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III. JURISPRUDENCE

CERD

- *Quereshi v. Denmark* (33/2003), CERD, A/60/18 (9 March 2005) 142 at paras. 2.5, 2.6, 2.8, 2.11, 2.13, 7.3, 8 and 9.

...

2.5 Speeches made at the Progressive Party's annual meeting, held on 20 and 21 October 2001, were broadcast on the State party's public television system, which has a duty to broadcast from annual meetings of political parties seeking election. The petitioner contends that the following statements were made at the meeting from the podium:b/

> Vagn Andreasen (party member): "The State has given the foreigners work. They work in our slaughterhouses where they can easily poison our food and endanger the agricultural exports. Another form of terrorism is to break into our waterworks and poison the water."
>
> Mogens Glistrup (former leader of the party): "The Mohammedans will exterminate the populations of the countries to which they have advanced." On 22 October, an article in the *Dagbladet Politiken* daily quoted this statement as: "Their holiest duty is, in the name of Allah, to exterminate the populations in the countries to which they have advanced."
>
> Erik Hammer Sørensen (party member, commenting on immigration to the State party): "There are fifth columnists about. Those that we have got in commit violence, murder and rape."
>
> Margit Petersen (party member, referring to her earlier conviction under section 266 (b) in the State party's courts): "I'm glad to be a racist. We want a Mohammedan-free Denmark"; "the Blacks breed like rats".
>
> Peter Rindal (party member): "Concerning Mohammedan burial grounds in Denmark, of course we should have such ones. And they should preferably be so large that there is room for all of them, and hopefully in one go."
>
> Bo Warming (party member): "The only difference between Mohammedans and rats is that rats don't draw social benefits." He allegedly distributed a drawing of a rat with the Koran under its arm to journalists present at the conference.

2.6 Upon viewing the meeting, the petitioner requested the Documentation and Advisory

Centre on Racial Discrimination (DRC) to file complaints against the above individuals, as well as the members of the executive board of the Progressive Party for its approval of the statements made.

...

2.8 On 25 October 2001, DRC filed a complaint with the Varde police, alleging that the statement made by Mr. Andreasen violated section 266 (b) (1) and (2) on the basis that it insulted and degraded a group of people on account of their religious origin. DRC added that the statement postulated that immigrants and refugees were potential terrorists, thereby generally and unobjectively equating a group of people of an ethnic origin other than Danish with crime. The same day, DRC filed a complaint with the Varde police, alleging that the statement made by Mr. Rindal violated section 266 (b) (1) and (2) on the basis that it threatened a group of people on account of their race and ethnic origin.

...

2.11 On 28 March 2003, the Varde Police Chief Constable forwarded the six cases to the Sønderborg Regional Public Prosecutor with the following recommendations:

...

- The charges against Mr. Andreasen and Mr. Sørensen should be withdrawn under sections 721 (1) (ii) of the Administration of Justice Act.

...

2.13 After receipt of further information, the Regional Public Prosecutor, on 18 June 2003, made the following recommendations to the Director of Public Prosecutions (DPP), in relation to prosecution of the above; DPP accepted them on 6 August 2003:

...

- The charges against Mr. Andreasen should be withdrawn on the basis that that further prosecution could not be expected to lead to conviction and sentence. DPP observed that the *actus reus* of section 266 (b) (1) required a statement to be directed at a group of persons on account of, *inter alia*, race, colour, national or ethnic origin and religion. In the view of DPP, this requirement had not been met as the concept of "foreigners" employed by Mr. Andreasen was "so diffuse that it does not signify a group within the meaning of the law".

...

7.3 The Committee recalls that Mr. Andreasen made offensive statements about "foreigners" at the party conference. The Committee notes that, regardless of what may have been the position in the State party in the past, a general reference to foreigners does not at present single out a group of persons, contrary to article 1 of the Convention, on the basis of a specific race, ethnicity, colour, descent, or national or ethnic origin. The Committee is thus unable to conclude that the State party's authorities reached an inappropriate conclusion in determining that Mr. Andreasen's statement, in contrast to the more specific statements of the other speakers at the conference, did not amount to an act of racial discrimination contrary to section 266 (b) of the Danish Criminal Code. It also follows that the petitioner was not deprived of the right to an effective remedy for an act of racial discrimination in

respect of Mr. Andreasen's statement.

