



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-first session
5 - 30 July 2004

DECISION

Communication No. 901/1999

Submitted by: Ms. Deborah Joy Laing (represented by counsel,
Mr. Gavan Griffith)

Alleged victim: Ms. Deborah Joy Laing, Jessica Joy Surgeon and
Samuel Colin John Surgeon

State party: Australia

Date of communication: 30 November 1999 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to
the State party on 10 December 1999 (not issued in
document form)

Date of adoption of Decision: 9 July 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

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

Eighty-first session

concerning

Communication No. 901/1999**

Submitted by: Ms. Deborah Joy Laing (represented by counsel,
Mr. Gavan Griffith)

Alleged victims: Ms. Deborah Joy Laing, Jessica Joy Surgeon and
Samuel Colin John Surgeon

State party: Australia

Date of communication: 30 November 1999 (initial submission)

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

Meeting on 9 July 2004,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication dated 30 November 1999, is Ms. Deborah Joy Laing (Ms. Laing). She submits the communication on behalf of herself and her two children Jessica Joy Surgeon and Samuel Surgeon. She claims that she is victim of violations by Australia¹ of articles 2, paragraph 3, 7, 14, paragraph 1, 17, 23, paragraph 1, and 26 of the International Covenant on Civil and Political Rights (the Covenant); that Jessica is victim of violations of articles 2, paragraph 3, 7, 12, paragraphs 1 and 4, 14, paragraph 1, 17, 23, paragraph 1, and 24, paragraph 1; and that Samuel is victim of violations of articles 2,

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanut, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The text of two individual opinions signed jointly by Mr. Prafullachandra Natwarlal Bhagwati and Mr. Walter Kälin and separately by Mr. Martin Scheinin is appended to the present document.

¹ The Optional Protocol entered into force for Australia on 25 September 1991.

paragraph 3, 7, 17, paragraph 1, 23, paragraph 1, and 24, paragraph 1 of the Covenant. They are represented by counsel.

1.2 On 10 December 1999, the Special Rapporteur on New Communications rejected the author's request for interim measures.

The facts as submitted

2.1 Ms. Laing married Lance Lynn Surgeon on 30 March 1991. Jessica was born on 9 November 1993, in the United States; she holds both Australian and American citizenship. The marriage disintegrated, and on 12 March 1994, Ms. Laing and Jessica, with Mr. Surgeon's consent, travelled to Australia where they remained until November 1994. They returned to the US upon request from Mr. Surgeon, who had suffered a heart attack in the meanwhile.

2.2 On 12 January 1995, Ms. Laing and Jessica left the matrimonial home in the US for Australia without the knowledge of Mr. Surgeon. On 17 January 1995, he filed an action for divorce in Georgia Superior court. On 27 February 1995, the Court ordered Jessica's return to the State of Georgia, US. In April and May 1995, the Georgia Superior Court heard a Rule Nisi application of Mr. Surgeon *ex parte*, without Ms. Laing's attendance, and ordered the dissolution of the marriage. It awarded the father "sole permanent custody" of Jessica, with no visitation rights for Ms. Laing until further order by a court of competent jurisdiction.

2.3 On 5 June 1995, Mr. Surgeon filed an application under the Hague Convention on the Civil Aspects of Child Abduction (the Hague Convention) to the US Central Authority. That application was communicated to the Australian Central Authority, which initiated proceedings in the Family Court on 28 June 1995, seeking an order that Mr. Surgeon be permitted to remove Jessica from Australia to the US. The Central Authority's application was listed for hearing on 5 September 1995, but the hearing dates were vacated and proceedings adjourned. On 22 September 1995, Ms. Laing's and Mr. Surgeon's son Samuel was born in Australia.

2.4 The application was heard before Justice O'Ryan in the Family Court of Australia on 2 and 5 February 1996. On 20 February 1996, he ordered that Jessica be returned to her father in the US. Ms. Laing appealed to the Full Court of the Family Court, requesting that new evidence be heard. The appeal was heard on 3 and 4 July 1996. The Full Court refused to receive the new evidence, and dismissed the appeal on 10 October 1996.

2.5 Following the dismissal of the appeal, Ms. Laing went into hiding with her two children. They were located on 9 January 1998 and detained.

2.6 On 9 April 1998, Ms. Laing lodged an application for leave to appeal to the High Court of Australia. The High Court refused the application on 7 August 1998 as Ms. Laing had not appealed within the statutory time-limit.

2.7 Ms. Laing then returned to the Full Court of the Family Court, and requested a re-opening of the case. The Full Court of the Family Court reconstituted as a bench of five, heard the application to re-open the case on 27 and 28 August and 14 September, and dismissed the application on 9 February 1999, by a 3-2 majority.

