



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-fifth session
17 October – 3 November 2005

DECISION

Communication No. 1279/2004

Submitted by: Moleni Fa'aaliga and Faatupu Fa'aaliga (represented by counsel, John Steven Petris)

Alleged victim: The authors and their children Salom, Blessing and Christos

State party: New Zealand

Date of communication: 26 February 2004 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 28 April 2004 (not issued in document form)

Date of decision: 28 October 2005

Subject matter: Expulsion to Samoa of parents of New Zealand-born children

Procedural issues: Exhaustion of domestic remedies – sufficient substantiation, for purposes of admissibility.

Substantive issues: Protection of the family unit – Measures of protection for minors

Articles of the Covenant: 23, paragraph 1, and 24, paragraph 1

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

[ANNEX]

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- Made public by decision of the Human Rights Committee

ANNEX

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

Eighty-fifth session

concerning

Communication No. 1279/2004**

Submitted by: Moleni Fa'aaliga and Faatupu Fa'aaliga (represented by counsel, John Steven Petris)

Alleged victim: The authors and their children Salom, Blessing and Christos

State party: New Zealand

Date of communication: 26 February 2004 (initial submission)

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

Meeting on 28 October 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication, initially dated 5 February 2004, are Moleni and Faatupu Fa'aaliga, Samoan nationals born 17 October 1969 and 4 February 1972. They bring the communication on their own behalves and on behalf of their children, Salom, Blessing and Christos, all New Zealand nationals born on 4 May 1996, 12 July 1999 and 29 September 2003, respectively. They claim to be victims of violations by New Zealand of their rights under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. They are represented by counsel.

Factual background

2.1 Mr Fa'aaliga arrived in New Zealand on 5 April 1996 and was granted a three week temporary permit, at the end of which he departed the country. Mrs Fa'aaliga first came to

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, 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, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

New Zealand in late 1996 and gave birth to her oldest child Salom shortly thereafter, who thereby became a New Zealand citizen. In July 1996 upon expiry of her temporary permits she returned to Samoa, where her circumstances are said to be such that she was unable to support her child. In late 1997, Salom was brought to Samoa. In May 1999, Mrs Fa'aaliga returned to New Zealand and was granted a one month temporary permit. On 12 July 1999, her second child, Blessing, was born. In October 1999, she returned to Samoa with Blessing. From July until November 2000, Blessing was brought back to New Zealand.

2.2 On 6 January 2002, the parents and Blessing returned to New Zealand and were granted visitor permits for a month, on the basis of a letter from Mr Fa'aaliga's employer, a Samoan bank, that he had been granted three weeks recreational leave. On 24 January 2002, the parents sought to prolong their visitor's permits, which was rejected on the basis that the original permits had been granted for the duration Mr Fa'aaliga's employer had granted him leave. The parents then stated that they wished to apply for residence, and were informed that they had until the expiry of their permits on 6 February 2002 to do so. On 6 February 2002, the permits expired, rendering the parents unlawfully present in New Zealand and requiring them by law to leave the country.

2.3 On 18 February 2002, the parents lodged an appeal under section 47 of the Immigration Act against the requirement to leave the country with the Removal Review Authority, arguing that the presence of New Zealand-born children raised sufficient humanitarian circumstances to justify the parents living in New Zealand. In that appeal, the Committee's decision in Winata v Australia¹ was cited and relied upon by the parents.

2.4 On 31 March 2003, the Authority rejected the appeal. It set out the Committee's reasoning in Winata and accepted that the case "raise[s] important and relevant general principles, which have application in the present appeals", but considered that the facts in that case were "significantly different". The Authority considered that the existence of New Zealand born children did not, of itself, constitute a humanitarian circumstance allowing the parents to remain. It noted that the parents had spent the majority of their lives in Samoa and that the children were relatively young at ages 3 and 6 respectively and their lives would not be substantially disrupted. Rather, it was important for the children to remain with their parents and retain strong relationships in the immediate family. There was no evidence that the children's standard of living in Samoa, while different than in New Zealand, would be so inadequate as to jeopardise or compromise their development, contrary to article 27 of the Convention on the Rights of the Child. The older child, Salom, had been left with the mother's brother and his family previously, and it was unclear whether the child remained with that family. Nor, given that the parents had most recently settled in New Zealand for only 14 months, could it be said that they were very well settled in the country. The Authority indicated that the parents had seven days to leave the country voluntarily, before being exposed to the service of removal orders (which would exclude them for 5 years from returning to the country).

2.5 On 12 May 2003, counsel for the parents sought advice from the Associate Minister of Immigration as to whether their situation could be considered exceptional and that temporary permits could be granted. On 2 September 2003, the Associate Minister responded that no specific information had been provided and that there was insufficient information for an

¹ Case No 930/2000, Views adopted on 26 July 2001.

informed decision to be made. Full and proper representations needed to be made. On 23 September 2003, counsel for the parents made a fuller application for a special direction permitting the parents to remain. On 29 September 2003, a third child, Christos, was born, who departed New Zealand on 16 January 2004.² On 11 December 2003, having considered the applicable international instruments, the Associate Minister dismissed the application, and observed that as they were unlawfully present they were subject to service of removal orders.