8. Nevertheless, the Committee considers itself obliged to call the State party's attention (i) to the hateful nature of the comments concerning foreigners made by Mr. Andreasen and of the particular seriousness of such speech when made by political figures and, in this context, (ii) to its general recommendation XXX, adopted at its sixty-fourth session, on discrimination against non-citizens.

9. The Committee on the Elimination of Racial Discrimination...is of the opinion that the facts before it do not disclose a violation of the Convention.

_____

Notes

...

b/ The form of the statements is as reported in the criminal complaints to the police lodged by the Documentation and Advisory Centre on Racial Discrimination.

_____

ICCPR

- *Mauritian Women v. Mauritius* (R.9/35), ICCPR, A/36/40 (9 April 1981) 134 at paras. 7.2-7.4, 9.2(b)1-9.2(b)2(i)8, 9.2(b)2(ii)2, 9.2(b)2(ii)3, 9.2(c)2 and 10.1.

...

7.2 Up to 1977, spouses (husbands and wives) of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. They had the right to be considered *de facto* as residents of Mauritius. The coming into force of the Immigration (Amendment) Act, 1977, and of the Deportation (Amendment) Act, 1977, limited these rights to the wives of Mauritius citizens only. Foreign husbands must apply to the Minister of the Interior for a residence permit and in case of refusal of the permit they have no possibility to seek redress before a court of law.

7.3 Seventeen of the co-authors are unmarried. Three of the co-authors were married to foreign husbands when, owing to the coming into force of the Immigration (Amendment) Acts 1977, their husbands lost the residence status in Mauritius which they had enjoyed before. Their further residence together with their spouses in Mauritius is based under the statute on a limited, temporary residence permit to be issued in accordance with section 9 of the Immigration (Amendment) Act, 1977. This residence permit is subject to specified conditions which might at any time be varied or cancelled by a decision of the Minister of the Interior, against which no remedy is available. In addition, the Deportation (Amendment) Act, 1977, subjects foreign husbands to a permanent risk of being deported from Mauritius.

7.4 In the case of Mrs. Aumeeruddy-Cziffra, one of the three married co-authors, more than three years have elapsed since her husband applied to the Mauritian a authorities for a residence permit, but so far no formal decision has been taken. If her husband's application were to receive a negative decision, she would be obliged to choose between either living with her husband abroad and giving up her political career, or living separated from her husband in Mauritius and there continuing to participate in the conduct of public affairs of that country.

...

9.2(b)1 The Committee will next examine that part of the communication which relates to the effect of the laws of 1977 on the family life of the three married women.

9.2(b)2 The Committee notes that several provisions of the Covenant are applicable in this respect. For reasons which will appear below, there is no doubt that they are actually affected by these laws, even in the absence of any individual measure of implementation (for instance, by way of a denial of residence, or an order of deportation, concerning one of the husbands). Their claim to be "victims" within the meaning of the Optional Protocol has to be examined.

9.2(b)2(i)1 First, their relationships to their husbands clearly belong to the area of "family" as used in article 17 (1) of the Covenant. They are therefore protected against what that article calls "arbitrary or unlawful interference" in this area.

9.2(b)2(i)2 The Committee takes the view that the common residence of husband and wife has to be considered as the normal behaviour of a family. Hence, and as the State party has admitted, the exclusion of a person from a country where close members of his family are living can amount to an interference within the meaning of article 17. In principle, article 17(1) applies also when one of the spouses is an alien. Whether the existence and application of immigration laws affecting the residence of a family member is compatible with the Covenant depends on whether such interference is either "arbitrary or unlawful" as stated in article 17(1), or conflicts in any other way with the State party's obligations under the Covenant.

