CHILDREN'S RIGHTS - PARENTS AND FAMILY

III. JURISPRUDENCE

ICCPR

- *Hendriks v. The Netherlands* (201/1985), ICCPR, A/43/40 (27 July 1988) 230 at paras. 10.2-10.5, 11, Individual Opinion by Messrs Vojin Dimitrijevic and Omar El Shafei, Mrs. Rosalyn Higgins and Mr. Adam Zielinski (concurring), 239, and Individual Opinion by Mr. Amos Wako (concurring), 240.

...

10.2 The main question before the Committee is whether the author of the communication is the victim of a violation of article 23, paragraphs 1 and 4, of the Covenant because, as a divorced parent, he has been denied access to his son. Article 23, paragraph 1, of the Covenant provides for the protection of the family by society and the State:

> "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State".

Under paragraph 4 of the same article:

> "States parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children."

10.3 In examining the communication, the Committee considers it important to stress that article 23, paragraphs 1 and 4, of the Covenant sets out three rules of equal importance, namely, that the family should be protected, that steps should be taken to ensure equality of rights of spouses upon the dissolution of the marriage and that provision should be made for the necessary protection of any children. The words "the family" in article 23, paragraph 1, do not refer solely to the family home as it exists during the marriage. The idea of the family must necessarily embrace the relations between parents and child. Although divorce legally ends a marriage, it cannot dissolve the bond uniting father - or mother - and child - this bond does not depend on the continuation of the parents' marriage. It would seem that the priority given to the child's interests is compatible with this rule.

10.4 The courts of the States parties are generally competent to evaluate the circumstances of individual cases. However, the Committee deems it necessary that the law should establish certain criteria so as to enable the courts to apply to the full the provisions of article 23 of the Covenant. It seems essential, barring exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between

the child and both parents. The unilateral opposition of one of the parents, cannot, in the opinion of the Committee, be considered an exceptional circumstance.

10.5 In the case under consideration, the Committee notes that the Netherlands courts, as the Supreme Court had previously done, recognized the child's right to permanent contact with each of his parents as well as the right of access of the non-custodial parent, but considered that these rights could not be exercised in the current case because of the child's interests. This was the court's appreciation in the light of all the circumstances, even though there was no finding of inappropriate behaviour on the part of the author.

11. As a result, the Committee cannot conclude that the State party has violated article 23, but draws its attention to the need to supplement the legislation, as stated in paragraph 10.4.

Individual Opinion by Messrs. Vojin Dimitrijevic and Omar El Shafei, Mrs. Rosalyn Higgins and Mr. Adam Zielinski

1. The great difficulty that we see in this case is that the undoubted right and duty of a domestic court to decide "in the best interests of the child" can, when applied in a certain way, deprive a non-custodial parent of his rights under article 23.

2. It is sometimes the case in domestic law that the very fact of a family rift will lead a non-custodial parent to lose access to the child, though he/she has not engaged in any conduct that would *per se* render contact with the child undesirable. However, article 23 of the Covenant speaks not only of the protection of the child, but also of the right to a family life. We agree with the Committee that this right to protection of the child and to a family life continues, in the parent-child relationship, beyond the termination of a marriage.

3. In this case, the Amsterdam District Court rejected the father's petition for access, although it had found the request reasonable and one that should in general be allowed. It would seem, from all the documentation at our disposal, that its denial of Mr. Hendriks' petition was based on the tensions likely to be generated by the mother's refusal to agree to such a contact - "even to a single meeting between the boy and his father on neutral ground, despite the fact that the Child Care and Protection Board would agree and would have offered guarantees" (decision of 20 December 1978). Given that it was not found that Mr. Hendriks' character or behaviour was such as to make the contact with his son undesirable, it seems to us that the only "exceptional circumstance" was the reaction of Wim Hendriks junior's mother to the possibility of parental access and that this determined the perception of what was in the best interests of the child.

4. It is not for us to insist that the courts were wrong, in their assessment of the best interests of the child, in giving priority to the current difficulties and tensions rather than to the

long-term importance for the child of contact with both its parents. However, we cannot but point out that this approach does not sustain the family rights to which Mr. Hendriks and his son were entitled under article 23 of the Covenant.

Individual Opinion by Mr. Amos Wako

1. The Committee's decision finding no violation of article 23 of the Covenant in this case is predicated on its reluctance to review the evaluation of facts or the exercise of discretion by a local court of a State party.

2. Although I fully appreciate and understand the Committee's opinion in this matter and, in fact, agreed to go along with the consensus, I wish to put on record my concerns, which are twofold.

