LEAVE OR RETURN – RIGHT TO

III. JURISPRUDENCE

ICCPR

- *Lichtensztejn v. Uruguay* (77/1980)(R.19/77), ICCPR, A/38/40 (31 March 1983) 166 at paras. 1.2, 6.1, 8.2, 8.3 and 9.

...

1.2 The author claims that a valid Uruguayan passport has been denied him by the Uruguayan authorities without any explanation, allegedly to punish him for the opinions which he holds and which he has expressed concerning human rights violations in Uruguay, and to prevent him from continuing to exercise his freedom of expression.

...

6.1 When considering the admissibility of the communication, the Human Rights Committee did not accept the State party's contention that it was not competent to deal with the communication because the author did not fulfil the requirements of article 1 of the Optional Protocol. In that connection, the Committee made the following observations: article 1 applies to individuals subject to the jurisdiction of the State concerned who claim to be victims of a violation by that State of any of the Covenant rights. The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction' of Uruguay for that purpose. Moreover, a passport is a means of enabling him 'to leave any country, including his own', as required by article 12 (2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposed obligations both on the State of residence and on the State of nationality and that, therefore, article 2 (1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory.

...

8.2 The Committee decides to base its views on the following facts which appear to be uncontested: Samuel Lichtensztejn, a Uruguayan citizen residing in Mexico since 1974, was refused issuance of a new passport by the Uruguayan authorities when his passport expired on 23 October 1978. His application for a new passport at the Uruguayan Consulate in Mexico was rejected without any substantive reasons being given, it being merely stated that by "express order from the Chancellery, the granting of the passport was not authorized". He then requested reconsideration of this decision from the Uruguayan Minister of the Interior. He was subsequently informed by the Uruguayan Consulate in Mexico that he "should rely on the (earlier) refusal". In December 1978, the author was issued an identity and travel document by the Mexican authorities which, however, could not be regarded as a sufficient substitute for a valid Uruguayan passport...

8.3 As to the alleged violation of article 12 (2) of the Covenant, the Committee observed in

its decision of 25 March 1982 (see para. 6.1 above) that a passport is a means of enabling an individual "to leave any country, including his own" as required by that provision: consequently, it follows from the very nature of that right that, in the case of a citizen resident abroad, article 12 (2) imposes obligations on the State of nationality as well as on the State of residence and therefore article 2 (1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12 (2) to citizens within its own territory. On the other hand, article 12 does not guarantee an unrestricted right to travel from one country to another. In particular, it confers no right for a person to enter a country other than his own. Moreover, the right recognized by article 12 (2) may, in accordance with article 12 (3), be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse passport facilities to one of its citizens. However, in the present case, the State party has not put forward any such justification for refusing to issue a passport to Samuel Lichtensztejn. The facilities afforded by Mexico do not in the opinion of the Committee relieve Uruguay of its obligations in this regard.

...

9. The Human Rights Committee... is of the view that the facts found by it disclose a violation of article 12 of the Covenant, because Samuel Lichtensztejn was refused the issuance of a passport without any justification, thus preventing him from fully enjoying the rights under article 12 of the Covenant.

See also:

- *Montero v. Uruguay* (106/1981)(R.24/106), ICCPR, A/38/40 (31 March 1983) 186 at para. 9.4.
- *Nuñez v. Uruguay* (108/1981)(R.25/108), ICCPR, A/38/40 (22 July 1983) 225 at paras. 9.2 and 9.3.

- *Martins v. Uruguay* (R.13/57), ICCPR, A/37/40 (23 March 1982) 157 at paras. 6.2, 7 and 9.

...

6.2 ...Sophie Vital Martins, a Uruguayan citizen residing at present in Mexico, and holder of a passport issued in 1971 in Sweden with a 10 years' validity upon condition that its validity be confirmed after five years, was refused such confirmation by the Uruguayan authorities without explanation several times between 1975 and 1977. In 1978 the author then applied for a new passport at the Uruguayan consulate in Mexico. According to the author, issuance of a passport is subject to the approval of the Ministry of Defence and the Ministry of the Interior. Two months after her application, Sophie Vidal Martins was informed that the Ministry of the Interior had refused to approve the issue to her of a new

passport. She then appealed against this decision which later was officially reconfirmed by the Uruguayan Foreign Ministry without any reasons given. The author was offered a document which would have entitled her to travel to Uruguay, but not to leave the country again. The author declined this offer for reasons of personal security.

...

7. ...The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose. Moreover, a passport is a means of enabling him "to leave any country, including his own", as required by article 12 (2) of the Covenant. It therefore follows from the very nature of the right that, in the case of a citizen resident abroad it imposes obligations both on the State of residence and on the State of nationality. Consequently, article 2(1) of the Covenant cannot be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.

...

9. The Human Rights Committee...is of the view that the facts as found by it...disclose a violation of article 12(2) of the Covenant, because Sophie Vidal Martins was refused the issuance of a passport without any justification therefor, thereby preventing her from leaving any country including her own.

- *González del Río v. Peru* (263/1987), ICCPR, A/48/40 vol. II (28 October 1992) 17 (CCPR/C/46/D/263/1987) at para 5.3.

...