2.6 On 20 January 2004, counsel for the parents again applied for a special direction, enclosing draft submissions of the communication to the Committee. By letters of 24 February and 14 June 2004, the Associate Minister confirmed the earlier decision, noting *inter alia* that submission of a communication alone to the Committee did not amount to a stay on removal. On 21 September 2004, Christos returned to New Zealand.

2.7 As to the exhaustion of domestic remedies, the authors argue that an appeal from the Authority to the High Court and Court of Appeal is only available on a point of law rather than a general review of the merits of the case. In the authors' view, there was no error of law by the Authority and thus no appeal was available. As to the Minister's decision, the decision is discretionary and there is no appeal to the courts.

The complaint

3. The authors argue that the rights of all members of the family under articles 23, paragraph 1, and 24, paragraph 1, of the Covenant have been violated. They refer to the Committee's decision in Sahid v New Zealand³ for the proposition that these articles have been properly invoked. As to article 23, the authors refer to a decision of admissibility of the European Commission on Human Rights in Uppal v United Kingdom, where the Commission, holding the case admissible, considered that issues arising under article 8 of the European Convention were complex and that their determination should depend on the merits. The authors also argue that the exceptional circumstances identified by the Committee in Winata v Australia⁴ are satisfied here, as there are a greater number of children affected and the circumstances of the parents are poor. As to article 24, the authors argue that the children are New Zealand nationals and are entitled to the same measures of protection as other New Zealand children. As a result, they are being discriminated against by virtue of their parents not being New Zealand nationals.

Submissions by the State party on the admissibility and merits of the communication

4.1 By submission of 26 October 2004, the State party contested the admissibility and merits of the communication. Concerning admissibility, the State party contends that the communication is inadmissible for failure to exhaust domestic remedies and for want of sufficient substantiation. The State party argues, with reference to domestic jurisprudence, that statutory powers such as those exercised by the Removal Review Authority must be exercised in accordance with national and international human rights standards. The meaning of, approach to and weighing of those obligations are matters of law open to judicial scrutiny. The Committee's case law was cited to the Removal Review Authority and applied. Had that

² No information is provided as to whom accompanied the child.

³ Case No 893/1999, Decision adopted on 28 March 2003, at paragraph 7.4.

⁴ *Op. cit.*

consideration been inadequate or flawed, it was open to correction on appeal to the High Court and Court of Appeal but the authors did not pursue such a course.

4.2 The State party also argues that the communication is insufficiently substantiated providing only broad and undetailed assertions with respect to article 23 and very little concerning article 24. It notes that the Committee rejected comparable arguments on this basis in *Rajan v New Zealand*.⁵ The very general assertions, beyond a bare reference to *Winata*, do not attempt to address the requirements of the Covenant at all, despite representation by counsel. No evidence is produced detailing the actual consequences to the family if returned to Samoa, or of any discrimination faced by the children. Finally, the assertion that the current situation falls within the “exceptional circumstances” described in *Winata* is not supportable.

4.3 The State party further made detailed on the merits of the communication as to why no violation of the Covenant was disclosed.

Comments on the State party’s submissions

5. By letter of 14 December 2004, the authors responded to the State party’s submissions. As to exhaustion of domestic remedies, the earlier submissions are reiterated. As to substantiation, for purposes of admissibility, the authors add that if the parents are required to return to Samoa they would have to make a decision as to whether to leave some or all of the children in New Zealand or take them to Samoa. If they return to Samoa with their children, they would be unable to provide the opportunities that the children are entitled to as New Zealand citizens. If on the other hand the children were left in New Zealand to avail themselves of the educational or other benefits of New Zealand citizenship, then the parents would be separated from their children. The authors also responded on the State party’s submissions on the merits of the communication.

Issues and Proceedings before the Committee

Consideration of admissibility

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 the complaint is admissible under the Optional Protocol to the Covenant.

6.2 As to the exhaustion of domestic remedies, the Committee observes that the authors did not appeal the decision of the Removal Review Authority to the High Court on a point of law, which the authors contend was not raised in the present case. The Committee notes, however, that the Authority considered its case law, setting out its reasoning in *Winata* and concluding that that the scope of the decision in that case did not extend to the facts of the present case. The Committee observes however that issues of the interpretation of a particular Covenant provision or the application of a certain interpretation to particular facts raise issues of law; indeed, the authors invite the Committee to determine that the Authority’s analysis was in breach of the Covenant. The Committee observes that these matters of law were not placed before the High Court, with the result that it is inappropriate to seek the same result from the

⁵ Case No 820/1998, Decision adopted on 7 August 2003, at paragraph 7.3.

Committee that could have been achieved before the domestic courts.⁶ The Committee notes, moreover, that with respect to the effectiveness of this remedy in two previous communications against the State party concerning issues under the same articles of the Covenant the authors involved appealed from decisions of the administrative tribunal in question to the appellate courts.⁷ It follows that the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol for failure to exhaust domestic remedies.

6.3 In light of this conclusion, the Committee need not address the remaining arguments of the State party.

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 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.]

⁶ See Karawa v Australia Case No 1127/2002, Decision adopted on 21 July 2005.

⁷ See Sahid and Rajan, op.cit.