3. My first concern is that, though the Committee's practice of not reviewing the decisions of local courts is prudent and appropriate, it is not dictated by the Optional Protocol. In cases where the facts are clear and the texts of all relevant orders and decisions have been made available by the parties, the Committee should be prepared to examine them as to their compatibility with the specific provisions of the Covenant invoked by the author. Thus, the Committee would not be acting as a "fourth instance" in determining whether a decision of a State party's court was correct according to that State's legislation, but would only examine whether the provisions of the Covenant invoked by the alleged victim have been violated.

4. In the present case, the Committee declared the communication of Mr. Hendriks admissible, thus indicating that it was prepared to examine the case on the merits. In its views, however, the Committee has essentially decided that it is unable to examine whether the decisions of the Netherlands courts not to grant the author visiting rights to his son were compatible with the requirements of protection of the family and protection of children laid down in articles 23 and 24 of the Covenant. Paragraph 10.3 of the decision reflects the Committee's understanding of the scope of article 23, paragraphs 1 and 4, and of the concept of "family". In paragraph 10.4, the Committee underlines the importance of maintaining permanent personal contact between the child and both his parents, barring exceptional circumstances; it further states that the unilateral opposition by one of the parents - as apparently happened in this case - cannot be considered such an exceptional circumstance. The Committee should therefore have applied these criteria to the facts of the Hendriks case, so as to determine whether a violation of the articles of the Covenant had occurred. The Committee, however, makes a finding of no violation on the ground that the discretion of the local courts should not be questioned.

5. My second concern is whether the Netherlands legislation, as applied to the Hendriks family is compatible with the Covenant. Section 161, paragraph 5, of the Netherlands Civil

Code does not provide for a statutory right of access to a child by the non-custodial parent, but leaves the question of visiting rights entirely to the discretion of the judge. The Netherlands legislation does not contain specific criteria for withholding of access. Thus the question arises whether the said general legislation can be deemed sufficient to guarantee the protection of children, in particular the right of children to have access to both parents, and to ensure equality of rights and responsibilities of spouses at the dissolution of a marriage, as envisaged in articles 23 and 24 of the Covenant. The continued contact between a child and a non-custodial parent is, in my opinion, too important a matter to be left solely to the judge to decide upon without any legislative guidance or clear criteria, hence the emerging international norms, notably international conventions against the abduction of children by parents, bilateral agreements providing for visiting rights and, most importantly, the draft convention on the rights of the child, draft article 6, paragraph 3, of which provides: "A child who is separated from one or both parents has the right to maintain personal relations and direct contacts with both parents on a regular basis, save in exceptional circumstances". Draft article 6 bis, paragraph 2, provides similarly: "A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents..."

6. The facts of this case, as presented to the Committee, do not reveal the existence of any exceptional circumstances that might have justified the denial of personal contacts between Wim Hendriks junior and Wim Hendriks senior. The Netherlands courts themselves agreed that the father's application for access was reasonable, but denied the application primarily on the grounds of the mother's opposition. Although the Netherlands courts may have applied Netherlands law to the facts of this case correctly, it remains my concern that that law does not include a statutory right of access nor any identifiable criteria under which the fundamental right of mutual contact between a non-custodial parent and his or her child could be denied. I am pleased that the Netherlands Government is currently contemplating the adoption of new legislation which would provide for a statutory right of access and give the courts some guidance for the denial of access based on exceptional circumstances. This legislation, if enacted, would better reflect the spirit of the Covenant.

- *Santacana v. Spain* (417/1990), ICCPR, A/49/40 vol. II (15 July 1994) 101 (CCPR/C/51/D/417/1990) at paras. 10.1-10.5, 11 and Individual Opinion by Mrs. Elizabeth Evatt, 113.

...
10.1 On the merits, the questions before the Committee concern the scope of articles 23, paragraphs 1 and 4, and 24, paragraph 1, i.e. whether these provisions guarantee an unqualified right of access for a divorced or separated parent, or not, and a child's right to have contact with both parents...

10.2 The State party has argued that article 23, paragraphs 1 and 4, do not apply to the case, as the author's unstable relationship with Ms. Montalvo cannot be subsumed under the term "family", and no marital ties between the author and Ms. Montalvo ever existed. The Committee begins by noting that the term "family" must be understood broadly; it reaffirms that the concept refers not solely to the family home during marriage or cohabitation, but also to the relations in general between parents and child. d/ Some minimal requirements for the existence of a family are however necessary, such as life together, economic ties, a regular and intense relationship, etc.

