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

DECISION

Communication No. 1272/2004

Submitted by:	Ms. Fatima Benali (represented by counsel, J.J.C. van Haren)
Alleged victim:	The author
State party:	The Netherlands
Date of initial communication:	23 June 2003 (initial submission)
Document references:	Special Rapporteur's rule 91 decision, transmitted to the Sate party on 28 April 2004. (not issued in document form)
Date of decision:	23 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. 1272/2004[**]

Submitted by:	Ms. Fatima Benali (represented by counsel, J.J.C. van Haren)
Alleged victim:	The author
State party:	The Netherlands
Date of initial communication:	23 June 2003 (initial submission)

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

Meeting on 23 July 2004

Adopts the following:

Decision on admissibility

1.1 The author of the communication, initially dated 23 June 2003, is Ms. Fatima Benali, a Moroccan national born in Morocco on 13 July 1984. She argues that for the Netherlands to remove her to Morocco would amount to a breach of articles 17, 23 and 24 of the Covenant. The author is represented by counsel.

1.2 On 29 June 2004, the Committee, acting through its Special Rapporteur on New Communications, decided to separate consideration of the admissibility and merits of the communication.

The facts as presented by the author

2.1 In 1985, the marriage of the author's parents, living in Morocco, was dissolved. Her mother moved out of the family home, where the author continued to live with her father. In

[**] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Walter Kälin, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

August 1989, the author's father remarried. Between 1989 and 1990, the author's mother also remarried and lived in a village some 50 kilometres removed from the author, who lived with her paternal grandmother. The author contends that, according to local cultural rules, her mother joined completely the family of her new husband and left her own family. She accordingly withdrew both de facto and legally from the care of the author, stating in an "*acte de remise d'enfant*" that she transferred the author's care to her father. In 1990, the author's father moved to the Netherlands with his new wife. It is said, however, that her father maintained contact with her, took decisions concerning her education in consultation with her grandmother and provided money for her education and care. In 1995, the paternal grandmother moved to France, but according to applicable French law it was allegedly not possible for the author to join her. Instead, on 1 September 1995, she traveled separately to her father in the Netherlands.

2.2 On 12 September 1995, the author applied to the Dutch authorities for a residence permit to stay with her father, residing in the Netherlands. On 2 June 1997, the Secretary of Justice refused the application. On 18 May 1998, the Secretary of Justice rejected the author's application that the previous decision was invalid.

2.3 On 22 January 1999, the District Court dismissed the author's appeal against the decision of the Secretary of Justice. The Court observed that domestic law provided for a residence permit to allow for family re-unification arising from a family relationship pre-existing a parent's arrival in the Netherlands. Such a claim fails, however, if the family relationship had been dissolved, such as by permanent assimilation of a child into another family whereby the initial parents no longer exercise parental authority or provide for the child's expenses. The claim also becomes more difficult the longer the period of separation has continued. In the Court's view, it was not probable that the author's father leaving her behind in 1990 with her grandmother's family for five years was seen as a temporary measure and that he had from the beginning intended her to join him in the Netherlands. The Court considered, on the contrary, that the decision to bring the author to the Netherlands was more probably prompted by the move of her grandmother to France in 1995. In light of all the facts, the Court found the relationship had come to an end ceased when her father left Morocco.

2.4 On the claim that the author nonetheless should be permitted to remain in the Netherlands on sufficiently urgent humanitarian grounds, the Court considered that unreasonable hardship in the event of a return had not been shown. Nor had it been shown that she had become so integrated into Dutch society, and so alienated from Moroccan society, that residence outside the Netherlands would be inconceivable and "so distressing" that she should be permitted to remain. Assessing the claim under the protection of family life afforded under article 8 of the European Convention on Human Rights, the Court found, on the above assessment of the facts, that no interference in family life had been made out. Nor had the author made out any positive obligation on the State in the circumstances to allow her to remain. No objective impediment to continuing to enjoy family life in Morocco had been shown. As a result, after weighing the competing factors, the Court found that the decision had been arrived at "in all reasonableness" and was not inconsistent with any general principle of sound and proper administration.

2.5 Since that point, the author has continued to live in the Netherlands and it is said that no action to remove her has been initiated.

The complaint

3.1 The author argues that to remove her to Morocco would amount to arbitrary or unlawful interference with her family and home, contrary to article 17 of the Covenant, and would breach her right to protection as a minor, contrary to article 24 of the Covenant. She also alleges, without any argumentation, a violation of article 23 of the Covenant.

3.2 The author contends that in Morocco there is no person who could take care of her. It is argued that her father cannot be expected to return there to care for her as his wife has lived in the Netherlands since 1980 and does not wish to return. The author states that she has joined school in the Netherlands and is completely integrated in Dutch society, speaking the language fluently.

Submissions by the State party on the admissibility of the communication

4. By submission of 28 June 2004, the State party argues the communication is inadmissible for failure to exhaust domestic remedies, arguing that after lodging the communication the author submitted a renewed request for a residence permit to the immigration authorities. That request was rejected on 21 April 2004, upon which the author filed an objection to the District Court accompanied by a request for a provisional measure that she not be expelled pending the Court's proceedings. A date for hearing has not yet been set.

The author's comments on the State party's submissions

5. By letter of 13 July 2004, the author responded to the State party's submissions, arguing that she submitted a new (as opposed to "renewed") request for a residence permit, but that the objection has been filed with immigration authorities rather than with the District Court. She concedes that a request for provisional measures pending the objection proceedings has been filed. She argues that all domestic proceedings regarding the particular request have been exhausted, a fact not altered by the filing of a new request with other argumentation. The new request argues that since her arrival in the Netherlands in 1995 and since the final decision of the District Court in 1999 no attempt was made to remove her, and that it would thus be a policy of "toughness" to remove her at the present time. The author thus concludes that the communication should be declared admissible.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 The Committee observes, with respect to the claim under article 24, that as the author is at the present time no longer a minor, then, regardless of what may have been the position at an earlier point in time, any future removal would not implicate any rights under this article. This

claim is thus inadmissible *ratione materiae* under article 3 of the Optional Protocol as incompatible with the provisions of the Covenant.

6.3 As to the claims under articles 17 and 23, the Committee refers to its jurisprudence that the removal of one or more family members from a State party to another country may, in principle, raise arguable issues under these provisions of the Covenant.[1] The Committee observes however that the issues which the author, by her own action, has presented to the authorities in her renewed application, are of substantial import to any decision of the Committee on these claims, as the Committee's decision would be based on assessment of the author's situation as it stands at the time of decision. The Committee refers to its jurisprudence that, where an author has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the author must be held to have failed to exhaust domestic remedies as required by article 5, paragraph 2(b), of the Optional Protocol.[2] The Committee thus declares the communication inadmissible on this basis.

7. Accordingly, the Committee decides:

a) that the communication is inadmissible under articles 3 and 5, paragraph 2(b), of the Optional Protocol; and

b) that this decision will be transmitted to the author and, for information, to the State party.

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

[1] See, for example, Winata v Australia Case No. 930/2000, Views adopted on 26 July 2001, and Sahid v New Zealand Case No. 893/1999, Views adopted on 28 March 2003.

[2] See Baroy v The Philippines, Case No. 1045/2002, Decision adopted on 31 October 2003, and Romans v Canada, Case No. 1040/2001, Decision adopted on 9 July 2004.