2.8 At this point, Ms. Laing only had two remaining options; (a) to seek appeal to the High Court again, or (b) to apply to the Family Court and request that the Court issue a certificate to enable her to appeal to the High Court. The Family Court had issued only three such certificates since 1975; a certificate would only be issued if the case involves an important question of law or is of public interest. On 24 April 1999, the Family Court issued a certificate allowing the author to appeal again to the High Court, on the ground that the Full Court of the Family Court should re-open its decision to allow the application to be determined by reference to the proper and applicable law. Up to this point, Ms. Laing was not offered legal aid. However, she received a limited grant of legal aid for the appeal to the High Court. The High Court hearing started on 7 October 1999, on its final day on 18 November 1999, it dismissed the appeal without giving reasons. Ms. Laing therefore claims that domestic remedies have been exhausted.

2.9 From 1994, Ms. Laing has written letters and sent photographs and other information about the children to the father in the US. She contends that he has shown no interest in the children, nor made any financial contribution for their maintenance, or visited them in Australia, or maintained telephone contact with them over the years.

The complaint

3.1 Ms. Laing claims that in violation of article 2, paragraph 3 of the Covenant, she does not have an adequate and effective remedy, since the Covenant is not incorporated into Australian domestic law in a manner which would enable her to enforce these rights. She submits that the Covenant is not part of Australian law and hence it has no legal effect upon the rights and duties of individuals.² While she has raised issues under the Covenant in her appeal to the High Court, she has not been provided with the Court's reasons in relation to this aspect of her appeal.

3.2 Ms. Laing claims that the forcible removal of her daughter Jessica, whom she would not see for many years, violates her rights under article 7. Neither she nor her son has the right to enter the US, nor, given the current court orders, is there any possibility of their visiting Jessica, even if they were able to enter the US. Ms. Laing has no means to pursue any further judicial action. She submits that such separation of a mother from her small child in the present circumstances amounts to cruel treatment in violation of article 7.

3.3 Ms. Laing claims that she was denied a fair trial, in violation of article 14, first in that the Family Court applied the incorrect law in its decision to remove Jessica from her custody. In the application to the Family Court in 1998 to re-consider the first appeal judgment, a majority of 3 judges, acknowledged that the first appeal court had applied the incorrect law, yet refused to re-open the matter. At the level of the High Court, it was conceded by all parties that the trial judge and the first full court had applied the incorrect law. However, on 18 November 1999, the High Court dismissed the appeal without giving reasons.

3.4 Secondly, Ms. Laing submits that the High Court did not provide reasons for its decision, in violation of article 14, paragraph 1. While the High Court decision implies that the removal orders for Jessica have immediate effect, the High Court indicated that the

² *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273, at page 287 of supporting documentation.

reasons for its decision would be provided later, thus leaving Ms. Laing without knowledge as to why the appeal failed before Jessica's return to the US.

3.5 It is further claimed that in view of the delays in resolving the proceedings concerning Jessica, any interference of the authors' home cannot not be said to be reasonable in terms of article 17, when measured against the irreparable damage and consequences to the authors' family.

3.6 Ms. Laing claims that the removal of Jessica from her family impairs her enjoyment of family life, in violation of article 23, paragraph 1, in particular as the resolution of the case was seriously delayed.

3.7 She finally argues a violation of her rights under article 26, in that, while by operation of the Hague Convention the father's court costs in Australia were paid, no equivalent assistance was paid to the author. This is particularly serious, given that the divorce judgment granted the father all matrimonial property.

3.8 On behalf of Jessica, it is claimed that in violation of article 2, paragraph 3 of the Covenant, she does not have an effective remedy, since the Covenant is not incorporated into Australian domestic law in a manner which would enable her to assert her Covenant rights. She submits that the Covenant has no legal effect upon the rights and duties of individuals or governments, and refers in this context to an Australian court case and to the Attorney-General's submission in the High Court proceedings in the present case.³ Also, Jessica has not been able to present any submissions or arguments about her interests. While the Family Court appointed a separate representative for her, he could not play an active role in the proceedings, since he could not participate at the separate court hearing of Jessica.

3.9 It is claimed that Jessica will suffer severe psychological damage if she were to be removed from the only family she has known and the source of her emotional, physical and social wellbeing, as well as her school friends. Returning her to her father, who has played no active role in her life, and to a place where there are no arrangements in place for her immediate care nor schooling, would amount to cruel treatment, in violation of article 7 of the Covenant.

3.10 Jessica, as she is lawfully within Australian territory, she has a right, under article 12, paragraph 1 and 4, to remain in the country. If she were to be returned to the US, this right would be violated.

3.11 It is claimed that Jessica was denied a fair trial, in violation of article 14. First, she was denied the right to participate in the proceedings regarding her own rights and to challenge the decision to remove her from Australia. The inability to have her interests determined separately and independently of her mother's interests, has had a significant impact on Jessica's ability to have the merits of her case considered. For example, when the Second Full Court of the Family Court judges refused to re-open the case, considering the mother's default and conduct to be a determining factor against re-opening of the case, Jessica's interest in having the case re-opened was not considered separately.