5.3 Article 12, paragraph 2, protects an individual's right to leave any country, including his own. The author claims that because of the arrest warrant still pending, he is prevented from leaving Peruvian territory. Pursuant to paragraph 3 of article 12, the right to leave any country may be restricted, primarily, on grounds of national security and public order (*ordre public*). The Committee considers that pending judicial proceedings may justify restrictions on an individual's right to leave his country. But where the judicial proceedings are unduly delayed, a constraint upon the right to leave the country is thus not justified. In this case, the restriction on Mr. González' freedom to leave Peru has been in force for seven years, and the date of its termination remains uncertain. The Committee considers that this situation violates the author's rights under article 12, paragraph 2; in this context, it observes that the violation of the author's rights under article 12 may be linked to the violation of his right, under article 14, to a fair trial.

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- *Bwalya v. Zambia* (314/1988), ICCPR, A/48/40 vol. II (14 July 1993) 52 (CCPR/C/48/D/314/1988) at para. 6.5.

...
6.5 The author has claimed, and the State party has not denied, that he continues to suffer restrictions on his freedom of movement, and that the authorities have refused to issue a passport to him. This, in the Committee's opinion, amounts to a violation of article 12, paragraph 1, of the Covenant.

See also:

- *Kalenga v. Zambia* (326/1988), ICCPR, A/48/40 vol. II (27 July 1993) 68 (CCPR/C/48/D/326/1988) at para. 6.4.

- *Bahamonde v. Equatorial Guinea* (468/1991), ICCPR, A/49/40 vol. II (20 October 1993) 183 (CCPR/C/49/D/468/1991) at para. 9.3.

...
9.3 The author has claimed, and the State party has not denied, that his passport was confiscated on two occasions in March 1986, and that he was denied the right to leave his country at his own free will. This, in the Committee's opinion, amounts to a violation of article 12, paragraphs 1 and 2, of the Covenant.

- *Mika Miha v. Equatorial Guinea* (414/1990), ICCPR, A/49/40 vol. II (8 July 1994) 96 (CCPR/C/51/D/414/1990) at para 6.6.

...
6.6 The author has claimed a violation of article 12, paragraphs 1 and 2. There is no indication, however, that he was either deprived of his passport or other documents, that the State party restricted his liberty of movement, or that he was denied the right to leave his country. On the basis of the material before the Committee, it appears, rather, that the author left Equatorial Guinea of his own free will, both in 1982 and 1990; nor is there an indication that restrictions were placed on his freedom of movement after his return to Equatorial Guinea in the summer of 1988 and prior to his arrest on 16 August 1988. The Committee thus concludes that there has been no violation of article 12.

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- *Peltonen v. Finland* (492/1992), ICCPR, A/49/40 vol. II (21 July 1994) 238 (CCPR/C/51/D/492/1992) at paras 8.2-8.4.

...

8.2 As to the question of whether the State party's refusal to issue a passport to Mr. Peltonen pursuant to Section 9, subsection 1(6), of the Finnish Passport Act, violates his right, under article 12, paragraph 2, of the Covenant, to leave any country, the Committee observes that a passport is a means of enabling an individual "to leave any country, including his own" as required by article 12, paragraph 2. The Committee further observes that, pursuant to paragraph 3 of article 12, the right to leave any country may be subject to such restrictions as are "provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant". There are, therefore, circumstances in which a State, if its law so provides, may refuse a passport to one of its citizens.

8.3 The *travaux préparatoires* to article 12, paragraph 3, of the Covenant reveal that it was agreed upon that the right to leave the country could not be claimed, *inter alia*, in order to avoid such obligations as national service. d/ Thus, States parties to the Covenant, whose laws institute a system of mandatory national service, may impose reasonable restrictions on the rights of individuals, who have not yet performed such service, to leave the country until service is completed, provided that all the conditions laid down in article 12, paragraph 3, are complied with.

8.4 In the present case, the Committee notes that the refusal by the Finnish authorities to issue a passport to the author, indirectly affects the author's right under article 12, paragraph 2, to leave any country, since he cannot leave his country of residence, Sweden, except to enter countries that do not require a valid passport. The Committee further notes that the Finnish authorities, when denying the author a passport, acted in accordance with Section 9, subsection 1(6), of the Passport Act, and that the restrictions on the author's right were thus provided by law. The Committee observes that restrictions of the freedom of movement of individuals who have not yet performed their military service are in principle to be considered necessary for the protection of national security and public order. The Committee notes that the author has stated that he needs his passport for holiday-travelling and that he has not claimed that the authorities' decision not to provide him with a passport was discriminatory or that it infringed any of his other rights under the Covenant. In the circumstances of the present case, therefore, the Committee finds that the restrictions placed upon the author's right to leave any country are in accordance with article 12, paragraph 3, of the Covenant.

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Notes

...

d/ See E/CN.4/SR.106, page 4 (USA); E/CN.4/SR.150, paragraph 41 (DK); E/CN.4/SR.151, paragraph 4 (U); E/CN.4/SR.315, page 12 (USA).

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For dissenting opinion in this context, see Peltonen v. Finland (492/1992), ICCPR, A/49/40 vol. II (21 July 1994) 238 (CCPR/C/51/D/492/1992) at Individual Opinion by Mr. Bertil Wennergren, 244.

- *Mukong v. Cameroon* (458/1991), ICCPR, A/49/40 vol. II (21 July 1994) 171 (CCPR/C/51/D/458/1991) at para. 9.10.

...

9.10 Finally, as to the claim under article 12, paragraph 4, the Committee notes that the author was not forced into exile by the State party's authorities in the summer of 1990 but left the country voluntarily, and that no laws or regulations or State practice prevented him from returning to Cameroon. As the author himself concedes, he was able to return to his country in April 1992; even if it may be that his return was made possible, or facilitated, by diplomatic intervention, this does not change the Committee's conclusion that there has been no violation of article 12, paragraph 4, in the case.