9.2(b)2(i)3 In the present cases, not only the future possibility of deportation, but the existing precarious residence situation of foreign husbands in Mauritius represents, in the opinion of the Committee, an interference by the authorities of the State party with the family life of the Mauritian wives and their husbands. The statutes in question have rendered it uncertain for the families concerned whether and for how long it will be possible for them to continue their family life by residing together in Mauritius. Moreover, as described above (para. 7.4) in one of the cases, even the delay for years, and the absence of a positive decision granting a residence permit, must be seen as a considerable inconvenience, among other reasons because the granting of a work permits and hence the possibility of the husband to

contribute to supporting the family, depends on the residence permit, and because deportation without judicial review is possible at any time.

9.2(b)2(i)4 Since, however, this situation results from the legislation itself, there can be no question of regarding this interference as "unlawful" within the meaning of article 17(1) in the present cases. It remains to be considered whether it is "arbitrary" or conflicts in any other way with the Covenant.

9.2(b)2(i)5 The protection owed to individuals...is subject to the principle of equal treatment of the sexes which follows from several provisions of the Covenant. It is an obligation of the State parties under article 2(1) generally to respect and ensure the rights of the Covenant "without distinction of any kind, such as...(i.e.) sex", and more particularly under article 3 "to ensure the equal right of men and women to the enjoyment" of all these rights, as well as under article 26 to provide "without any discrimination" for "the equal protection of the law.

9.2(b)2(i)6 The authors who are married to foreign nationals are suffering from the adverse consequences of the statutes discussed above only because they are women. The precarious residence status of their husbands, affecting their family life as described, results from the 1977 laws which do not apply the same measures of control to foreign wives. In this connexion the Committee has noted that under section 16 of the Constitution of Mauritius sex is not one of the grounds on which discrimination is prohibited.

9.2(b)2(i)7 In these circumstances, it is not necessary for the Committee to decide in the present cases how far such or other restrictions on the residence of foreign spouses might conflict with the Covenant if applied without discrimination of any kind.

9.2(b)2(i)8 The Committee considers that it is also unnecessary to say whether the existing discrimination should be called an "arbitrary" interference with the family within the meaning of article 17. Whether or not the particular interference could as such be justified if it were applied without discrimination does not matter here. Whenever restrictions are placed on a right guaranteed by the Covenant, this has to be done without discrimination on the ground of sex. Whether the restriction in itself would be in breach of that right regarded in isolation, is not decisive in this respect. It is the enjoyment of the rights which must be secured without discrimination. Here it is sufficient, therefore, to note that in the present position an adverse distinction based on sex is made, affecting the alleged victims in their enjoyment of one of their rights. No sufficient justification for this difference has been given. The Committee must then find that there is a violation of articles 2 (1) and 3 of the Covenant, in conjunction with article 17 (1).

...

9.2(b)2(ii)2 ...[T]he principle of equal treatment of the sexes applies by virtue of articles

2(1), 3 and 26, of which the latter is also relevant because it refers particularly to the "equal protection of the law". Where the Covenant requires a substantial protection as in article 23, it follows from those provisions that such protection must be equal, that is to say not discriminatory, for example on the basis of sex.

9.2(b)2(ii)3 It follows also in this line of argument the Covenant must lead to the result that the protection of a family cannot vary with the sex of one or the other spouse. Though it might be justified for Mauritius to restrict the access of aliens to their territory and to expel them for security reasons...legislation which only subjects foreign spouses of Mauritian women to these restrictions, not foreign spouses of Mauritian men, is discriminatory with respect to Mauritian women and cannot be justified by security requirements.

...

9.2(c)2 The Committee considers that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference with opportunity should infringe the principle of sexual equality.

...

10.1 Accordingly, the Human Rights Committee acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts, as outlined in paragraph 7 above, disclose violations of the Covenant, in particular of articles 2 (1), 3 and 26 in relation to articles 17 (1) and 23 (1) with respect to the three co-authors who are married to foreign husbands, because the coming into force of the Immigration (Amendment) Act, 1977, and the Deportation (Amendment) Act, 1977, resulted in discrimination against them on the ground of sex.