³ *Minister for Immigration and Ethnic Affairs v. Teoh*, and *DJL v. The Central Authority*, in the High Court proceedings of 7 October 1999, paragraph 48-50.

3.12 Secondly, she was denied a fair trial in that the Family Court judge applied the incorrect law when deciding that she was to be returned. Counsel refers to the Convention on the Rights of the Child, which states that a child shall not be separated from his or her parents unless it is determined in accordance with applicable law and procedures that such separation is necessary for the best interest of the child. When Jessica's mother's final appeal to the High Court was dismissed, they were provided with no reasons for the decision.

3.13 The proposed forced removal of Jessica from her mother and brother would amount to arbitrary interference with her family and home, in violation of article 17 of the Covenant. Counsel refers to the Committee's views in *Toonen v. Australia*⁴. It is contended that the delays in resolving the proceedings regarding Jessica's removal, entail that any interference with Jessica's home could not be considered reasonable when measured against the irreparable damage and consequences to her family. There is allegedly no legal avenue for Jessica to seek protection against this interference.

3.14 Finally, it is claimed, on behalf of Jessica, that the application of the Hague Convention in this case did not properly address the best interests of the child, which amounted to a violation of articles 23, paragraph 1, and 24, paragraph 1, of the Covenant. The removal of Jessica from her family would impair with her right to enjoyment of family life, since the strict application of the Hague Convention, operates to affect her interest adversely when the application and removal have not been dealt with expeditiously – that is at least within a year. It is also argued that the denial of access to her mother and brother in the event of removal would constitute a breach of article 10, paragraph 2, of the Convention on the Rights of the Child, and of article 24, paragraph 1, of the Covenant.

3.15 As to Samuel's rights, it is contended that, in violation of article 2, paragraphs 3(a) and (b), the State party failed to provide him with an effective remedy to assert Covenant rights, as the Covenant is not justifiable in Australian law. Moreover, in the proceedings affecting his interests in that he risked a permanent separation from his sister, he was not able to participate. He has no independent standing in legal proceedings.

3.16 It is also claimed that Samuel's rights under article 7 would be violated, in that his sister's removal from the family would break the close bond between the two children and cause mental suffering to Samuel.

3.17 Jessica's imminent removal from her family, would amount to an arbitrary interference with Samuel's family and home, contrary to article 17.

3.18 It is argued that the removal of Jessica from her family would impair Samuel's enjoyment of family life, since he has no right to enter and remain in the US or to visit his sister, and which would constitute a violation of articles 23 and 24 in this regard. Counsel submits that when determining a child's right, the Committee may have regard to article 3 of the Convention on the Rights of the Child providing that the best interests of the child shall be a primary consideration in all actions concerning children. By failing to take any steps that would enable Samuel to protect his rights, the State party violated article 24, paragraph 1, of the Covenant.

⁴ Communication No.488/1992, Views adopted on 31 March 1994, paragraph 6.4.

The State party's submission on the admissibility and merits of the communication

4.1 By note verbale of 8 February 2001, the State party made its submission on the admissibility and merits of the communication. It submits that the communication is inadmissible and that the Committee should dismiss it without consideration on the merits. In the alternative, should the Committee be of the view that the allegations are admissible; the State party submits that they should be dismissed as unfounded.

4.2 With regard to the authors' article 2 claim, the State party submits that there were no violations of other Covenant articles, and therefore no issue of a violation under article 2 of the Covenant arises. Consequently, this aspect of the communication should be dismissed as inadmissible. In any event, Australia does provide effective remedies for violations of Covenant rights. The provisions of international treaties to which Australia becomes a party do not become part of domestic law by virtue only of the formal acceptance of the treaty by Australia. This long-standing principle of Australian law was recognised by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*. Australia submits that there are sufficient remedies available to enable Ms. Laing, Jessica and Samuel to assert their rights under the Covenant.

4.3 With regard to the authors' claim under article 7 that the return of Jessica to the US will result in her being forcibly removed from her mother and brother, causing mental suffering, the State party submits that the allegations are inadmissible *ratione materiae*, as there is no evidence of infliction of any such mental suffering by Australia.

4.4 Firstly, Australia pursues the lawful objective of returning an abducted child to the country of habitual residence in accordance with the Hague Convention, and to have her custody determined by the relevant and competent court. Ms. Laing was ordered by the Family Court to return to the US as the proper forum to determine the issue of Jessica's custody. This was a *bona fide* attempt by Australia to give Jessica the opportunity to be reunited with her father and have the issue of custody finally determined. The actions of a State in fulfilling its obligations under international law cannot be interpreted as evidence of cruel, inhuman or degrading treatment.