- *Stewart v. Canada* (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/58/D/538/1993) at paras. 12.2-12.5, 12.7-12.9, Individual Opinion by Eckart Klein (concurring), 60 and Individual Opinion by Laurel B. Francis (concurring), 60.

...

12.2 Article 12, paragraph 4, of the Covenant provides: "No one shall be arbitrarily deprived of the right to enter his own country". This article does not refer directly to expulsion or deportation of a person. It may, of course, be argued that the duty of a State party to refrain from deporting persons is a direct function of this provision and that a State party that is under an obligation to allow entry of a person is also prohibited from deporting that person. Given its conclusion regarding article 12, paragraph 4, that will be explained below, the Committee does not have to rule on that argument in the present case. It will merely assume that if article 12, paragraph 4, were to apply to the author, the State party would be precluded from deporting him.

12.3 It must now be asked whether Canada qualifies as being Mr. Stewart's “country”. In interpreting article 12, paragraph 4, it is important to note that the scope of the phrase "his

own country" is broader than the concept "country of his nationality", which it embraces and which some regional human rights treaties use in guaranteeing the right to enter a country. Moreover, in seeking to understand the meaning of article 12, paragraph 4, account must also be had of the language of article 13 of the Covenant. That provision speaks of "an alien lawfully in the territory of a State party" in limiting the rights of States to expel an individual categorized as an "alien". It would thus appear that "his own country" as a concept applies to individuals who are nationals and to certain categories of individuals who, while not nationals in a formal sense, are also not "aliens" within the meaning of article 13, although they may be considered as aliens for other purposes.

12.4 What is less clear is who, in addition to nationals, is protected by the provisions of article 12, paragraph 4. Since the concept "his own country" is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them. In short, while these individuals may not be nationals in the formal sense, neither are they aliens within the meaning of article 13. The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.

12.5 The question in the present case is whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home.

...

12.7 This case would not raise the obvious human problems Mr. Stewart's deportation from Canada presents were it not for the fact that he was not deported much earlier. Were the Committee to rely on this argument to prevent Canada from now deporting him, it would establish a principle that might adversely affect immigrants all over the world whose first

brush with the law would trigger their deportation lest their continued residence in the country convert them into individuals entitled to the protection of article 12, paragraph 4.

12.8 Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences. The fact that Mr. Stewart's criminal record disqualified him from becoming a Canadian national cannot confer on him greater rights than would be enjoyed by any other alien who, for whatever reasons, opted not to become a Canadian national. Individuals in these situations must be distinguished from the categories of persons described in paragraph 12.4 above.

12.9 The Committee concludes that as Canada cannot be regarded as Mr. Stewart's "country", for the purposes of article 12, paragraph 4, of the Covenant, there could not have been a violation of that article by the State party.

...

Individual Opinion by Eckart Klein

Being in full agreement with the finding of the Committee that the facts of the case disclose neither a violation of article 12, paragraph 4, nor of article 17 and 23...I cannot accept the way how the relationship between article 12, paragraph 4, and article 13 has been determined. Although this issue is not decisive for the outcome of the present case, it could become relevant for the consideration of other communications, and I therefore feel obliged to clarify this point.

The view suggests that there is a category of persons who are not "nationals in the formal sense", but are also not "aliens within the meaning of article 13" (paragraph 12.4). While I clearly accept that the scope of article 12, paragraph 4, is not entirely restricted to nationals but may embrace other persons as pointed out in the view, I nevertheless think that this category of persons - not being nationals, but still covered by article 12, paragraph 4 - may be deemed to be "aliens" in the sense of article 13. I do not believe that article 13 deals only with some aliens. The wording of the article is clear and provides for no exceptions, and aliens are all non-nationals. The relationship between article 12, paragraph 4, and article 13 is not exclusive. Both provisions may come into play together.

I therefore hold that article 13 applies in all cases where an alien is to be expelled. Article 13 deals with the procedure of expelling aliens, while article 12, paragraph 4, and, under certain circumstances, also other provisions of the Covenant may bar deportation for substantive reasons. Thus, article 12, paragraph 4, may apply even though it concerns a

person who is an "alien".

Individual Opinion by Laurel B. Francis

This opinion is given against the background of my recorded views during the Committee's preliminary consideration of this case quite early in the session when I stated *inter alia* that (a) Mr. Stewart was an "own country" resident under article 12 of the Covenant and (b) his expulsion under article 13 was not in violation of article 12, paragraph 4.

I will as far as possible avoid a discursive format in relation to the Committee's decision adopted on November 1 with respect to the question whether the expulsion of Mr. Stewart from Canada (under article 13 of the Covenant) violates the State party's obligation under articles 12, paragraph 4, 17 and 23 of the Covenant.