- *Maroufidou v. Sweden* (R.13/58), ICCPR, A/36/40 (9 April 1981) 160 at paras. 8, 9.2, 9.3, 10.1, 10.2 and 11.

...

8. ...Anna Maroufidou, a Greek citizen, who came to Sweden seeking asylum, was granted a residence permit in 1976. Subsequently on 4 April 1977 she was arrested on suspicion of being involved in a plan of a terrorist group to abduct a former member of the Swedish Government. In these circumstances the Central Immigration Authority on 28 April 1977 raised the question of her expulsion from Sweden on the ground that there was good reason to believe that she belonged to, or worked for, a terrorist organization or group, and that there was a danger that she would participate in Sweden in a terrorist act of the kind referred to in sections 20 and 29 of the Aliens Act. A lawyer was appointed to represent her in the proceedings under the Act. On 5 May 1977 the Swedish Government decided to expel her and the decision was immediately executed.

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...
9.2 Article 13 lays down a number of conditions which must be complied with by the State party concerned when it expels an alien from its territory. The article applies only to an alien "lawfully in the territory" of the State party, but it is not in dispute that when the question of Anna Maroufidou's expulsion arose in April 1977 she was lawfully resident in Sweden. Nor is there any dispute in this case concerning the due observance by the State party of the procedural safeguards laid doom in article 13. The only question is whether the expulsion was "in accordance with law".

9.3 The reference to "law" in this context is to the domestic law of the State party concerned, which in the present case is Swedish law, though of course the relevant provisions of domestic law must in themselves be compatible with the provisions of the Covenant. Article 13 requires compliance with both the substantive and the procedural requirements of the law.

10.1. Anna Maroufidou claims that the decision to expel her was in violation of article 13 of the Covenant because it was not "in accordance with law". In her submission it was based on an incorrect interpretation of the Swedish Aliens Act. The Committee takes the view that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned. It is not within the powers or functions of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the Optional Protocol, unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.

10.2 In the light of all written information made available to it by the individual and the explanations and observations of the State party concerned, the Committee is satisfied that in reaching the decision to expel Anna Maroufidou the Swedish authorities did interpret and apply the relevant provisions of Swedish law in good faith and in a reasonable manner and consequently that the decision was made "in accordance with law" as required by article 13 of the Covenant.

11. The Human Rights Committee...is therefore of the view that the above facts do not disclose any violation of the Covenant and in particular of article 13.

- *M. F. v. The Netherlands* (173/1984), ICCPR, A/40/40 (2 November 1984) 213 at paras. 2.1, 2.2 and 4.

...
2.1 The author states that after political persecution and detention in Chile, he left the country on 26 July 1980 on a valid passport and flew to Spain, where he resided until March

1981, when he travelled to Belgium and subsequently to Den Helder, in the Netherlands. On 1 June 1981, he filed an application for political asylum in the Netherlands. On 15 September 1982, his requests for a residence permit and refugee status were turned down by administrative decree on the grounds that he had not belonged to an opposition party, had been able to leave Chile without objection from the authorities, and has sojourned in Spain and Belgium prior to entering the Netherlands. The author's lawyer appealed against the administrative decree on 22 October 1982, contending that the author had been a member of a resistance group and that the Chilean Government had a practice of inducing "undesirable elements" to leave the country. On 16 June 1983, a hearing took place before a Standing Consultative Committee for Alien Affairs of the Ministry of Justice, and on 16 September 1983, the Deputy Minister of Justice by administrative decree rejected the request for asylum. An appeal was lodged against the decree on 14 October 1983, before an "independent judge" (name of court not given), but it appears that this procedure has not been concluded. The Deputy Minister of Justice, bypassing the appeal, ordered the expulsion of the author by 3 November 1983 at the latest. Thereupon, the author initiated a separate court procedure against the State of the Netherlands, seeking an injunction against the expulsion order, at least until the appeal was decided. On 17 January 1984, in an interim judgement, the president of the Court in The Hague stated that the author did not qualify for refugee status. On 15 March 1984, the Court ruled that the author's submission that he suffered from a mental illness and that this should be considered in his favour did not constitute a ground barring expulsion. Therefore, on 29 March 1984, the Deputy Minister of Justice instructed the local police to expel the author, stipulating that an appeal against the judgement of the president of the Court could not delay the process of expulsion. A further appeal against the judgement of 15 March 1984 was lodged on 24 May 1984 at a Superior Court in the Hague. It appears that this appeal is still pending.