4.5 Secondly, it is incorrect to assume that Jessica's return to the US will conclusively result in her permanent removal from Australia, from Ms. Laing and from Samuel. There is a possibility that Jessica may be returned to her father, but this is a matter for US courts to determine. There is no evidence of the infliction of deliberate or aggravated treatment by Australia in violation of article 7 of the Covenant.

4.6 Thirdly, Ms. Laing claims that she and Samuel may not be allowed to enter and remain in the US. The State party submits that this is irrelevant for the purposes of establishing aggravated or deliberate treatment by Australia, in violation of article 7 of the Covenant. In any event, the Full Court of the Family Court sought to ensure that Ms. Laing and her children are permitted to enter and remain in the US, by ordering that Mr Surgeon support the visa application of Ms. Laing and refrain from prosecuting her for Jessica's abduction.

4.7 Furthermore, while Australia concedes that Ms. Laing, Jessica and Samuel may suffer some degree of mental strain as a result of overseas travel or the court proceedings in the US, any such strain would not reach the severity of suffering required to find a violation of article

7. Australia therefore submits that the allegation of a breach of article 7 should be declared inadmissible as inconsistent with article 2 of the Optional Protocol.

4.8 In the alternative, the State party submits that the allegations ought to be dismissed as unfounded, since the applicants do not give any evidence of relevant treatment by Australia, nor that it would attain the minimum level of severity to constitute treatment in violation of article 7.

4.9 With regard to Ms. Laing's allegation under article 7, the State party submits that these matters are yet to be determined and therefore it cannot reasonably be maintained that they show that any relevant treatment has been or will be inflicted on her. Moreover, these matters will be determined by the US and cannot be regarded as deliberate treatment by Australia. In any event, there is no evidence to suggest that Ms. Laing would not be able to enter, or remain, in the US. The US recently extended the Public Benefit Parole category of visas to include abduction cases, as to allow an abducting parent to enter and remain in the US so as to be able to participate in court proceedings.

4.10 With regard to Jessica, the State party submits that it does not intend to harm her in any way by returning her to the US. Australia's actions therefore cannot constitute treatment relevant under article 7 of the Covenant. Moreover, the Full Court of the Family Court considered whether there was a grave risk that Jessica would be physically or psychologically harmed, or otherwise placed in an intolerable situation, as a result of her removal to the US. It considered a report by a child psychologist on this point, and found that the alleged abrupt and permanent separation from her mother would cause Jessica some distress, but that she could adapt to the change and a new carer.

4.11 Finally, it is submitted that Samuel's allegation that he will be forcibly separated from his sister lacks merit for the reasons outlined in relation to admissibility of the claim.

4.12 The State party rejects Jessica's claim under article 12 as inadmissible pursuant to article 1 of the Optional Protocol, for inconsistency with the Covenant requirements to protect the family and provide special protection to the child (articles 23(1) and 24(1) of the Covenant). It submits that Jessica's allegation incorrectly interprets article 12(1) of the Covenant as implying the right to remain in Australia. However, The State party understands that article 12(1) of the Covenant is concerned with the right to movement and residence *within* Australia. Jessica's allegation therefore raises no issue under the Covenant, nor does it substantiate any claim under article 12.

4.13 The State party submits that should the Committee find sufficient evidence to demonstrate a restriction by Australia of the rights in article 12(1) of the Covenant, such a restriction would fall within the scope of restrictions permitted by article 12(3). Jessica's return is necessary for the maintenance of public order, that is, the prevention of child abduction and regulation of return arrangements. Jessica's return to the US is also in the interests of the protection of the family, consistent with article 23(1) of the Covenant.

4.14 Furthermore, the State party submits that Jessica's allegation of a breach of article 12(4) of the Covenant is without merit, since it is prohibited from arbitrarily depriving Jessica of her right to enter Australia. The Full Court of the Family Court of Australia considered whether Jessica has the right to remain in Australia. It found that she does have this right but that it has to be balanced with other rights. The judgment of the Full Court of the Family

Court on 9 February 1998 found that to return Jessica to the US on application of the Hague Convention, would not affect her right, as an Australian citizen, to live in Australia. In any event, there is no reason advanced as to why her basic right to live in Australia is any more significant or worthy of protection than her basic right to not be wrongfully removed from the US.

4.15 With regard to the allegation that the Australian courts failed to determine the issue of Jessica's return to the US fairly and in accordance with the proper law, the State party submits that the Full Court of the Family Court considered, in its appeal of 14 September 1998, that the lower court applied the wrong laws but that it did not affect the outcome of the case. This decision was subsequently reviewed by another sitting of the Full Court of the Family Court and the High Court. To the extent that Ms Laing's communication would require the Committee to assess the substantive, rather than the procedural of the decision of the High Court, the State party submits that this would require the Committee to exceed its proper functions under the Optional Protocol and that the allegations under article 14 are therefore incompatible with the Covenant. In this respect, it refers to the Committee's decision in *Maroufidou v Sweden*⁵. Furthermore, it submits that the authors failed to provide sufficient evidence to substantiate a violation of that article of the Covenant, and in the alternative that the Committee should find the communication admissible, that it is without merits.