I should like to submit that:

> ...
> 2. ...[S]econdly I do not agree with the Committee's restricted application of his "own country" concept at the fourth sentence of paragraph 12.3 of the Committee's decision under reference. (That provision speaks of an "alien lawfully in the territory of a State party" in limiting the rights of States to expel an individual categorized as an "alien".) Does it preclude the expulsion of unlawful aliens? Of course not - falling as they do under another legal regime. I have made this point in order to suggest that the legal significance in relation to "an alien lawfully in the territory of a State party" as appears in the first line of article 13 of the Covenant, is related to the first line of article 12: "everyone lawfully in the territory of a State", which includes aliens but, it may be borne in mind that in respect of a compatriot of Mr. Stewart lawfully in Canada on a visitor's visa (not being a permanent resident of Canada) he would not normally have acquired "own country" status as Mr. Stewart had, and would be indifferent to the application of article 12, paragraph 4. But Mr. Stewart would certainly be concerned as indeed he has been.
>
> 3. Thirdly, were it intended to restrict the application of article 13 to exclude aliens lawfully in the territory of a State party who had acquired "own country" status, such exclusion would have been specifically provided in article 13 itself and not left to the interpretation of the scope of article 12, paragraph 4, which incontestably applies to nationals and other persons contemplated in the Committee's text.
>
> 4. In regard to "own country" status in its submission of 24 February 1995,

> the State party argues that "Mr. Stewart has never acquired an unconditional...right to remain in Canada as his 'own country'. Moreover his deportation will not operate as an absolute bar to his re-entry to Canada. A humanitarian review in the context of the future application to re-enter Canada as an immigrant is a viable administrative procedure that does not entail reconsideration of the judicial decision of the Immigration Appeal Board"... 10/

Implicit in the foregoing is the admission that the State party recognizes Mr. Stewart's status as a permanent resident in Canada as his "own country". It is that qualified right applicable to such status which facilitated the decision to expel Mr. Stewart.

But for the foregoing statement attributable to the State party we could have concluded that the decision taken to expel Mr. Stewart terminated his "own country" status in regard to Canada but in light of such statement the "own country" status remains only suspended at the pleasure of the State party.

On the basis of the foregoing analysis, I am unable to support the decision of the Committee that Mr. Stewart had at no time acquired "own country" status in Canada.

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Notes

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10/ See also statements in paragraph 4.2 attributable to the State party, including the following "...furthermore, he would not be barred once and for all from readmission to Canada".

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For dissenting opinions in this context, see Stewart v. Canada (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/58/D/538/1993) at Individual Opinion by Elizabeth Evatt and Cecilia Medina Quirogay, and Francisco José Aguilar Urbina, 62, Individual Opinion by Christine Chanet and Julio Prado Vallejo, 64, and Individual Opinion by Prafullachandra Bhagwati, 65.

- *Hill v. Spain* (526/1993), ICCPR, A/52/40 vol. II (2 April 1997) 5 (CCPR/C/59/D/526/1993) at para. 12.3.

> ...
> 12.3 As for article 9, paragraph 3, of the Covenant, which stipulates that it shall not be the general rule that persons awaiting trial shall be detained in custody, the authors complain that they were not granted bail and that, because they could not return to the United Kingdom, their construction firm was declared bankrupt. The Committee reaffirms its prior

jurisprudence that pre-trial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The mere fact that the accused is a foreigner does not of itself imply that he may be held in detention pending trial. The State party has indeed argued that there was a well-founded concern that the authors would leave Spanish territory if released on bail. However, it has provided no information on what this concern was based and why it could not be addressed by setting an appropriate sum of bail and other conditions of release. The mere conjecture of a State party that a foreigner might leave its jurisdiction if released on bail does not justify an exception to the rule laid down in article 9, paragraph 3, of the Covenant. In these circumstances, the Committee finds that this right in respect of the authors has been violated.

- *Canepa v. Canada* (558/1993), ICCPR, A/52/40 vol. II (3 April 1997) 115 (CCPR/C/59/D/558/1993) at para. 11.3 and Individual Opinion by Martin Scheinin (concurring), 123.

...
11.3 As to the author's claim that his expulsion from Canada violates article 12, paragraph 4, of the Covenant, the Committee recalls that in its prior jurisprudence, 25/ it expressed the view that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arose in the prior case the Committee dealt with, nor do they arise in the present case. The author was not impeded in acquiring Canadian citizenship, nor was he deprived of his original citizenship arbitrarily. In the circumstances, the Committee concludes that the author cannot claim that Canada is his own country, for purposes of article 12, paragraph 4, of the Covenant.
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Notes

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25/ Communication No. 538/1993 (*Stewart v. Canada*), Views adopted on 1 November 1996, para. 12.2 to 12.9.

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Individual Opinion by Martin Scheinin

While I share the Committee's view that there was no violation of the author's rights, I

wish to explain my reasoning for such a conclusion.

As regards the alleged violation of article 12, paragraph 4, I have difficulties in accepting the majority reasoning in communication No. 538/1993 (*Stewart v. Canada*), decided prior to my term as a member of the Committee. In my opinion, there are situations in which a person is entitled to protection both as an alien (i.e. a non-citizen) under article 13 and because the country of residence being understood as his or her "own country" under article 12, paragraph 4. In paragraph 11.3 of the present case, reference is made to the Views in *Stewart* which, in my opinion, give too narrow a picture of situations in which a non-citizen is to be understood to reside in his or her "own country". Besides a situation in which there are unreasonable impediments on the acquisition of nationality, as mentioned in the Views, the same conclusion must, in my opinion, be made in certain other situations as well, for instance, if the person is stateless or if it would be impossible or clearly unreasonable for him or her to integrate into the society corresponding to his or her *de jure* nationality. Just to take one illustrative example, for a blind or deaf person who knows the language used in the country of residence but not the language of his or her nationality country, the country of residence should be interpreted as the person's "own country" under article 12, paragraph 4.