2.2 The author claims that the following provisions of the International Covenant on Civil and Political Rights have been violated...article 7, because the author's expulsion would now constitute cruel and inhuman treatment...

...

4. A thorough examination of the communication has not revealed any facts in substantiation of the author's claim that he is a victim of a breach by the State party of any rights protected by the Covenant. In particular, it emerges from the author's own submission that he was given ample opportunity in formal proceedings, including oral hearings, to present his case for sojourn in the Netherlands. The Committee, accordingly, concludes that the author has no claim under article 2 of the Optional Protocol.

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- *Hammel v. Madagascar* (155/1983), ICCPR, A/42/40 (3 April 1987) 130 at paras. 18.2, 19.1-19.3 and 20.

...

18.2 Maître Hammel is a French national and resident of France, formerly a practising attorney in Madagascar for 19 years until his expulsion on 11 February 1982. In February 1980 he was threatened with expulsion and was detained and interrogated on 1 March and again on 4 November 1980 in this connection. On 8 February 1982, he was arrested at his law office in Antananarivo by the Malagasy political police, who took him to a basement cell in the Malagasy political prison and kept him in incommunicado detention until 11 February 1982 when he was notified of an expulsion order against him issued on that same date by the Minister of the Interior. At that time he was taken under guard to his home where he had two hours to pack his belongings. He was deported on the same evening to France, where he arrived on 12 February 1982. He was not indicted nor brought before a magistrate on any charge; he was not afforded an opportunity to challenge the expulsion order prior to his expulsion. The proceedings concerning his subsequent application to have the expulsion order revoked ended with the decision of the Administrative Chamber of the Supreme Court of Madagascar, dated 13 August 1986, in which the Court rejected Maître Hammel's application and found the expulsion order valid on the grounds that Maître Hammel allegedly made "use both of his status as a corresponding member of Amnesty International and of the Human Rights Committee [*sic*] at Geneva, and as a barrister" to discredit Madagascar.

19.1 In this context, the Committee observes that article 13 of the Covenant provides, at any rate, that an alien lawfully in the territory of a State party "may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority".

19.2 The Committee notes that, in the circumstances of the present case, the author was not given an effective remedy to challenge his expulsion and that the State party has not shown that there were compelling reasons of national security to deprive him of that remedy. In formulating its views the Human Rights Committee also takes into account its general comment 15 (27), a/ on the position of aliens under the Covenant, and in particular points out that "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one".

19.3 The Committee further notes with concern that...the decision to expel Eric Hammel would appear to have been linked to the fact that he had represented persons before the Human Rights Committee. Were that to be the case, the Committee observes that it would

be both untenable and incompatible with the spirit of the International Covenant on Civil and Political Rights and the Optional Protocol thereto, if States parties to these instruments were to take exception to anyone acting as legal counsel for persons placing their communications before the Committee for consideration under the Optional Protocol.

...

20. The Human Rights Committee...is of the view that the facts as found by the Committee disclose violations of the International Covenant on Civil and Political Rights with respect to:

> ...
> Article 13, because, for grounds that were not those of compelling reasons of national security, he was not allowed to submit the reasons against his expulsion and to have his case reviewed by a competent authority within a reasonable time.

_____

Notes

a/ Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), annex VI.

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- *V. M. R. B. v. Canada* (236/1987), ICCPR, A/43/40 (18 July 1988) 258 at paras. 6.3 and 7.

...