4.16 The State party submits that Jessica's allegation of a violation of article 14, paragraph 1, for failure to ensure separate representation in the court proceedings, is inadmissible for failure to raise an issue under the Covenant, since she is no victim of a violation of the Covenant. It submits that while an application was made to the Family Court for a representation on Jessica's behalf, it presented insufficient reasons for why a separate representation would be of benefit to her, taken into account that Australian courts consider the child's interests to be of paramount importance. In the alternative, the communication should be dismissed as unfounded.

4.17 Finally, with regard to the allegation under article 14, paragraph 1, that no reasons were provided by the High Court, the State party submits that the reasons for the High Court decision were published on 13 April 2000; and this allegation therefore is unsubstantiated.

4.18 With regard to the authors' allegation that Jessica's return to the US is an arbitrary interference with the family and home by Australia, under article 17, the State party submits that the authors have not provided evidence of a violation, and thus fail to raise an issue under this provision. Moreover, they fail to demonstrate how they have been directly affected by the alleged lack of legal protection, and may therefore not be deemed victims of a Covenant violation.

4.19 In the alternative that the Committee finds the claim under article 17 admissible, the State party finds that it is without merits, since Jessica is being returned to the US in accordance with Australia's international obligations under the Hague Convention to have the issue of Jessica's custody determined in the competent US Court. Accordingly, the intervention is in accordance with the law and not arbitrary.

⁵ Communication No. 58/1979, Views adopted on 9 April 1981, paragraph 10.1.

4.20 The State party submits that the allegation that Jessica's return to the US constitutes a violation of the obligation to protect the family under article 23(1), is incompatible with this provision of the Covenant. It refers to the preamble to the Hague Convention, where the signatory States affirm that they are 'firmly convinced that the interests of the child are of paramount importance in matters relating to their custody', and that the Hague Convention was drafted "to protect children internationally from the harmful effects of their wrongful removal or retention..." The fact that Australia is a party to this Convention is sufficient evidence of Australia's commitment to a protection of the family and, indeed, the child.

4.21 The State party adds that article 23(1) requires that Australia protect the family as an institution and that Ms Laing, Jessica and Samuel fail to provide any evidence to substantiate a claim that it has violated this obligation. The authors' allegation that applications for the return of a child made after one year are too late is deemed incorrect. In any event, the application for the return of Jessica was made within one year. The State party submits that the authors fail to establish that they are victims of any breach of article 23(1) of the Covenant, and that the return of Jessica to the US for her custody proceedings will take into account the rights of each family member.

4.22 On the merits, the State party submits that the courts' decision to return Jessica protects the interests of the individual family members and the interests of the community as a whole in the protection of families. The Full Court of the Family Court specified that Jessica's interests were of paramount importance, notwithstanding the unlawful actions of Ms Laing. Jessica's father is included in the definition of family under article 23(1); the return of Jessica to the US to determine whether she will have access to her father is an active pursuit by Australia of the recognition of her right to enjoy family life.

4.23 On Jessica and Samuel's claim under article 24(1) of the Covenant, the State party submits that the object of the Hague Convention proceedings in Australia was to determine the proper forum and not the issues of custody of, and access to, Jessica. It reiterates that the underlying principle of that Convention is the best interests of the child. Moreover, the fact that the US Court may award custody to Jessica's father is not evidence of a violation of article 24(1) of the Covenant. In relation to child abduction hearings, the Full Court of the Family Court has determined that it is an abducted child's best interests to be returned to its habitual country of residence and to have issues of custody and access determined by the courts of that country. In the alternative that the Committee finds this claim admissible, the State party submits that it is unfounded.

4.24 The State party submits that Ms. Laing's claim under article 26 is inadmissible *ratione materiae* on three grounds; firstly, she has no claim under article 1 of the Covenant because she has not submitted evidence to the effect that she suffered financial discrimination; secondly, she has not substantiated her claim; and thirdly, in the event that the Committee is satisfied that the author has shown a difference in the treatment of Ms Laing and Jessica's father based on one of the prohibited grounds in Article 26, it submits that there is a failure to substantiate the assumption that this differentiation was not reasonable and objective and that the aim was not to achieve a purpose which is legitimate under the Covenant.