10.3 In the instant case, irrespective of the nature of the author's relationship with Ms. Montalvo, the Committee observes that the State party has always acknowledged that the relations between the author and his daughter were protected by the law, and that the mother, between 1986 and 1990, never objected to the author's contacts with his daughter. It was only after Mr. Balaguer continuously failed to observe, and objected to, the modalities of his right of access, that she sought exclusive custody and non-contentious proceedings were suspended. The Committee concludes that there has been no violation of article 23, paragraph 1.

10.4 The Committee further notes that article 23, paragraph 4, does not apply in the instant case, as Mr. Balaguer was never married to Ms. Montalvo. If paragraph 4 is placed into the overall context of article 23, it becomes clear that the protection of the second sentence refers only to children of the marriage which is being dissolved. In any event, the material before the Committee justifies the conclusion that the State party's authorities, when determining custody or access issues in the case, always took the child's best interests into consideration...

10.5 The author has claimed a violation of article 24, paragraph 1, since his daughter, as a minor, has not benefitted from the appropriate measures of protection, by law or otherwise, on the part of her family and the State. The Committee cannot share this conclusion. On the one hand, the girl's mother has, on the basis of the available documentation, fulfilled her obligations as custodian of the child; secondly, there is no indication that the applicable Spanish law, in particular Sections 154, 156, 159 and 160 of the Civil Code, do not provide for appropriate protection of children upon dissolution of a marriage or the separation of unmarried parents.

...

11. The Human Rights Committee...is of the view that the facts before it do not reveal a breach by the State party of any of the provisions of the Covenant.

Notes

...

d/ See Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VII.H, communication No. 201/1985 (*Hendriks v. The Netherlands*), views

adopted on 27 July 1988, para.10.3.

Individual Opinion by Mrs. Elizabeth Evatt (concurring)

I agree with the Committee's conclusion that there has been no violation of the author's rights under the Covenant. I agree also that, in the circumstances of the case, it is not necessary to apply article 23, paragraph 4, since the measures of protection required for a minor under article 24, paragraph 1, also require that decisions about custody and access (visiting rights) be decided on the basis of the child's best interests.

I do not agree, however, with an interpretation of the concept of "marriage" in article 23, paragraph 4, which would automatically exclude its application to relationships which, while not "formal" marriages, are in the nature of marriage and share many of its attributes including joint responsibility for the care and upbringing of children. Legal regimes applying to such relationships should, in my view, be in conformity with article 23, paragraph 4.

- *Mónaco et al. v. Argentina* (400/1990), ICCPR, A/50/40 vol. II (3 April 1995) 10 (CCPR/C/53/D/400/1990) at paras. 2.1-2.4, 10.3-10.5, 11.1 and 11.2.

...

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the Headquarters of the Federal Police (Departamento Central de la Policía Federal) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (*histocompatibilidad*) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (*ocultamiento de menor*) and forgery of documents...

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly

participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires...

...

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986, 4/ and the Committee is not in a position *ratione temporis* to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24, 5/ in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

...

11.1 The Human Rights Committee...is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

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4/ See the Committee's decision on admissibility concerning Communication No. 275/1988, *S.E. v. Argentina*, declared inadmissible *ratione temporis* on 26 March 1990, para. 5.3.

5/ General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989.

CHILDREN'S RIGHTS - PARENTS AND FAMILY

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

...

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.

Notes

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

- *J. P. L. v. France* (472/1991), ICCPR, A/51/40 vol. II (26 October 1995) 231 (CCPR/C/55/D/472/1991) at paras. 2.1, 2.2, 2.4, 2.5, 2.8, 2.9, 2.11, 2.12, 4.3 and 5.

...

2.1 The author married in 1974. At the beginning of 1988, his wife filed for divorce, and on 15 December 1988, the Tribunal of Nanterre (*Tribunal de Grande Instance de Nanterre*) pronounced the divorce...

2.2 The judgment of 15 December 1988 awarded custody of the children to the mother; the author was granted what are considered to be customary visiting rights, i.e. every second weekend and for half of the yearly school vacations. He was further ordered to pay 3,500 FF per calendar month to his ex-wife.

...

2.4 On 30 August 1989, Mr. L. was ordered by the judge responsible for matrimonial and custody matters (*juge aux affaires matrimoniales*) of the *Tribunal de Grande Instance de Nanterre* to present himself the following day. On 1 September 1989, the judge, upon hearing the author, his ex-wife and the children, decided to suspend the author's visiting rights temporarily. She indicated that such a step was necessary because the author had made numerous incriminating comments with sexual connotations ("*propos orduriers*") to his sons and asked them repeated questions about the sexual behaviour of their mother. Moreover, the children had complained, by letter dated 11 June 1989 addressed to the family judge, about the difficult living conditions at their father's home, and about their being asked to study in his studio.

