



**International covenant  
on civil and political  
rights**

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HUMAN RIGHTS COMMITTEE  
Ninety-second session  
17 March-4 April 2008

**DECISION**

**Communication No. 1429/2005**

|                                      |                                                                                                                          |
|--------------------------------------|--------------------------------------------------------------------------------------------------------------------------|
| <u>Submitted by:</u>                 | A., B., C., D., and E. (represented by the Franciscan Missionaries of Mary)                                              |
| <u>Alleged victim:</u>               | The authors                                                                                                              |
| <u>State party:</u>                  | Australia                                                                                                                |
| <u>Date of communication:</u>        | 2 February 2005 (initial communication)                                                                                  |
| <u>Document references:</u>          | Special Rapporteur's rule 97 decision, transmitted to the State party on 20 September 2005 (not issued in document form) |
| <u>Date of adoption of Decision:</u> | 1 April 2008                                                                                                             |

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\* Made public by decision of the Human Rights Committee.

*Subject matter:* Deportation, risk of persecution upon return to the country of origin

*Procedural issues:* non-substantiation of claim

*Substantive issues:* Cruel, inhuman or degrading treatment; detention, protection of children as minors

*Articles of the Covenant:* Article 7; article 9, paragraphs 1 and 4; and article 24.

*Articles of the Optional Protocol:* 2

[ANNEX]

**ANNEX**

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

Ninety-second session

concerning

**Communication No. 1429/2005\***

|                               |                                                                            |
|-------------------------------|----------------------------------------------------------------------------|
| <u>Submitted by:</u>          | A., B., C., D., and E., represented by the Franciscan Missionaries of Mary |
| <u>Alleged victim:</u>        | The authors                                                                |
| <u>State party:</u>           | Australia                                                                  |
| <u>Date of communication:</u> | 2 February 2005 (initial communication)                                    |

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

Meeting on 1 April 2008,

Adopts the following:

**DECISION ON ADMISSIBILITY**

1.1 The authors of the communication are A. (first author), born in 1957, her husband B. (second author), born in 1964, their daughters D. and E., born respectively in 1991 and 1993 and the second author's mother, C., born in 1945. They are all Colombian nationals, born in Colombia, currently residing in Australia and awaiting deportation from Australia to Colombia. They claim to be the victims of violations by Australia<sup>1</sup> of article 7; article 9, paragraphs 1 and 4; and article 24,

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\* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Ms. Ruth Wedgwood.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

<sup>1</sup> The Covenant and the Optional Protocol entered into force for Australia respectively on 13 November 1980 and 25 December 1991.

paragraph 1, of the International Covenant on Civil and Political Rights. They are represented by the Franciscan Missionaries of Mary.

1.2 On 20 September 2005, the Special Rapporteur on New Communications and Interim Measures denied the authors' request for interim measures of protection.

### **Facts as presented by the authors**

2.1 From 1976 to 1996, the second author worked in Cali in Colombia, as a waiter in nightclubs. From December 1994 to March 1996, he worked in a nightclub owned by a local Mafia leader, who was involved in illicit drug-trafficking. Because of his job, the second author knew many things on the Mafia's operations and the leaders' identities. During that period, he witnessed several Mafia meetings in the club. On 25 December 1995, the police raided the club during such a meeting, and arrested Mafia leaders. The employer believed that the raid occurred because there was a police informer among the staff. A waiter suspected to be the informer was killed by the employer after the incident.

2.2 After the incident, the second author started to work for another nightclub, where he also observed illegal activities. He made a number of anonymous calls to the police to report on those activities. He was warned to keep quiet. On 22 April 1996, he was the victim of assault and lost consciousness. One of the men who assaulted him was a policeman he had seen at the nightclub. On 29 April 1996, he left Colombia for Israel. In March 1997, he travelled to Australia.

2.3 The second author arrived in Australia on 7 March 1997 and applied for a protection visa on 29 May 1997. This was denied by a delegate of the Minister for Immigration and Multicultural Affairs on 17 September 1997, on the ground that the harm feared was criminal in intent, and was not based on a reason listed by the Refugee Convention.

2.4 After the second author's departure, the remaining authors moved to different places and finally moved in with the first author's sister in La Pradera in Decepaz. The first author received threats and questions about her husband's whereabouts. In April 1998, her sister was raped and killed, and a note was found indicating: "We are sorry we got mixed up. Next time we will not fail". The first author believes that she was the intended target and that her sister was killed by mistake.