4.25 In this respect, it submits that Ms Laing received legal or financial assistance from the Australian authorities in respect of the Hague Convention proceedings in Australia. She was

granted legal aid by the New South Wales Legal Aid Commission in respect of the original hearing of the Hague Convention application in 1996, and the proceedings in 1999 before the Full Court of the Family Court. She was also granted financial assistance in respect of her subsequent appeal to the High Court. No financial contribution was required from her towards the cost of these proceedings; counsel had agreed to represent Ms Laing in these proceedings on a pro bono basis, notwithstanding the provision of legal aid. In addition, the Full Court of the Family Court of Australia ordered on 9 April 1998, that Jessica's father pay costs relating to their return to the US for Ms Laing, Jessica and Samuel. In the alternative that the Committee finds this claim admissible, the State party submits that it should be dismissed as unfounded.

The author's comments

5.1 In his response of 23 April 2001 to the State party's submission, counsel submits that the State party is mistaken when stating that the Australian courts considered Jessica's interests to be of paramount importance. The operation of the Hague Convention and its implementing legislation, show that the child's best interest is not taken into account. Furthermore, he submits that the State party's assumption that Jessica's future custody remains to be finally determined by a US court lacks foundation, since there are final orders of an American court awarding permanent custody to Jessica's father, with no visitation rights for the mother.

5.2 In respect of the State party's allegation that article 2 is not an autonomous right, counsel submits that the jurisprudence of the Committee may be reversed at any time, in light of further arguments regarding consideration of another case, and that recent jurisprudence of the Committee reveals a shift in the application of article 2, paragraph 3 of the Covenant towards providing a freestanding right for individuals. Moreover, in view of the particular circumstances that Australia has no Bill of Rights, no uniform constitutional, statutory or common law protections, which reflect the Covenant, leaves the authors with no effective remedies to safeguard their rights.

5.3 In respect of the claim under article 7 of the Covenant, counsel submits that the salient issue is whether a certain treatment which a State party is responsible for has the effect of being cruel. She considers that the forced separation of Jessica from her family constitutes cruel treatment because it has the effect of imposing severe suffering on Jessica and her family. Furthermore, the question of whether the treatment of a child is cruel requires an assessment of the child's particular circumstances, and in that regard a mere threat of such treatment is sufficient.

5.4 Counsel also submits that where the objectives of the Hague Convention for a speedy return of a child are not satisfied, the strict and inflexible application may be oppressive and unfair in certain circumstances. In the present case it took 13 months from the time of the unlawful removal until the first decision of an Australian court, and after 6 years, final resolution of the case remained outstanding.

5.5 Moreover, the psychiatric report submitted by the authors' suggest that Jessica is sensitive to change and has difficulty with sleep and nightmares as a result of the temporary separation by police from her family in 1998. The State party has not challenged this evidence. Another report prepared for the Family Court when Jessica was 2 years old noted

that “an abrupt and permanent separation from her mother would be associated with protest and extreme distress...” Counsel submits that mental distress may constitute cruel treatment.

5.6 In relation to the State party’s contention under article 12 of the Covenant, that Jessica has the right to be reunited with her father as a child and as an individual within a family, counsel submits that a claim concerning a family life must be real and not hypothetical, like in the case of Jessica.

5.7 Counsel reiterates the claim of a violation of article 14, paragraph 1. The State party’s response that even if the proper law had been applied the result would have been the same, did not represent the view of second Full Court of the Family Court, but merely represents the view of one judge. Moreover, the views of the Chief Justice and another judge of that court considered that in the light of the correct law, the result may not have been the same.

5.8 In relation to the State party’s contention that it is not the role of the Committee to review the facts, counsel acknowledges the Committee’s established jurisprudence, but contends that the application of an incorrect law and the failure to correct the error makes the decisions of Jessica’s removal “manifestly arbitrary”. He adds that the authors’ right to a fair trial includes a right to be provided with reasons at the time the orders were made.

5.9 In respect of the claim under article 17, counsel submits that interference with home in this case, is the interference with the authors’ family arrangements and home life, including the extended family.

5.10 In respect of the claim under article 23 of the Covenant, counsel notes that the ECHR has constantly held that article 8 of the Convention includes a right for the parent to have measures taken with a view to his or her being reunited with the child, and an obligation for the national authorities to take such action. In Jessica’s case, there are no family bonds between father and child, and the only family requiring protection is Jessica, Samuel, Ms. Laing, as well as the extended family in Australia,

5.11 With regard to the alleged discrimination of Ms. Laing, counsel submits that Mr. Surgeon was represented by the Central Authority, and that she only received a grant which covered a small proportion of the overall costs.

Supplementary submissions by the the State party and the author

6.1 On 3 September 2001, the State party submitted further comments. With regard to counsel’s contention that there is no factual foundation for Australia’s assertion that American courts may give Ms Laing custody of, and access to, Jessica, it submits that the custody order in favour of Mr. Surgeon, may, under the Georgia Code, be challenged and subsequently changed by the Court if there is a material change in the circumstances.