2.5 On 11 December 1989, the same judge ordered a social enquiry ("*enquête sociale*") and a psycho-medical examination ("*examen psycho-médical*") of both parents, in order to determine under which conditions the author might be allowed to exercise his visiting rights. The results of the study were to be transmitted to the judge within three months. On 13 July 1990, the family judge again heard the parties, including the author's older son, and examined the report of the social enquiry. The author confirmed that he had refused to meet with the social worker and explicitly stated that he would not submit to any psycho-medical examination. As a result, and on the basis of the report of the social enquiry as well as the wishes of the author's sons, the suspension of the author's visiting rights was confirmed.

...
2.8 The author continued his efforts to obtain custody of his sons or "at least daily visiting rights". On 13 March 1991, he filed another request to this effect with the family judge at Nanterre. He justified his request with the allegedly unsatisfactory school results of his sons and his desire to assist them in their studies. A hearing took place on 15 May, and the children were convoked for a separate hearing on 5 June 1991. On that date, only M. met with the judge, whereas A. sent a confidential letter.

2.9 On 10 July 1991, the judge confirmed the suspension of the author's visiting rights, for a duration of three years (i.e. until 10 July 1994). In her decision, the judge stated that the author's obsession with his sons' school education had eliminated every sign of affection vis-à-vis them and interest in their development, and that the sons were exasperated by the situation...
...
2.11 After the family judge's decision of 10 July 1991, the author stopped having direct contacts with his sons. He continued however to write to them on a regular basis (over 100 letters between July 1991 and July 1994). His ex-wife moved away from Paris, and the author's efforts to ascertain where his sons were enrolled in school were unsuccessful. On 1 April 1993, the police brought the author to a psychiatric institution located approximately 60 kilometres from Paris. He indicates that there were no grounds for assigning him to this institution for treatment of psychological disorder. On 25 June 1993, he was released.

2.12 ...By letters dated 13 August and 17 September 1995, he indicates that by injunction ("*ordonnance de référé*") of 8 July 1994 handed down by the family judge at the *Tribunal de Grande Instance de Caen*, the suspension of his visiting rights was extended for another three years, until July 1997. In her decision, the judge, who had heard the parties on 4 July 1994, concluded that while the author had not seen his sons since 1991, he had addressed regular letters to them, reminding them of his proximity and their duties, and thereby reinforcing a sentiment of animosity and persecution in his sons. Furthermore, in eight letters sent to them between 24 April and 24 June 1994, he had informed them of the imminent resumption of his visiting rights and of his intention to spend his vacations with them as of 11 July 1994. The tone of the letters, the fact that the author did not even consult with his sons then aged 13 and 17 years, and the latters' exasperation with their father's attitude, manifested in various letters, led the judge to conclude that an extension of the suspension order was justified.
...
4.3 With respect to article 23, paragraph 4, the Committee accepts that this provision grants, barring exceptional circumstances, a right to regular contact between children and both parents. a/ The material before the judges seized of the case clearly supported the conclusion that there were special circumstances which justified a denial of the author's access to his sons, in the interest of the children. The author has not advanced any grounds to show that

the material before the courts could not support such a conclusion. In this respect, therefore, the Committee equally concludes that the author has made no claim within the meaning of article 2 of the Optional Protocol.

5. The Human Rights Committee therefore decides:

> (a) that the communication is inadmissible under article 2 of the Optional Protocol...

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Notes

a/ See Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40), vol. II, annex X.J, communication No. 514/1992 (*Fei v. Colombia*), views adopted on 4 April 1995, para. 8.9; see also general comment No. 19 (39) on article 23 (*ibid*., Forty-fifth Session, Supplement No. 40 A/45/40), vol. I, annex VI.B), para. 6.

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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

...

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.

...

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.

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.

- *Winata v. Australia* (930/2000), ICCPR, A/56/40 vol. II (26 July 2001) 199 at paras. 2.1-2.6, 6.2-6.5, 7.1-7.3, 8 and 9.

...
2.1 On 24 August 1985 and 6 February 1987, Mr. Winata and Ms. Li arrived in Australia on a visitor's visa and a student visa respectively. In each case, after expiry of the relevant visas on 9 September 1985 and 30 June 1988 respectively they remained unlawfully in Australia. In Australia Mr. Winata and Ms. Li met and commenced a *de facto* relationship akin to marriage, and have a thirteen year old son, Barry, born in Australia on 2 June 1988.