2.5 The first author, her daughters and mother-in-law arrived in Australia on 20 April 1998 and applied for a protection visa on 4 June 1998. On 29 June 1998, a Minister's delegate denied their application. On 13 May 1999, the Refugee Review Tribunal (RRT) confirmed the delegates' decision in both the cases of the husband and the rest of the family. The RRT considered that the authors' account appeared plausible, including that the second author had made phone calls to the police to inform them about illegal activities that he had witnessed. The RRT found, however, that the authors' fears were not based on any of the grounds listed in the 1951 Refugee Convention.

2.6 On 20 October 1999, the Federal Court set aside the RRT's decisions on both applications, which were sent back to the RRT for review. On 26 February 2001, a differently constituted RRT confirmed the Minister delegate's decisions not to grant protection visas to the authors. The RRT considered that the second author was not a credible witness and that important elements of his story

were implausible and contradictory. It noted that the information the second author claimed to have passed on to the police was vague and general and not threatening to anyone. The Rodriguez brothers he claimed to have seen in the club has been arrested many months earlier. It noted that the message in the threats was inconsistent, in that some requested him to return while others said he should disappear. The RRT noted that the claims in his initial application were considerably different to his later claims. It found his oral evidence to the RRT to be often hesitant or evasive. The RRT explored the information allegedly provided by the author to the authorities, which was vague and general. It found it implausible that he would have taken steps to inform of matters that were so completely unhelpful or already in the public domain. Because his claim to be an informant was inconsistent and the details about this were vague and unconvincing, the RRT was not satisfied that he was a police informant, or that he had been the victim of an attempted kidnapping or of assault. It also considered that the authors had the possibility of relocating elsewhere in Colombia if they feared to live in Cali. On 12 December 2003, the Federal Court dismissed the authors' appeal. On 2 July 2004, the Full Federal Court dismissed their leave to appeal. On 5 July 2002 and 17 January 2005, the Minister of Immigration declined to intervene in their case under section 417 of the Migration Act 1958.

### **The complaint**

3.1 The authors claim that they are actual or potential victims of a breach of article 7 of the Covenant. The first author was intimidated by officers of the Department of Immigration and Multicultural Affairs (DIMA). The second author was "treated as a liar" by the State party's authorities, which is a violation of his dignity and individual integrity. The children have experienced adverse psychological effects as a result of the authorities' denial of a protection visa.

3.2 Furthermore, a necessary and foreseeable consequence of the authors' detention and removal to Colombia would be of a violation of their rights under article 7. The authors fear revenge for the second author's actions while in Colombia, in particular in the form of kidnap, disappearance or murder. It is referred to the jurisprudence of the Committee against Torture, according to which the Committee is not bound by findings of fact made by national authorities and may freely assess the facts of a case. The authors point out that there is no evidence that the second author relied on forged documents in support of his claims. The RRT simply did not believe him. They claim that the Committee can make its own conclusions as to the plausibility of the authors' account. The fact that the authors are of a high religious moral and that the second author reported illegal activities are alone sufficient to establish that they are at risk of torture or similar treatment if returned to Colombia. This is a country in which there is a consistent pattern of gross, flagrant or mass violation of human rights. Finally, the authors claim that the government of Colombia would not be able to afford them the protection needed.

3.3 The authors claim that if they were to be detained under section 189 (1) of the Migration Act, which allows the detention of persons whose bridging visas have expired or whose protection applications have been denied, that would entail a violation of article 9, paragraphs 1 and 4, of the Covenant, because they do not intend to abscond or fail to cooperate.

3.4 The authors claim a violation of article 24, paragraph 1, of the Covenant, because there is no indication that the Minister for Immigration committed himself to comply with the requirement of

the adoption of special measures to protect children, pursuant to article 24. No consideration was given to whether it was in the best interest of the children to grant them or their family a protection visa. The children are in constant fear of what would happen to their physical safety if they were to return to Colombia, because they are members of their father's family. Relatives of parties to a conflict are often targeted by irregular armed groups on grounds of revenge. If they were detained or removed to Colombia, they would be the victims of a violation of article 24.