6.2 Furthermore, in relation to the authors’ claim that Australia has no statutory or common law protections which reflect the terms of the Covenant, the State party submits that both legislation and the common law protect the rights in the Covenant. For example, under the *Human Rights and Equal Opportunity Commission Act 1986*, the Human Rights and Equal Opportunity Commission (the Commission) has the power to inquire into alleged Commonwealth violations of the rights set out in the Covenant.

6.3 On 7 November 2001, counsel submitted further comments and notes that the Commission does not provide an effective remedy, since its only power is to prepare a report on human rights violations to the government. The Commission cannot issue enforceable decisions.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for purposes of article 5, paragraph 2 (a) of the Optional Protocol.

7.3 As to the claims presented by the author on behalf of her daughter Jessica, the Committee notes that at the time of her removal from the United States Jessica was fourteen months old, making her ten and a half years old at the time of the adoption of the Committee's decision. Notwithstanding the consistent practice of the Committee that a custodial, or, for that matter, non-custodial, parent is entitled to represent his or her child under the Optional Protocol procedure without explicit authorization, the Committee points out that it is always for the author to substantiate that any claims made on behalf of a child represent the best interest of the child. In the current case, the author had the opportunity to raise any concerns related to Covenant rights in the proceedings before the national courts. While the Committee takes the position that the application of the Hague Convention in no way excludes the applicability of the Covenant it considers that the author has failed to substantiate, for purposes of admissibility, that the application of the Hague Convention would amount to a violation of Jessica's rights under the Covenant. Consequently, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

7.4 As to the alleged violations of the author's own rights, the Committee notes that the present situation, including its possible adverse effect on the enjoyment of Covenant rights by the author, is a result of her own decision to abduct her daughter Jessica in early 1995 from the United States to Australia and of her subsequent refusal to allow for the implementation of the Hague Convention for the purpose of letting the competent courts to decide about the parents' custody and access rights in respect of Jessica. In the light of these considerations, the Committee finds that this part of the communication has not been substantiated, for purposes of admissibility and is, consequently, inadmissible pursuant to article 2 of the Optional Protocol.

7.5 As to the remaining part of the communication, related to the author's claims presented on behalf of the author's son Samuel who was born in September 1995 in Australia, the Committee notes that the exercise of Samuel's rights is not governed by the Hague Convention. Noting also that the decisions of the United States courts may potentially affect the possibilities of Samuel to maintain contact with his sister Jessica, the Committee in the light of its conclusions above nevertheless takes the view that the author has failed to substantiate, for purposes of admissibility, any claim that such effects would amount to a

violation of the Covenant. Consequently, this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

8. 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.

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

APPENDIX

Individual opinion by Committee members Mr. Prafullachandra Natwarlal Bhagwati and Mr. Walter Kälin (Dissenting)

The majority of the members of the Committee have declared this communication inadmissible with regard to all alleged victims. While we concur in the inadmissibility decision regarding the author and her son, we dissent when it comes to her daughter Jessica. In paragraph 7.3 of the views adopted by the Committee, the majority considers that the author has failed to substantiate, for the purposes of admissibility, that the application of the Hague Convention on the Civil Aspects of Child Abduction (the Hague Convention) would amount to a violation of Jessica's rights under the Covenant. This opinion seems to rest on the assumption that the application of the Hague Convention is in the best interest of the child and therefore automatically compatible with the Covenant. We agree with this view in principle, but disagree as regards its application in the circumstances of the present case.

The purpose of the Hague Convention is to "secure the prompt return of children wrongfully removed" (article 1) to the country from where they were abducted in order to reunite them with the parent who has been granted sole custody or to enable the courts of that country to determine the issue of custody without delay if this question is contentious. The Convention is thus based on the idea that it is in the best interest of the child to return to that country. This is certainly true if the return is executed within a relatively short period of time after the wrongful removal, but may be no longer the case if much time has elapsed since then. The Hague Convention recognizes this by allowing States not to return the child, *inter alia* if the child has spent a prolonged period of time abroad and is firmly settled there, if the return would cause serious harm and expose the child to serious dangers, or if the child is opposing return and is old and mature enough to take such a decision (articles 12 and 13). While the Committee had not to examine the application of the Convention by Australia as such, it is relevant to note that this treaty accepts that return may not always safeguard the rights and the best interest of the child.

In the present case, the Committee has to decide whether upholding the decision by the competent Australian courts to return Jessica to the USA would violate her rights under the Covenant, in particular those under Articles 17, 23 and 24 of the Covenant. As she has not yet been returned, the material point in time must be that of the Committee's consideration of the case, i.e. it is the present conditions which are decisive.