For dissenting opinions in this context, see Canepa v. Canada (558/1993), ICCPR, A/52/40 vol. II (3 April 1997) 115 (CCPR/C/59/D/558/1993) at Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga, 123 and Individual Opinion by Christine Chanet, 124.

- *Dias v. Angola* (711/1996), ICCPR, A/55/40 vol. II (20 March 2000) 111 at paras. 3, 8.3 and 10.

...
3. The author claims that Angola has violated the Covenant, since it failed to investigate the crimes committed, keeps those responsible for the crimes in high positions, and harasses the author and the witnesses so that they can't return to Angola, with as a consequence for the author that he has lost his property...
...
8.3 The Committee recalls its jurisprudence that article 9(1) of the Covenant protects the right to security of person also outside the context of formal deprivation of liberty. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons subject to its jurisdiction would render totally ineffective the guarantees of the Covenant. 1/ In the present case, the author has claimed that the authorities themselves have been the source of the threats. As a consequence of the threats against him, the author has been unable to enter Angola, and he has therefore been prevented from exercising his rights. If the State party neither denies the threats nor cooperates with the Committee to explain the matter, the Committee must give due weight to the author's

allegations in this respect. Accordingly, the Committee concludes that the facts before it disclose a violation of the author's right of security of person under article 9, paragraph 1, of the Covenant.

...

10. ...[T]he State party is under the obligation to provide Mr. Dias with an effective remedy and to take adequate measures to protect his personal security from threats of any kind. The State party is under an obligation to take measures to prevent similar violations in the future.

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Notes

1/ See the Committee's Views in case No. 195/1985, *Delgado Paez v. Colombia*, paragraph 5.5, adopted on 12 July 1990, document CCPR/C/39/D/195/1985.

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- *Toala et al. v. New Zealand* (675/1995), ICCPR, A/56/40 vol. II (2 November 2000) 35 at paras. 2.1, 2.5-2.7, 6.3 and 11.2-11.6.

...

2.1 The authors were all born in Western Samoa: Mr. Toala was born in 1932, Mrs. Toala in 1934, and their adopted child, Eka Toala, in 1984, 1/ Mr. Tofaeono in 1934 and Mrs. Tofaeono in 1933. At the time of the communication, the families were residing in New Zealand, where deportation orders were recently issued against them. The families went into hiding in New Zealand, so as to avoid deportation. The authors claim that they are New Zealand citizens, and that the acts of the New Zealand Government which seek to remove them from New Zealand violate the Covenant.

...

2.5 The authors claim that they are New Zealand citizens pursuant to the decision of the Judicial Committee of the Privy Council in *Lesa v. The Attorney-General of New Zealand* [1983] 2 A.C.20. 2/ In this case, the Privy Council held that by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, persons born in Western Samoa between 13 May 1924 and 1 January 1949 (and their descendants) are New Zealand citizens.

2.6 It is stated that there was considerable adverse reaction in New Zealand to the Lesa judgement, which was delivered by the Privy Council in July 1982. It was estimated that some 100,000 Samoans out of a total population of 160,000 would be affected by the decision.

2.7 The response of the New Zealand Government was to negotiate a Protocol to the Treaty of Friendship between New Zealand and Western Samoa. The Protocol was ratified on 13 September 1982 by the two parties. Within one month, the New Zealand Government passed

into law the Citizenship (Western Samoa) Act of 1982, which gave effect to the Protocol in New Zealand, and nullified the effect of the "Lesa" decision, except for Ms. Lesa herself and a very limited number of persons.

...

6.3 The authors claimed that they were, pursuant to the Lesa ruling, New Zealand citizens and consequently, had the right to freely enter and reside in New Zealand territory, despite the 1982 Act which stripped them of their New Zealand citizenship. The legislation in question was enacted in 1982 after New Zealand had ratified the International Covenant on Civil and Political Rights, but before it ratified the Optional Protocol in 1989. The Committee considered, however, that the legislation in question may have continuing effects which in themselves could constitute a violation under article 12, paragraph 4, of the Covenant. The issue of whether these continuing effects were in violation of the Covenant was one which should be examined on the merits. The Committee considered therefore that it was not precluded *ratione temporis* from declaring the communication admissible.

...

11.2 With regard to the authors' claim to enter and remain in New Zealand the Committee notes that this claim depends on whether under article 12, paragraph 4, of the Covenant New Zealand is or has been at any time their own country and if so, whether they have been deprived arbitrarily of the right to enter New Zealand. In this regard, the Committee notes that none of the authors holds New Zealand nationality at present, nor do they have entitlement to that nationality under New Zealand law. It also notes that all the authors are Western Samoan citizens under the nationality law of that country, which has applied since 1959.

11.3 The Committee notes that the effect of the 1982 Lesa decision was to make four of the authors New Zealand citizens, as from the date of their birth. The fifth author Eka Toala was born in 1984, and appears not to have been affected by Lesa. The four authors who had New Zealand nationality under the Lesa decision, were by virtue of that fact entitled to enter New Zealand. When the 1982 Act took away New Zealand citizenship it removed their right to enter New Zealand as citizens. Their ability to enter New Zealand thereafter was governed by New Zealand immigration laws.

11.4 The Committee's general comment on article 12 observes that "A State party must not by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent that person from returning to his or her own country." In this case, the Committee considers that the circumstances in which the authors gained and then lost New Zealand citizenship need to be examined in the context of the issues which arise under article 12(4).