2.2 On 2 June 1998, by virtue of his birth in that country and residing there for 10 years, Barry acquired Australian citizenship. On 3 June 1998, Mr. Winata and Ms. Li lodged combined applications for a protection visa with the Department of Immigration and Multicultural Affairs (DIMA), based generally upon a claim that they faced persecution in Indonesia owing to their Chinese ethnicity and Catholic religion. On 26 June 1998, the Minister's delegate refused to grant a protection visa.

2.3 On 15 October 1998, 1/ Mr. Winata and Ms. Li's representative in Jakarta lodged an application with the Australian Embassy to migrate to Australia on the basis of a "subclass 103 Parent Visa". A requirement for such a visa, of which presently 500 are granted per year, is that the applicant must be outside Australia when the visa is granted. According to counsel, it thus could be expected that Mr. Winata and Ms. Li would face a delay of several years before they would be able to return to Australia under parent visas.

2.4 On 25 January 2000, the Refugee Review Tribunal (RRT) affirmed DIMA's decision to refuse a protection visa. The RRT, examining the authors' refugee entitlements under article 1A(2) of the Convention Relating to the Status of Refugees (as amended) only, found that even though Mr. Winata and Ms. Li may have lost their Indonesian citizenship having been absent from that country for such a long time, there would be little difficulty in re-acquiring it. 2/ Furthermore, on the basis of recent information from Indonesia, the RRT considered

that while the possibility of being caught up in racial and religious conflict could not be discounted, the outlook in Indonesia was improving and any chance of persecution in the particular case was remote. The RRT specifically found that its task was solely limited to an examination of a refugee's entitlement to a protection visa, and could not take into account broader evidence of family life in Australia.

2.5 On the basis of legal advice that any application for judicial review of the RRT's decision had no prospects of success, Mr. Winata and Ms. Li did not seek review of the decision. With the passing of the mandatory and non-extendable filing period of 28 days from the decision having now passed, Mr. Winata and Ms. Li cannot pursue this avenue.

2.6 On 20 March 2000, 3/ Mr. Winata and Ms. Li applied to the Minister for Immigration and Multicultural Affairs, requesting the exercise in their favour on compelling and compassionate grounds of his non-enforceable discretion. 4/ The application, relying *inter alia* on articles 17 and 23 of the Covenant, cited "strong compassionate circumstances such that failure to recognize them would result in irreparable harm and continuing hardship to an Australian family". The application was accompanied by a two and a half page psychiatric report on the authors and possible effects of a removal to Indonesia. 5/ On 6 May 2000, the Minister decided against exercising his discretionary power. 6/

...

6.2 As to the State party's arguments that available domestic remedies have not been exhausted, the Committee observes that both proposed appeals from the RRT decision are further steps in the refugee determination process. The claim before the Committee, however, does not relate to the authors' original application for recognition as refugees, but rather to their separate and distinct claim to be allowed to remain in Australia on family grounds. The State party has not provided the Committee with any information on the remedies available to challenge the Minister's decision not to allow them to remain in Australia on these grounds. The processing of the authors' application for a parent visa, which requires them to leave Australia for an appreciable period of time, cannot be regarded as an available domestic remedy against the Minister's decision. The Committee therefore cannot accept the State party's argument that the communication is inadmissible for failure to exhaust domestic remedies.

6.3 As to the State party's contention that the claims are in essence claims to residence by unlawfully present aliens and accordingly incompatible with the Covenant, the Committee notes that the authors do not claim merely that they have a right of residence in Australia, but that by forcing them to leave the State party would be arbitrarily interfering with their family life. While aliens may not, as such, have the right to reside in the territory of a State party, States parties are obliged to respect and ensure all their rights under the Covenant. The claim that the State party's actions would interfere arbitrarily with the authors' family life relates to an alleged violation of a right which is guaranteed under the Covenant to all persons. The

authors have substantiated this claim sufficiently for the purposes of admissibility and it should be examined on the merits.

6.4 As to the State party's claims that the alleged violations of article 23, paragraph 1, and article 24, paragraph 1, have not been substantiated, the Committee considers that the facts and arguments presented raise cross-cutting issues between all three provisions of the Covenant. The Committee considers it helpful to consider these overlapping provisions in conjunction with each other at the merits stage. It finds the complaints under these heads therefore substantiated for purposes of admissibility.

6.5 Accordingly, the Committee finds the communication admissible as pleaded and proceeds without delay to a consideration of its merits. The Committee has considered the communication in the light of all the information made available to it by the parties, as required by article 5, paragraph 1, of the Optional Protocol.

7.1 As to the claim of violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether Barry will accompany his parents to Indonesia or remain in Australia, occasioning in the latter case a physical separation, is purely an issue for the family and is not compelled by the State's actions. The Committee notes that there may indeed be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of a family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.