### **The State party's observations**

4.1 On 26 October 2006, the State party commented on the admissibility and merits of the communication. It indicates that the children and mother-in-law of the author made a separate application for protection visas, which were denied by the DIMA on 23 December 2005, and by the RRT on 8 June 2006<sup>2</sup>. It specifies that the authors have been granted bridging visas pending their removal.

4.2 On the authors' claim that they have been subjected to treatment contrary to article 7 while in Australia, the State party submits that it is inadmissible. It notes that this claim was not raised at the domestic level and argues that they have failed to provide sufficient evidence to substantiate their claim. While it accepts that the authors might be suffering from psychological distress, there is no evidence to show that the treatment received at the hands of the State party's authorities caused their condition. On the merits of this claim, the State party argues that the treatment allegedly experienced by the authors in Australia did not involve the infliction of severe pain and suffering or practices aimed at humiliating the authors and as such could not constitute a breach of article 7.

4.3 With respect to the authors' claim that they are risk of a violation of article 7 if returned to Colombia, the State party submits that they have provided insufficient evidence to substantiate such claim. There is no evidence to support statements made about treatment the authors have allegedly suffered, or fear that they might suffer in Colombia upon their return.

4.4 On the merits, the State party points out that its authorities have fully reviewed the authors' claims on several occasions and concluded that torture or cruel, inhuman or degrading treatment would not be a necessary or foreseeable consequence of their return to Colombia. The Committee should accept the findings of fact of domestic tribunals in the case. There is no evidence to dispute the RRT's findings that the second author was not a credible witness and that his claims of being an anonymous police informant were implausible. The authors' concerns of removal to Colombia are underpinned by the second author's claim that he was a police informant. As the RRT did not find this claim credible, it follows that all further claims arising from this premise are implausible. This includes the first author's claim of her sister's murder being a case of mistaken identity and an indicator of a potential threat to her life. While the RRT accepted that her sister was murdered, it

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<sup>2</sup> In its decision of 19 May 2006, the RRT discussed the credibility of the second author. It found that while he may well have been aware of some mafia activity in the clubs, he has exaggerated, or at least has been confused, with regard to what he saw. The tribunal expressed considerable doubt that the second author had given information anonymously to the police. It concluded that the authors were not at risk of being persecuted by members of the Colombian mafia. It affirmed the decision not to grant protection visas.

concluded that neither the motive for the murder nor the identity of the murderer was known. The authors' removal to Colombia would therefore not expose them to a real risk of violation of their rights under the Covenant.

4.5 The State party submits that the authors' allegations of a potential violation of article 9, paragraph 1, should be declared inadmissible for lack of substantiation, as they do not provide any evidence that they would be detained if they were removed, or that such detention would be arbitrary. On the merits of this claim, the State party notes the Committee's jurisprudence<sup>3</sup> that the detention of asylum seekers is not arbitrary *per se*. Any decision to detain the authors pending removal would be made in accordance with the law. The authors have been liable for removal on various occasions during their stay in Australia. Although the second author was initially detained for a two-month period, all were subsequently granted bridging visas.

4.6 With respect to the authors' claim under article 9, paragraph 4, the State party argues that it should be declared inadmissible as unsubstantiated. Although not directly asserted by the authors, the State party presumes that their claim is that if they were to be detained prior to removal, they would be denied the right to have the lawfulness of such detention determined. The communication provides no evidence to support such a claim. The State party further submits that this claim is without merit. It provides an overview of Australian legislation and argues that persons in detention have the possibility to test the lawfulness of their detention.

4.7 The State party maintains that the authors failed to substantiate their claims under article 24, paragraph 1, on behalf of the children. They provided no details or evidence that the State party has acted in such a way as to deny the children their right to such measures of protection as are required by their status as minors. The authors have provided no argument demonstrating why or how their removal would violate this article. On the merits of this claim, the State party refers to the Committee's General Comment 17 on article 24, and points out that it is for each State to determine which measures are to be adopted, in the light of the protection needs of children in its territory.

#### **Authors' comments**

5.1 On 7 January 2007 the authors submitted comments on the State party's observations. With respect to the State party's observations on the claim under article 7 of treatment in the State party, she explains the asylum process the authors went through. She indicates that although the second author's application for a protection visa was refused on Refugee Convention grounds, it was recognised that there was a risk of serious harm for humanitarian reasons<sup>4</sup>. However, the law does

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<sup>3</sup> See Communication No. 560/1993, *A v. Australia*, paragraph 9.3.