11.5 The Committee notes that in 1982 the authors had no connection with New Zealand by reason of birth, descent from any New Zealander, ties with New Zealand or residence in New Zealand. They were unaware of any claim to New Zealand citizenship at the time of the Lesa

decision and had acquired New Zealand citizenship involuntarily. It also appears that, with the exception of Mr Toala, none of the authors had ever been in New Zealand. All these circumstances make it arguable that New Zealand did not become their "own country" by virtue of the Lesa decision. But in any event, the Committee does not consider that the removal of their New Zealand citizenship was arbitrary. In addition to the circumstances already mentioned, none of the authors had been in New Zealand between the date of the Lesa decision and the passage of the 1982 Act. They had never applied for a New Zealand passport or claimed to exercise any rights as New Zealand citizens. The Committee is therefore of the view that article 12(4) was not violated in the authors' case.

11.6 As to the claim that the 1982 Act was discriminatory, the Committee observes that the Act applied only to those Western Samoans were not resident in New Zealand and that the authors at that time were not resident in New Zealand and had no ties with that country. There is no basis for concluding that the application of the Act to the authors was discriminatory contrary to article 26 of the Covenant.

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Notes

1/ It is stated that Eka Toala is adopted by Mr. and Mrs. Toala, and as a descendent to them entitled to all rights that they are entitled to; reference is made to the New Zealand Adoption Act 1955, Section 16 (2): "The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock."

2/ Judgment delivered on 28 July 1982.

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- *Jiménez Vaca v. Colombia* (859/1999), ICCPR, A/57/40 vol. II (25 March 2002) 187 (CCPR/C/74/D/859/1999) at paras. 7.1, 7.2, 7.4, 8 and 9.

...

7.1 The author claims that article 9, paragraph 1, of the Covenant has been violated, insofar as the State party was obligated, in view of the death threats that had been made against him, to take the necessary measures to ensure his personal safety and did not do so. The Committee recalls its jurisprudence3/ regarding article 9, paragraph 1, and reiterates that the Covenant also protects the right to security of persons not deprived of their liberty. An interpretation of article 9 which would allow a State party to ignore known threats to the lives of persons under its jurisdiction solely on the grounds that those persons are not imprisoned or detained would render the guarantees of the Covenant totally ineffective.

7.2 In the case in question, Mr. Jiménez Vaca had an objective need for the State to take steps to ensure his safety, given the threats made against him. The Committee takes note of the State party's observations, set out in paragraph 5.1, but notes that the State party does not refer to the complaint which the author claims to have filed with the regional procurator's office in Turbo or before the regional office of the administrative security department of Turbo, nor does it offer any argument to show that the so-called "extortion" did not begin as a result of the complaint concerning death threats which the author filed with the Turbo second criminal circuit court. The Committee must also consider the fact that the State party does not deny the author's allegations that there was no reply to his request that the threats should be investigated and his protection guaranteed. The attempt on the author's life subsequent to the threats confirms that the State party did not take, or was unable to take, adequate measures to guarantee Mr. Asdrúbal Jiménez's right to security of person as provided for in article 9, paragraph 1.

...

7.4 With regard to the author's claims that paragraphs 1 and 4 of article 12 have been violated, the Committee notes the observations of the State party whereby the State cannot be held responsible for the loss of other rights which may be indirectly affected as a result of violent acts. Nevertheless, considering the Committee's view that the right to security of person (art. 9, para. 1) was violated and that there were no effective domestic remedies allowing the author to return from involuntary exile in safety, the Committee concludes that the State party has not ensured to the author his right to remain in, return to and reside in his own country. Paragraphs 1 and 4 of article 12 of the Covenant were therefore violated. This violation necessarily has a negative impact on the author's enjoyment of the other rights ensured under the Covenant.

8. The Human Rights Committee...is of the view that the facts before it disclose violations of article 6, paragraph 1, article 9, paragraph 1, and article 12, paragraphs 1 and 4.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Mr. Luis Asdrúbal Jiménez Vaca with an effective remedy, including compensation, and to take appropriate measures to protect his security of person and his life so as to allow him to return to the country. The Committee urges the State party to carry out an independent inquiry into the attempt on his life and to expedite the criminal proceedings against those responsible for it. The State party is also under an obligation to try to prevent similar violations in the future.

Notes

...

3/ Communication No. 195/1985, *William Eduardo Delgado Páez v. Colombia*, Views adopted on 12 July 1990.

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- *Wilson v. The Philippines* (868/1999), ICCPR, A/59/40 vol. II (30 October 2003) 48 (CCPR/C/79/D/868/1999) at paras. 2.3, 2.6-2.10, 8 and 9.

...
2.3 On 30 September 1998 the author was convicted of rape and sentenced to death, as well as to P50,000 indemnity, by the Regional Trial Court of Valenzuela...
...
2.6 On 21 December 1999, i.e. subsequent to the submission of the communication under the Optional Protocol, the Supreme Court, considering the case on automatic review, set aside the conviction, finding it based on allegations "not worthy of credence", and ordered the author's immediate release. The Solicitor-General had filed a brief with the Court recommending acquittal on the basis that material contradictions in witness testimony, as well as the physical evidence to the contrary, justified the conclusion that the author's guilt had not been shown beyond reasonable doubt.

2.7 On 22 December 1999, on his release from death row, the Bureau of Immigration lifted a Hold Departure Order, on condition that the author paid fees and fines amounting to P22,740 for overstaying his tourist visa. The order covered the entirety of his detention, and if he had not paid, he would not have been allowed to leave the country for the United Kingdom. The ruling was confirmed after an appeal by the British Ambassador to the Philippines, and subsequent efforts directed from the United Kingdom to the Bureau of Immigration and the Supreme Court in order to recover these fees proved similarly unavailing.