7.2 In the present case, the Committee considers that a decision of the State party to deport two parents and to compel the family to choose whether a 13-year old child, who has attained citizenship of the State party after living there 10 years, either remains alone in the State party or accompanies his parents is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and contrary to article 17 of the Covenant.

7.3 It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen

years. The authors' son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the alleged victims, and, additionally, a violation of article 24, paragraph 1, in relation to Barry Winata due to a failure to provide him with the necessary measures of protection as a minor.

8. The Human Rights Committee...is of the view that the removal by the State party of the authors would, if implemented, entail a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant.

9. 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, including refraining from removing the authors from Australia before they have had an opportunity to have their application for parent visas examined with due consideration given to the protection required by Barry Winata's status as a minor. The State party is under an obligation to ensure that violations of the Covenant in similar situations do not occur in the future.

Notes

1/ The State party's chronology provides the date for this event as 20 October 1998.

2/ The authors have not contested that re-acquisition of Indonesian citizenship would be unproblematic.

3/ The State party's chronology provides the date for this event as 20 October 1998.

4/ Under s.417 of the Migration Act, the Minister may substitute the decision of the RRT with a more favourable one if it is considered in the public interest to do so.

5/ The report, on file with the Secretariat, states in relation to the family's life in Australia that (i) Barry is having a normal upbringing and education, has "several fairly close friends", understands (but apparently does not speak) Indonesian, and (ii) the family is a strong and close one in the Chinese tradition, but outgoing and with a variety of multicultural friendships through work, church and social life. The report also refers to refugee issues relating to the family history which are not pursued in the present communication.

6/ The authors were formally advised of the Minister's decision on 17 May 2000, postdating the dispatch of the communication to the Committee on 11 May 2000.

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For dissenting opinion in this context, see Winata v. Australia (930/2000), ICCPR, A/56/40 vol. II (26 July 2001) 199 at Individual Opinion by Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden, 211 at paras. 3-6.

- *Van Grinsven v. The Netherlands* (1142/2002), ICCPR, A/58/40 vol. II (27 March 2003) 603 (CCPR/C/77/D/1142/2002) at paras. 2.1-2.3 and 5.6.

...

2.1 According to the author, in June 1998 the author's wife attempted to kill their two children. Subsequently, the children remained in the sole custody of the author, and his wife was made to follow psychiatric treatment. The author filed for divorce in December 1998.

2.2 In July 1999, the court (Rechtbank) in 's-Hertogenbosch awarded joint custody to the parents, but decided that the children should live with their mother. However, when the mother came to pick up the children from the author's house in August, the author killed her. The author claims that he killed his wife in order to protect his children from their mother. On 12 September 2001, on appeal the Court (Gerechtshof 's-Hertogenbosch) convicted the author of the murder of his wife. He was sentenced to 6 years' imprisonment.

2.3 On 13 March 2000, the first instance court (Rechtbank 's-Hertogenbosch) decided to withdraw child custody from the father and the author's application for visits and telephone contact with his children was denied. On 12 July 2000, the Court of Appeal (Gerechtshof 's-Hertogenbosch) ordered further examination of the children's situation and needs. Subsequently, in its decision of 2 January 2002, the Court of Appeal confirmed the lower court's decision that it is in the interest of the children not to visit or to have telephone contact with their father. On 12 February 2002, the author's lawyer provided him with detailed advice on why an appeal in cassation would have no chance of success. He explained that since the author's complaint was based only on the court's evaluation of facts and evidence, it could not be appealed further.

...

5.6 With regard to the author's claim that he and his children were subjected to mental torture and cruel, inhuman and degrading treatment, the Committee notes that, in the circumstances of the case, the withdrawal of custody rights from the author, the refusal to let him meet and talk to his children, and the censoring of mail to his children, do not fall under the scope of article 7 of the Covenant. Furthermore, the Committee considers that the claim that the author and his children are being held in servitude of the state, in view of the factual

circumstances of the case, does not fall within the scope of application of article 8 of the Covenant. Hence, these claims are incompatible with the Covenant and inadmissible under article 3 of the Optional Protocol.

...

- *Sahid v. New Zealand* (893/1999), ICCPR, A/58/40 vol. II (28 March 2003) 176 (CCPR/C/77/D/893/1999) at paras. 2.1, 2.3, 2.4 and 8.2.

...

