A.U.'s work visa application stated that a future residence application was likely to be declined because of policy F2.5 (e). Section 72 of the Immigration Act provides that a decision on a residence application must be made in accordance with immigration instructions.

5.2 The authors challenge the State party's assertion that policy F2.5 (e) allows for discretion. They note that the policy affects mainly persons from countries such as Afghanistan and Somalia who are allowed to enter New Zealand under refugee policies but are required to be single. The effect of policy F2.5 (e) is to keep families separated.

5.3 The authors insist that the Immigration and Protection Tribunal cannot grant residence but only recommend to the Associate Minister that residence be granted based on special circumstances. In the case of A.U. it is unlikely that the Tribunal would make such a recommendation because it would be contrary to policy F2.5 (e). Moreover, the authors had already made a request, which was rejected, to the Associate Minister, who is very unlikely to intervene again in the present case.

5.4 Regarding the length of the proceedings, the authors allege that, according to an official response given to them, the average time for immigration authorities to deal with residence applications ranged between 387 and 576 days. Given the complexity of their

(e) Determine the appeal by cancelling the decision and referring the application back to the Minister, if he or she made the decision, or the chief executive, in any other case, for correct assessment in terms of the applicable residence instructions, where the Tribunal —

(i) Considers that the decision appealed against was made on the basis of an incorrect assessment in terms of the residence instructions applicable at the time the application was made; but

(ii) Is not satisfied that the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the visa or entry permission; or

(f) Confirm the decision as having been correct in terms of the residence instructions applicable at the time the visa application was made, but recommend that the special circumstances of the applicant are such as to warrant consideration by the Minister as an exception to those instructions.

application, it is possible that the processing time would be three years. An appeal would involve a further 12 months. This period is unreasonably long considering the likely negative outcome and the fact that A.U. will have to remain in Afghanistan all this time.

Additional submissions from the parties

6.1 In its submission of 12 August 2015, the State party submits that the authors have failed to substantiate their claim of a breach of the Covenant. General abstract allegations or allegations based on future, hypothetical situations do not constitute a sufficient basis for finding a breach of the Covenant.

6.2 The State party submits that policy F2.5 (e) is a reasonable policy intended to protect against dishonest declarations of family relationships and that it is consistent with articles 17 (1) and 23 (1) of the Covenant. The State party supports a family reunification policy in principle. However, it has the legitimate need, in the public interest, to ensure that any claims based on family status are bona fide. Policy F2.5 (e) contains a discretionary clause that can protect an applicant's rights under the Covenant. If the principal applicant has no intention to mislead the authorities and if the non-declaration of marriage does not affect the visa application, an immigration officer may approve the partner's application provided all other requirements are met. In any event, officers should not decline an application on the basis of policy F2.5 (e) without first offering the principal applicant an opportunity to explain the non-declaration. This discretionary clause ensures that two partners may still be reunited when no dishonesty is involved. Should A.U. apply for a residence visa, the Government would, in assessing whether F2.5 (e) applied, consider whether H.R.'s decision not to declare her marriage was taken with no intention to mislead and whether a declaration of marriage might have affected the outcome of her own residence application. In addition, exceptions to policy F2.5 (e) apply in the form of ministerial special directions. The authors may submit an additional application to the Immigration and Protection Tribunal.

6.3 The State party notes that the Committee has found that, in some extraordinary circumstances, the decisions of immigration authorities have breached articles 17 and 23 of the Covenant, but it also notes that such breaches have occurred only in the context of a decision to remove a person from a jurisdiction.⁶ Decisions to remove a person are more likely to interfere with family rights because they have the effect of separating a family. In any case, even a decision to remove a family member who has the right to stay does not necessarily interfere with those rights.⁷ In its Views on *A.S. v. Canada*, the Committee declared inadmissible a claim related to the rejection of an entry visa noting that the authors had been separated for 17 years and that family life no longer existed.⁸ In the present case, at the time A.U. applied to enter New Zealand, the authors had already been separated for eight years, had no children and were not dependent on each other.

7. In their submission of 1 February 2016, the authors reiterate their previous submissions relating to the lack of discretion of policy F2.5 (e), the unreasonably long nature of residence application proceedings and the little chance of those proceedings being successful.

⁶ The State party cites communication No. 930/2000, *Winata and Li v. Australia*, Views adopted on 26 July 2001.

⁷ The State party cites communication No. 2243/2013, *Husseini v. Denmark*, Views adopted on 24 October 2014.

⁸ See communication No. 68/1980, *A.S. v. Canada*, decision of inadmissibility adopted on 31 March 1981, para. 5.1.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the claim is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's argument that domestic remedies have not been exhausted because A.U. could have applied for a residence visa and have had the circumstances of his case examined against broader immigration instructions. He could also have appealed to the Immigration and Protection Tribunal. The authors have argued that these proceedings would be inaccessible, unreasonably long and ineffective. They have argued, in particular, that filing a residence application from Afghanistan would be difficult, that it is likely that such an application would be declined and that proceedings would take an excessively long time. They have also argued that the Immigration and Protection Tribunal cannot grant residence but only recommend to the Associate Minister that residence be granted on the basis of special circumstances.

8.4 The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.⁹ In the present case, the Committee is not convinced that the author, who is represented by a counsel in New Zealand, would be unable to submit a residence application as suggested by national immigration authorities. The Committee further considers that, in the light of the official average time frames of immigration authorities and the Immigration and Protection Tribunal in dealing with residence applications and appeals against those applications respectively, it does not appear that those proceedings would be unreasonably long in the sense of article 5 (2) (b) of the Optional Protocol. It notes, in this respect, that the authors had already been separated for eight years by the time A.U. applied for a temporary entry work visa and that no information has been provided as to the reasons for such delay. The Committee also notes the State party's argument that, although A.U.'s work visa was declined because he was not considered to be a bona fide applicant, nothing would prevent immigration authorities from reaching a different conclusion when examining his residence application in the light of all the circumstances and the information provided by the authors. Finally, the Committee notes the State party's statement that, under the Immigration Act, the Immigration and Protection Tribunal may reverse a decision to refuse residence. In the light of all the above, the Committee concludes that the authors have not exhausted domestic remedies in relation to their claim that the State party's refusal to grant A.U. a temporary entry work visa constituted a violation of their rights under articles 17 (1) and 23 (1) of the Covenant.

⁹ See, inter alia, the Committee's communications No. 2072/2011, *V.S. v. New Zealand*, decision of inadmissibility adopted on 2 November 2015, para. 6.3; No. 1639/2007, *Zsolt Vargay v. Canada*, decision of inadmissibility adopted on 28 July 2009, para. 7.3; No. 1511/2006, *García Perea and García Perea v. Spain*, decision of inadmissibility adopted on 27 March 2009, para. 6.2; and No. 560/1993, *A v. Australia*, Views adopted on 3 April 1997, para. 6.4.

9. The Committee therefore decides:
- (a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;
 - (b) That the present decision should be transmitted to the State party and to the author.
-