2.8 Upon his return to the United Kingdom, the author sought compensation pursuant to Philippine Republic Act 7309. The Act creates a Board of Claims under the Department of Justice for victims of unjust imprisonment or detention, compensation being calculable by month. Upon inquiry, he was informed on 21 February 2001 that on 1 January 2001, he had been awarded P14,000, but that he would be required to claim it in person in the Philippines. On 12 March 2001, he wrote to the Board of Claims seeking reconsideration of quantum, on the basis that according to the legal scale 40 months in prison should result in a sum of P40,000. On 23 April 2001, he was informed that the amount claimed was “subject to availability of funds” and that the person liable for the author's misfortune was the complainant accusing him of rape. No further clarification on the discrepancy of the award was received.

2.9 On 9 August 2001, after applying for a tourist visa to visit his family, the author was informed that as a result of having overstayed his tourist visa and having been convicted of a crime involving moral turpitude, he had been placed on a Bureau of Immigration watchlist. When he inquired why the conviction should have such effect after it had been quashed, he was informed that to secure travel certification he would have to attend the Bureau of Immigration in the Philippines itself.

2.10 The author also sought to lodge a civil suit for reparation, on the basis that the administrative remedy for compensation outline above would not take into account the extent of physical and psychological suffering involved. He was not eligible for legal aid in the Philippines, and from outside the country was unable to secure pro bono legal assistance.

...

8 The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by the Philippines of article 7, article 9, paragraphs 1, 2 and 3, and article 10, paragraphs 1 and 2, 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 author with an effective remedy. In respect of the violations of article 9 the State party should compensate the author. As to the violations of articles 7 and 10 suffered while in detention, including subsequent to sentence of death, the Committee observes that the compensation provided by the State party under its domestic law was not directed at these violations, and that compensation due to the author should take due account both of the seriousness of the violations and the damage to the author caused...As to the imposition of immigration fees and visa exclusion, the Committee takes the view that in order to remedy the violations of the Covenant the State party should refund to the author the moneys claimed from him. All monetary compensation thus due to the author by the State party should be made available for payment to the author at the venue of his choice, be it within the State party's territory or abroad. The State party is also under an obligation to avoid similar violations in the future.

- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at para. 9.6.

...

9.6 As to whether Mr. Madafferi's rights under article 12, paragraph 4, of the Covenant were violated by being arbitrarily deprived of his right to leave his own country, the Committee must first consider whether Australia is indeed Mr. Madafferi's "own country" for the purposes of this provision. The Committee recalls its jurisprudence in the case of *Stewart v. Canada*, that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot normally regard that State as his "own country", when he has not acquired its nationality and continues to retain the nationality of his country of

origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arise in the present case, and neither are the other arguments advanced by the authors sufficient to trigger the exception. In the circumstances, the Committee concludes that Mr. Madafferi cannot claim that Australia is his "own country", for purposes of article 12, paragraph 4, of the Covenant. Consequently, there cannot be a violation of this provision in the current case.

- *El Ghar v. Libyan Arab Jamahiriya* (1107/2002), ICCPR, A/60/40 vol. II (2 November 2004) 156 at paras. 2.1-2.4, 3, 7.2, 7.3, 8 and 9.

...

2.1 The author, of Libyan nationality, has lived all her life in Morocco with her divorced mother and holds a residence permit for that country. As a student of French law at the Hassan II University faculty of law in Casablanca, she wished to continue her studies in France and to specialize in international law. To that end, she has been applying to the Libyan Consulate in Morocco for a passport since 1998.

2.2 The author claims that all her applications have been denied, without any lawful or legitimate grounds. She notes that although she is an adult, she attached to her application form an authorization from her father, who is resident in the Libyan Arab Jamahiriya, that was certified by the Libyan Ministry of Foreign Affairs in order to obtain any official document required. She adds that in September 2002 the Libyan consul stated, without giving any details, that on the basis of the pertinent regulations he could not issue her a passport, but could only provide her with a temporary travel document allowing her to travel to the Libyan Arab Jamahiriya.

2.3 The author also contacted the French diplomatic mission in Morocco to ascertain whether it would be possible to obtain a *laissez-passer* for France, a request which the French authorities were unable to comply with.

2.4 Since she had no passport, the author was unable to enrol in the University of Montpellier I in France.

3. The author claims that the refusal by the Libyan Consulate in Casablanca to issue her with a passport prevents her from travelling and studying and constitutes a violation of the Covenant.

...

7.2 The Committee notes that to date the author has been unable to obtain a passport from the Libyan consular authorities even though, according to the authorities' own statements, her official application dates back at least to 1 September 1999. Moreover, it is clear that

initially, on 18 September 2002, the Libyan consul had indicated to the author that it was not possible to issue her a passport but that she could be given a *laissez-passer* for Libya, by virtue of a regulation that was explained neither orally nor on the *laissez-passer* itself. The passport application submitted to the Libyan Consulate was thus rejected without any explanation of the grounds for the decision, the only comment being that since the author "is a native of Morocco and has not obtained a passport, this travel document [*laissez-passer*] is issued to enable her to return to national territory". The Committee considers that this *laissez-passer* cannot be considered a satisfactory substitute for a valid Libyan passport that would enable the author to travel abroad.