2.1 In July 1988, the author arrived in New Zealand on a temporary visitor's visa to visit his adult daughter, Jamila, and her husband. His wife and four other children remained in Fiji. In February 1989, a son, Robert, was born to Jamila, and in March 1989 he applied for residence in New Zealand for himself, his wife and four children in Fiji. In June 1989, the application for residence was denied. After a series of extensions, the author's final temporary permit expired on 7 June 1991; from that point, he was unlawfully in New Zealand. In May 1992, his daughter and her husband divorced. On 30 November 1992, the author was served with a removal order under the Immigration Act. On 24 December 1992, the author appealed his deportation order to the Removal Review Authority ("the Authority"). In 1995, the author's daughter remarried, divorced, and then remarried again.

...

2.3 On 27 July 1998, the author's representative sought a special direction from the Minister of Immigration, exceptionally to allow him to remain in New Zealand. On 28 August 1998, the author petitioned the Human Rights Committee. On 9 September 1998, the Minister of Immigration declined the request for a special direction for lack of substance. On 9 June 1999, the author was arrested with a view to removal. On 10 June 1999, the High Court, on an application for interim relief to stay removal, directed that the author be released on bail while interviews would be undertaken. On 16 June 1999, following a humanitarian assessment, the authorities decided to proceed with removal. On 1 July 1999, the High Court dismissed the application for interim relief. On 2 July 1999, the author was removed to Fiji.

...

2.4 On 3 July 2000, the Minister of Immigration cancelled the author's removal order, which would allow him to apply in the usual fashion for a temporary or residence visa without waiting out the usual five year period following removal.

...

8.2 As to the admissible claims under article 23, paragraph 1, the Committee notes its earlier decision in *Winata v. Australia*,27/ that, in extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In *Winata*, the extraordinary circumstance was the State party's intention to remove the parents of a minor, born in the State party, who had become a naturalized citizen

after the required 10 years' residence in that country. In the present case, the author's removal has left his grandson with his mother and her husband in New Zealand. As a result, in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of the author was not contrary to his right under article 23, paragraph 1, of the Covenant.

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27/ [*Winata v. Australia* Case No. 930/2000, Views adopted on 26 July 2001.]

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- *Rajan v. New Zealand* (820/1998), ICCPR, A/58/40 vol. II (6 August 2003) 410 (CCPR/C/78/D/820/1998) at paras. 2.1-2.4, 2.8, 2.10 and 7.3.

...

2.1 Mr. Rajan emigrated to Australia in 1988, where he was granted a residence permit on 19 February 1990, on the basis of his *de facto* relationship with an Australian woman. Subsequently, in 1994, the woman was convicted in Australia of making a false statement in Mr. Rajan's application for residence. In 1990, Mr. Rajan married Sashi Kantra Rajan in Fiji, who followed him to Australia in 1991, where she obtained a residence permit on her husband's residency status. In 1991, Australian authorities became aware that the claimed *de facto* relationship was fraudulent and started taking action against Mr. and Mrs. Rajan, as well as against Mr. Rajan's brother (Bal) and sister who were believed to have obtained Australian residency under similarly false pretences. On 2 February 1992, son Vicky was born in Australia. On 22 April 1992, Mr. Rajan's brother (Bal) was arrested on ground of false immigration, and Mr. Rajan was advised of a pending interview by authorities.

2.2 The following day, Mr. and Mrs. Rajan migrated to New Zealand. They did not disclose events transpiring in Australia, and were granted New Zealand residence permits on the basis of their Australian permits. On 24 April 1992, Mr. Rajan's brother (Bal) also left Australia for New Zealand. On 30 April 1992, the Australian authorities cancelled Mr. and Mrs. Rajan's Australian permits. On 5 June 1992, the New Zealand authorities were informed that Mr. and Mrs. Rajan were deemed to have absconded from Australia and were prohibited from re-entering Australia. On 3 July 1992, Mr. Rajan admitted to New Zealand authorities that his original *de facto* relationship in Australia was not genuine. Following investigations by the authorities, including interviews with Mr. and Mrs. Rajan, the Minister of Immigration, on 21 June 1994 revoked Mr. and Mrs. Rajan's residence permits on the basis that Mr. Rajan had failed to disclose that the Australian documentation (upon which the New Zealand permits were founded) was dishonestly obtained.

2.3 Mrs. Rajan, not having disclosed these facts in an application for citizenship to the Ministry of Internal Affairs, was granted citizenship on 26 October 1994, whereby, under s.8 of the Citizenship Act 1977, her Fijian citizenship was automatically annulled. In early 1995, her son Vicky was also granted New Zealand citizenship. On 19 April 1995, the Minister of Internal Affairs issued notice of intention to revoke citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information or by mistake.

