# CHILDREN'S RIGHTS - BEST INTERESTS

## III. JURISPRUDENCE

## ICCPR

· *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995) 77 (CCPR/C/53/D/514/1992) at paras. 8.7, 8.9, 8.10, 9 and 10.

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8.7 The Committee has noted and accepts the State party's argument that in proceedings which are initiated by the children of a divorced parent, the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests. The Committee recalls, however, that when such matters are before a local court that is assessing these matters, the court must respect all the guarantees of fair trial.

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8.9 As to the alleged violation of article 23, paragraph 4, the Committee recalls that this provision grants, barring exceptional circumstances, a right to regular contact between children and both of their parents upon dissolution of a marriage. The unilateral opposition of one parent generally does not constitute such an exceptional circumstance. 25/

8.10 In the present case, it was the author's ex-husband who sought to prevent the author from maintaining regular contact with her daughters, in spite of court decisions granting the author such access. On the basis of the material made available to the Committee, the father's refusal apparently was justified as being "in the best interest" of the children. The Committee cannot share this assessment. No special circumstances have been adduced that would have justified the restrictions on the author's contacts with her children. Rather, it appears that the author's ex-husband sought to stifle, by all means at his disposal, the author's access to the girls, or to alienate them from her. The severe restrictions imposed by Mrs. Fei's ex-husband on Mrs. Fei's rare meetings with her daughters support this conclusion. Her attempts to initiate criminal proceedings against her ex-husband for non-compliance with the court order granting her visiting rights were frustrated by delay and inaction on the part of the prosecutor's office. In the circumstances, it was not reasonable to expect her to pursue any remedy that may have been available under the Code of Civil Procedure. In the Committee's opinion, in the absence of special circumstances, none of which are discernible in the present case, it cannot be deemed to be in the "best interest" of children virtually to eliminate one parent's access to them. That Mrs. Fei has, since 1992-1993, reduced her attempts to vindicate her right of access cannot, in the Committee's opinion, be held against her. In all the circumstances of the case, the Committee concludes that there has been a violation of article 23, paragraph 4. Furthermore, the failure of the prosecutor's office to ensure the right to permanent contact

between the author and her daughters also has entailed a violation of article 17, paragraph 1, of the Covenant.

9. The Human Rights Committee...is of the view that the facts before the Committee reveal violations by Colombia of articles 14, paragraph 1, and 23, paragraph 4, in conjunction with article 17, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. In the Committee's opinion, this entails guaranteeing the author's regular access to her daughters, and that the State party ensure that the terms of the judgements in the author's favour are complied with. The State party is under an obligation to ensure that similar violations do not occur in the future.

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Notes

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25/ Views on case No. 201/1985 (*Hendriks v. The Netherlands*), adopted on 27 July 1988, para. 10.4.

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· *Buckle v. New Zealand* (858/1999), ICCPR, A/56/40 vol. II (25 October 2000) 175 at paras. 2.1, 2.2 and 9.1-9.3.

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2.1 The author's six children (aged at the time between 8 and 1 year of age) were removed from her care in 1994 allegedly because of her inability to look after them adequately.

2.2 In August 1997 the author appealed, to the Court of Appeal, the decision of the New Zealand Family Court that had deprived her of her guardianship rights. On 25 February 1998, the Court of Appeal confirmed the decision of the Family Court. The author's request for leave to appeal to the Privy Council against the decision of February 1998 was rejected. Notwithstanding this Mrs Buckle travelled to the United Kingdom and secured a hearing in May 1998, before the Judicial Committee of the Privy Council. The application was unsuccessful.

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9.1 Concerning the author's claim under article 17 of the Covenant, the Committee notes the information provided by the State party with respect to the extensive procedures followed in the author's case. The Committee also notes that the situation is under regular review and that the author has been given the opportunity to retain access to her children. In the circumstances, the Committee finds that the interference with the author's family has not been unlawful or arbitrary and is thus not in violation of article 17 of the Covenant.

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9.2 The author has also claimed a violation of article 23 of the Covenant. The Committee recognizes the weighty nature of the decision to separate mother and children, but notes that the information before it shows that the State party's authorities and the Courts considered carefully all the material presented to them and acted with the best interests of the children in mind and that nothing indicates that they violated their duty under article 23 to protect the family.

9.3 With respect to the alleged violation of article 24 of the Covenant, the Committee is of the opinion that the author's arguments and the information before it do not raise issues that would be separate from the above findings.

· *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 2.1-2.3, 2.5-2.8, 2.10, 2.12, 2.14, 9.3, 9.5-9.7, 10 and 11.

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2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ("RRT") dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

2.3 Some time after July 2001, Mr. Bakhtiyari found out from an Hazara detainee who had been released from the Woomera detention facility that his wife and children had arrived in Australia and were being held at Woomera. On 6 August 2001, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department"), as a matter of standard procedure following an unsuccessful appeal to the RRT, assessed the case in the light of the Minister's public interest guidelines, 1/ which include consideration of international obligations, including the Covenant. It was decided that Mrs. Bakhtiyari and the children did not meet the test of the guidelines. In October 2001, Mrs. Bakhtiyari applied to the Minister for Immigration requesting that he exercise his discretion under s.417 of the *Migration* Act to substitute, in the public interest, a more favourable decision for that of the RRT, on the basis of the family relationship with Mr. Bakhtiyari.

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2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the *Migration* Act. The application sought to require the Minister to grant a visa to Mrs. Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration* Act, but was informed that such matters were generally not referred to the Minister while litigation was underway.

2.7 On 11 June 2002, the High Court granted an Order Nisi in respect of the application of Mrs. Bakhtiyari and her children, finding an arguable case to have been established. On 27 June 2002, some 30 detainees, amongst them the eldest sons of Mrs. Bakhtiyari, Almadar and Mentazer, escaped from the Woomera facility. On 16 July 2002, Mrs. Bakhtiyari again made a request to the Minister under s.417 of the *Migration* Act, but was again informed that such matters were generally not referred to the Minister while litigation was under way. On 18 July 2002, the two boys who had escaped gave themselves up at the British Consulate in Melbourne, Australia, and sought asylum. The request was refused and they were returned to the Woomera facility.

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the

*Family Law* Act 1975[2]/ for the release of the boys from detention and for them to be made available for examination by a psychologist.

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2.10 On 9 October 2002, the Family Court (Dawe J) dismissed the application made to it, finding it had no jurisdiction to make orders in respect of children in immigration detention. On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

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2.12 On 4 February 2003, the High Court, by a majority of five justices against two, refused the application of Mrs. Bakhtiyari and her children to be granted a protection visa on account of Mr. Bakhtiyari's status. The Court found that as the Minister was under no obligation to make a new decision, no object would be served in setting aside his decision, and in any event it was not tainted by illegality, impropriety or jurisdictional error. Likewise, the RRT's decision on their appeal was not tainted by any jurisdictional error.

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2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

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9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in

particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs. Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary to article 9, paragraph 1, of the Covenant.

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9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that

in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy...So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

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Notes

1/ The Guidelines, provided by the authors, provide that "public interest" factors may arise in a number of circumstances, including where there are circumstances that provide a sound basis for a significant threat to a person´s personal security, human rights or human dignity upon return to their country of origin, where there are circumstances that may bring the State party´s obligations under the Covenant, the Convention on the Rights of the Child or the Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment into consideration, or where there are unintended but particularly unfair or unreasonable consequences of the legislation.

2/ Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the

court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

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*For dissenting opinion in this context, see Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at Individual Opinion by Sir Nigel Rodley, 319.