7.3 The Committee notes that subsequently, on 1 July 2003, the Passport Department sent a *communiqué* to the Libyan consular authorities in Morocco with a view to granting the author a passport; this information was certified by the State party, which produced a copy of the document. The State party alleges that the author was contacted personally by telephone at home and told to collect her passport from the Libyan Consulate. However, it appears that thus far, despite the author's two visits to the Libyan Consulate, no passport has been issued to her, through no fault of her own. The Committee recalls that a passport provides a national with the means "to leave any country, including his own", as stipulated in article 12, paragraph 2, of the Covenant, and that owing to the very nature of the right in question, in the case of a national residing abroad, article 12, paragraph 2, of the Covenant imposes obligations both on the individual's State of residence and on the State of nationality, and that article 12, paragraph 1, of the Covenant cannot be interpreted as limiting Libya's obligations under article 12, paragraph 2, to nationals living in its territory. The right recognized by article 12, paragraph 2, may, by virtue of paragraph 3 of that article, be subject to restrictions "which are provided by law [and] are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant". Thus there are circumstances in which a State may, if the law so provides, refuse to issue a passport to one of its nationals. In the present case, however, the State party has not put forward any such argument in the information it has submitted to the Committee but has actually assured the Committee that it issued instructions to ensure that the author's passport application was successful, a statement that was not in fact followed up.

8. The Human Rights Committee...is of the view that the facts before it disclose a violation of article 12, paragraph 2, of the Covenant insofar as the author was denied a passport without any valid justification and subjected to an unreasonable delay, and as a result was prevented from travelling abroad to continue her studies.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to ensure that the author has an effective remedy, including compensation. The Committee urges the State party to issue the author with a passport without further delay.

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The State party is also under an obligation to take effective measures to ensure that similar violations do not recur in future.

- *Marques v. Angola* (1128/2002), ICCPR, A/60/40 vol. II (29 March 2005) 181 at paras. 2.6, 2.14, 6.7-6.9, 7 and 8.

...
2.6 On 25 November 1999, the author was released from prison on bail and informed of the charges against him for the first time. Together with the director, A. S., and the chief editor, A.J.F., of *Agora*, he was charged with "materially and continuously committ[ing] the crimes characteristic of defamation and slander against His Excellency the President of the Republic and the Attorney General of the Republic...by arts. 44, 46 all of Law no 22/91 of June 15 (the Press Law) with aggravating circumstances 1, 2, 10, 20, 21 and 25, all of articles 34 of the Penal Code." The terms of bail obliged the author "not to leave the country" and "not to engage in certain activities that are punishable by the offence committed and that create the risk that new violations may be perpetrated - Art 270 of the Penal Code". Several requests by the author for clarification of these terms were unsuccessful.
...
2.14 On 12 December 2000, the author was prevented from leaving Angola for South Africa to participate in an Open Society Institute conference; his passport was confiscated. Despite repeated requests, his passport was not returned to him until 8 February 2001, following a court order of 2 February 2001 based on Amnesty Law 7/00 of 15 December 2000, 8/ which was declared applicable to the author's case. Regardless of this amnesty, on 19 January 2002, the author was summoned to the Provincial Court and ordered to pay compensation of Nkz. 30,000 to the President, which he refused to pay, and legal costs, for which he paid.
...
6.7 The next issue before the Committee is whether the author's arrest, detention and conviction, or his travel constraints, unlawfully restricted his right to freedom of expression, in violation of article 19 of the Covenant. The Committee reiterates that the right to freedom of expression in article 19, paragraph 2, includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment. 19/

6.8 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in paragraph 3 of article 19: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes. The Committee notes that the author's final conviction was based on article 43 of the Press Law, in conjunction with section 410 of the Criminal Code. Even if it were assumed that his arrest

and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order, it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, 20/ the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition. In addition, the Committee considers it an aggravating factor that the author's proposed truth defence against the libel charge was ruled out by the courts. In the circumstances, the Committee concludes that there has been a violation of article 19.

6.9 The last issue before the Committee is whether the author's prevention from leaving Angola on 12 December 2000 and the subsequent confiscation of his passport were in violation of article 12 of the Covenant. It notes the author's contention that his passport was confiscated without justification or legal basis, as his bail restrictions no longer applied, and that he was denied access to information about his entitlement to travel. In the absence of any justification advanced by the State party, the Committee finds that the author's rights under article 12, paragraph 1, have been violated.

7. The Human Rights Committee...is of the view that the facts before it reveal violations of article 9, paragraphs 1, 2, 3 and 4, and of articles 12 and 19 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the author is entitled to an effective remedy, including compensation for his arbitrary arrest and detention, as well as for the violations of his rights under articles 12 and 19 of the Covenant. The State party is under an obligation to take measures to prevent similar violations in the future.

Notes

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8/ Amnesty Law 7/00 applies to "crimes against security which were committed […] within the sphere of the Angolan conflict, as long as its agents have presented themselves or may come to present themselves to the Angolan authorities [...]."

...

19/ See communications Nos. 422/1990, 423/1990 and 424/1990, *Aduayom et al. v. Togo*, Views adopted on 12 July 1996, at para. 7.4.

20/ See Human Rights Committee, general comment No. 25 [57], 12 July 1996, at para. 25.

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For dissenting opinions in this context generally, see:

- *Byahuranga v. Denmark* (1222/2003), ICCPR, A/60/40 vol. II (1 November 2004) 247, Individual Opinion of Ruth Wedgwood and Maxwell Yalden, at 257.