2.4 On 31 July 1995, the High Court dismissed an appeal against the revocation of residence permits and an application for judicial review of the Minister's decision to revoke, finding that they had been procured by fraud and false and misleading representation. The Court considered there was no threat to the family unit, as the child could live with the parents in Fiji and, if he so wished, return to New Zealand in his own right. The Court of Appeal dismissed their appeal. In March 1996, a second child, Ashnita, was born and automatically acquired New Zealand citizenship by birth.

...

2.8 On 1 October 1999, the Immigration Act was substantially amended, including a provision that persons who were unlawfully in New Zealand following a confirmation of the Deportation Review Tribunal of the decision to revoke a residence permit could not further appeal to the Removal Review Authority. On 18 September 2000, the Government announced a "Transitional Policy". The policy permitted "well settled" overstayers, that is overstayers in New Zealand for five or more years with New Zealand-born dependent children, to be granted permits, subject to health and good character requirements. Mr. and Mrs. Rajan fell within the group requiring character waivers.

...

2.10 On 19 March 2001, the authors applied under the "Transitional Policy". A character waiver was sought on the basis of a conviction of Mr. Rajan in Australia for tax evasion. The application was silent as to the fraudulent obtaining of residence. On 23 April 2001, the Minister of Immigration rejected the request for a character waiver. As a result, on 15 October 2001, the application under the "Transitional Policy" was declined. On 23 May 2002, the Fijian authorities confirmed that both Mr. and Mrs. Rajan continued to be Fijian citizens with valid passports. In December 2002, following submission of further information, the Associate Minister of Immigration confirmed the Minister's decision, specifically considering the children's position.

...

7.3 With respect to the authors' claim that the removal of Mr. and Mrs. Rajan would violate their rights under article 23, paragraph 1, and their children's right to protection under article 24, paragraph 1, the Committee notes that other than a statement that because of the children's youth they would also have to leave New Zealand if their parents were removed, the authors have provided insufficient argument on how their rights in this regard would be violated. It is clear from the decisions of the domestic authorities, that the protection of the

family and, more particularly, the protection of the children were considered at each stage in the process including the High Court, the Court of Appeal, the Deportation Removal Tribunal and most recently by the Minister considering the author's application under the "Transitional Policy". The Committee observes that from an early point, and several years prior to the birth of Ashnita, the State party's authorities moved to remove the authors once fraudulent action became apparent, and that the subsequent time in New Zealand has, in large measure, been spent either in pursuing available remedies or in hiding. In addition, any contention that Mrs. Rajan, in the event that she was uninvolved in the fraud of Mr. Rajan, may have had a separate reliance interest arising from the passage of time is diminished by the State party moving with reasonable dispatch to enforce its immigration laws against criminal conduct. Consequently, the Committee is of the view that the authors have failed to substantiate their claim that they or their children are victims of violations of articles 17, 23 paragraph 1 and 24, paragraph 1, of the Covenant. These claims are, therefore, unsubstantiated and inadmissible under article 2 of the Optional Protocol.

- *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.

...

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.

...

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.

...

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.

...

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.

...

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.

...

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.

...

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. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. 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.

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.

- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) at paras. 9.8, 10 and 11.

...

9.8 In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and thus contrary to article 17 of the Covenant. The Committee observes that in cases of imminent deportation the material point in time for assessing this issue must be that of its consideration of the case. It further observes that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal. In the present case, the Committee notes that the State party justifies the removal of Mr. Madafferi by his illegal presence in Australia, his alleged dishonesty in his relations with the Department of Immigration and Multicultural Affairs, and his "bad character" stemming from criminal acts committed in Italy 20 years ago. The Committee also notes that Mr. Madafferi's outstanding sentences in Italy have been extinguished and that there is no outstanding warrant for his arrest. At the same time, it notes the considerable hardship that would be imposed on a family that has been in existence for 14 years. If Mrs. Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would not only have to live in a country they do not know and whose

language the children (two of whom are already 13 and 11 years old) do not speak, but would also have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State party. In these very specific circumstances, the Committee considers that the reasons advanced by the State party for the decision of the Minister overruling the Administrative Appeals Tribunal, to remove Mr. Madafferi from Australia are not pressing enough to justify, in the present case, interference to this extent with the family and infringement of the right of the children to such measures of protection as are required by their status as minors. Thus, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

10. The Human Rights Committee...is of the view that the State party has violated the rights of Mr. Francesco Madafferi under articles 10, paragraph 1, of the Covenant. Moreover, the Committee considers that the removal by the State party of Mr. Madafferi would, if implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

11. 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 and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

For dissenting opinion in this context, see Madafferi v. Australia (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at Individual Opinion of Ruth Wedgwood, 229.