In this regard, we note that Jessica is almost 11 years old and is clearly opposing the envisaged return to her father. She has spent all of her life in Australia except the first four months after her birth and another three months after her first birthday. When she was approximately three years old, the Full Court of the Family Court of Australia dismissed the appeal of her mother in this case. Since then, almost eight years have passed without any full examination of the question as to whether the circumstances mentioned in articles 12 and 13 of the Hague Convention would apply in her case. This raises serious questions under the Covenant, in particular the following: Can the right of Jessica to lead a family life with her mother and brother still be trumped by the right of a distant father who was granted, more than a decade ago, sole permanent custody of the child, with no visitation rights of the mother? Would it be compatible with her right to such measures of protection as are required by her status as a minor to force her to live with a man who she most probably will battle in

court and who she only knows as the person who wanted to separate her from her mother and brother as long as she can remember? These and similar questions are serious enough to warrant a thorough examination on the merits. Therefore, we would declare the communication admissible with regard to Jessica's claim to be a victim of a violation of Articles 17, 23 and 24 of the Covenant.

[*Signed*] Mr. Prafullachandra Natwarlal Bhagwati

[*Signed*] Mr. Walter Kälin

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Individual opinion by Committee member Mr. Martin Scheinin (concurring)

While I joined the majority in finding the communication inadmissible due to lack of substantiation in respect of all three alleged victims I feel a need to present additional reasons in respect of the claims made on behalf of Jessica Joy Surgeon, now aged ten years.

First of all, I wish to make it clear from the outset that I see no problem in the Committee's approach to derive from article 2 of the Optional Protocol an admissibility condition of substantiation of any claims made of a violation of the Covenant. The reference to a "claim" of a violation in article 2 of the Optional Protocol must be understood as referring to a claim substantiated by relevant facts and legal arguments.

Secondly, when finding that Ms Laing has not managed to substantiate her claims presented on behalf of Jessica, I attach significant importance on article 19 of the Hague Convention on Child Abduction, according to which a decision taken pursuant to the Convention on the return of a child "shall not be taken to be determination on the merits of any custody issue". As is reflected in paragraph 2.2 of the Committee's decision, the existing US court decision of May 1995, awarding Mr Surgeon sole custody of Jessica with no visitation rights for Ms Laing was made "until further order by a court of competent jurisdiction". Hence, the case before the Committee is *not* about returning Jessica to the sole custody of Mr Surgeon without any visiting rights afforded to Ms Laing. The result of the application of the Hague Convention would have been in 1996, and still is, merely that Jessica is to be returned to the effective jurisdiction of United States courts so that they can decide about all matters related to custody and access rights. This is pointed out by the State party in paragraphs 4.4, 4.5, 4.19, 4.23 and 6.1 of the Committee's decision. It has not been substantiated, for purposes of admissibility, that the application of this principle would amount to a violation of Jessica's rights under the Covenant. This is my main reason for finding the claim presented on behalf of Jessica inadmissible. What follows hereafter, should be seen as supplementary reasons.

As is spelled out in paragraph 7.3 of the Committee's decision, it is its consistent practice that a parent is entitled to represent an under-aged child in the Optional Protocol proceedings without explicit written authorization. This approach also means that *either one* of the parents, custodial or non-custodial, is entitled to submit a communication on behalf of a child, alleging violations of his or her rights. While this approach means that a parent will always have formal standing to bring a case on behalf of his or her child, it is for the Committee to assess whether the custodial or non-custodial parent has managed to substantiate that he or she is representing the free will and the best interest of the child. For this reason it would always be best if the Committee could receive either a letter of authorization or another expression of the child's opinion whenever a child has reached an age where his or her opinion can be taken into account. In the current case, Jessica is approaching the age in which many jurisdictions attach legal significance to the freely expressed will of the child. For my assessment that Ms Laing failed to substantiate the claims presented on behalf of Jessica, for purposes of admissibility, it was of some relevance that the Committee received no letter of authorization or other free and direct expression of Jessica's own opinion.

However, I attach more relevance to the fact that the Optional Protocol procedure always is between two parties, i.e. one or more individuals and a State party to the Optional

Protocol. The requirement of substantiation relates to the claims made by the author, not merely to the issue whether the rights of a child have been violated. It may very well be that Jessica is a victim of violations by Australia of her rights under the Covenant. Those violations may result from the decisions made by Australian courts in the case, or from the non-implementation of those decision, or from the possibility that the decisions would be implemented in the future by returning Jessica to the United States. The claim made by Ms Laing on behalf of Jessica relates, at least primarily, to the third one of these options. It would be a part of her duty to substantiate the claim to demonstrate to the Committee that the implementation of the Court decisions taken several years ago is now likely or at least a real possibility, instead of mere speculation. In addressing the question whether such a claim is substantiated the Committee would need to keep in mind also the alternative scenario of a parent claiming a violation of the human rights of an abducted child due to the non-implementation of the decisions of a State party's own courts to return the child to the jurisdiction of the country from which he or she was removed. While there is no general solution to such conflicting human rights claims, this setting of potentially conflicting claims affects the application of the substantiation requirement as one of the admissibility conditions.

[Signed] Mr. Martin Scheinin

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