<sup>4</sup> The RRT decision of 13 May 1999 reads:

"I am sympathetic to the applicants' situation. Their lives have been dramatically altered by circumstances over which they have had little control. I also accept that they have a strong subjective fear of harm in Colombia and that their fear is well-founded. However, I am not satisfied that their fear of harm is owing to a Convention reason. As this is an essential element of the Convention definition of a refugee, I am not satisfied that they are refugees.

In the light of the violence which has been perpetrated on those close to the applicants and the power of the agents of harm in a country such as Colombia in my view this is a case in which compelling

not allow the recognition of humanitarian considerations which fall outside the scope of the Refugee Convention, thereby discriminating against people in need of security who do not meet the definition of a refugee. An appeal to the RRT is considered only in the light of the Refugee Convention, and there are no accessible alternatives. The Federal Court can only decide on jurisdictional errors of the RRT. It cannot decide on the merits of a humanitarian claim filed by a non-convention asylum seeker.

5.2 During the second author's detention, the first author experienced pressure in the context of the uncertainty of her husband's condition and the necessity to keep the family together. Because they were not allowed to work, the authors encountered financial hardship. They had difficulties in supporting the family and in obtaining basic social services, such as seeing a doctor or providing the children, who had poor eyesight, with glasses. They had to ask friends to pay their bills. Their debts remained unpaid, resulting in stress for the family.

5.3 With respect to the claims of arbitrary detention, the authors refer to the second author's two-month detention and claim that "for a period of 5 days he was probably unlawfully detained". As a result, the authors fear further detention. In addition, they argue that persons who do not fall within the scope of the Refugee Convention may remain in detention indefinitely awaiting removal, if such *refoulement* appears to be "too dangerous".

5.4 With respect to article 24, the authors point out that the children have now lived in Australia for longer than in their country of birth. They are now teenagers and in an important stage of their development.

### **Issues and proceedings before the Committee**

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not the communication is admissible under the Optional Protocol.

6.2 The Committee notes that the State party has challenged the admissibility of the entire communication. With respect to the authors' claim that they were treated in violation of article 7 while in Australia, the Committee notes the State party's contention that this claim was not raised at the domestic level and that it is insufficiently substantiated. The Committee observes that the authors refer in general terms to mistreatment by the Australian authorities, to their distress during the immigration proceedings, and to their inability to work and earn their living. The Committee nevertheless considers that the authors have failed to sufficiently substantiate this claim and thus finds this claim to be inadmissible under article 2 of the Optional Protocol.

6.3 On the claim that the authors' removal would amount to a violation of article 7 of the Covenant, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or

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humanitarian grounds are raised. However, my role is limited to determining whether the applicants satisfy the criteria for the grant of protection visas. A consideration of their circumstances on other grounds is a matter solely within the Minister's discretion."



punishment upon entering in another country by way of their extradition, expulsion or *refoulement*<sup>5</sup>. The Committee notes the finding by the RRT that such a risk could not be established for lack of credibility of the authors. It also notes that the authors have not demonstrated the existence of a real risk of being deprived of their life or exposed to torture or cruel, inhuman or degrading treatment in case of their return to Colombia. The Committee considers that the authors have failed to sufficiently substantiate their claims under article 7, for purposes of admissibility, and concludes that this claim is inadmissible under article 2 of the Optional Protocol.

6.4 With respect to the author's claims under article 9, paragraphs 1 and 4, the Committee notes that the second author was detained for two months on one occasion. The authors have not demonstrated how this detention should be deemed to have been unlawful or arbitrary. The rest of the authors have not been detained. Moreover, the authors do not provide any evidence supporting the allegation that, if the State party were to detain them, that detention would be arbitrary or unlawful. The Committee accordingly finds that the claims of violation of article 9 of the Covenant have been insufficiently substantiated, for purposes of admissibility, and is thus inadmissible under article 2 of the Optional Protocol.

6.5 With respect to the authors' claim under article 24 on behalf of the children, the Committee finds that the authors have failed to substantiate why their removal with their parents would violate their rights under this article. It concludes that this claim is inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

- a) That the communication is inadmissible under article 2 of the Optional Protocol;
- b) That this decision shall be communicated to the State party and to the author, through counsel.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]

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<sup>5</sup> See Communication No.1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4