6.3 The Committee...observes that a right of asylum is not protected by the Covenant. With regard to the author's allegation that his right to life under article 6 of the Covenant and that his right to liberty under article 9 have been violated, the Committee finds that he has not substantiated either allegation. With regard to article 6 of the Covenant, the author has merely expressed fear for his life in the hypothetical case that he should be deported to El Salvador. The Committee cannot examine hypothetical violations of Covenant rights which might occur in the future; furthermore, the Government of Canada has publicly stated on several occasions that it would not extradite the author to El Salvador and has given him the opportunity to select a safe third country. With regard to article 9, the Committee points out that this article prohibits unlawful arrest and detention, whereas the author was lawfully arrested in connection with his unauthorized entry into Canada, and the decision to detain him was not made arbitrarily, especially in view of his insistence not to leave the territory of Canada. The Committee also found it necessary to determine whether a claim could be substantiated under article 13, although the author has not invoked it. It observes that one of the conditions for the application of this article is that the alien be lawfully in the territory of the State party, whereas Mr. R. has not been lawfully in the territory of Canada. Furthermore, the State party has pleaded reasons of national security in connection with the

proceedings to deport him. It is not for the Committee to test a sovereign State's evaluation of an alien's security rating; moreover, on the basis of the information before the Committee, the procedures to deport Mr. R. have respected the safeguards provided for in article 13. With respect to article 14, the Committee notes that even if immigration hearings and deportation proceedings were to be deemed to constitute "suits at law" within the meaning of article 14, paragraph 1, of the Covenant, as the author contends, a thorough examination of the communication has not revealed any facts in substantiation of the author's claim that he is the victim of a violation of this article...With respect to articles 18 and 19 of the Covenant, the Committee notes that the author has not submitted any evidence to substantiate how his exercise of freedom of conscience or expression has been restricted in Canada. His apparent contention that the deportation proceedings resulted from the State party's disapproval of his political opinions is refuted by the State party's uncontested statement that, as early as November 1980, he had been excluded from re-entering Canada on clear national security grounds...Deportation of an alien on security grounds does not constitute an interference with the rights guaranteed by articles 18 and 19 of the Covenant. With respect to articles 2 and 26 of the Covenant, the author has failed to establish how the deportation of an alien on national security grounds constitutes discrimination.

7. The Human Rights Committee therefore decides:

> (a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol because the author's claims are either unsubstantiated or incompatible with the provisions of the Covenant...

- *Torres v. Finland* (291/1988), ICCPR, A/45/40 vol. II (2 April 1990) 96 (CCPR/C/38/D/291/1988) at paras. 6 and 7.1-7.4.

...

6. The Committee notes the author's allegation that Finland is in violation of article 7 of the Covenant for extraditing him to a country where there were reasons to believe that he might be subjected to torture. The Committee finds, however, that the author has not sufficiently substantiated his fears that he would be subject to torture in Spain.

7.1 Three separate questions arise with respect to article 9, paragraph 4, of the Covenant: (a) whether the fact that the author was precluded, under the Aliens Act, from challenging his detention for the periods of 8 to 15 October, 1987, 3 to 10 December 1987 and 5 to 10 January, 1988 before a court when he was being detained under orders of the police, constitutes a breach of this provision; (b) whether at once he was by law entitled to challenge his detention under the Aliens Act, (c) whether the application of the Extradition Act to the author entails any violation of this provision.

7.2 With respect to the first question, the Committee was taken note of the State party's contention that the author could have appealed the detention orders of 7 October, 3 December 1987 and 5 January 1988 pursuant to section 32 of the Aliens Act to the Ministry of the Interior. In the Committee's opinion, this possibility, while providing for some measure of protection and review if the legality of detention, does not satisfy the requirements of article 9, paragraph 4, which envisages that the legality of detention will be determined by a court so as to ensure a higher degree of objectivity and independence in such control. The Committee further notes that while the author was detained under order of the police, he could not have the lawfulness of his detention reviewed by a court. Review by a court of law was possible only when, after seven days, the detention was confirmed by order of the Minister. As no challenge could have been made until the second week of detention, the author's detention from 8 to 15 October 1987 and from 5 to 20 January 1988 violated the requirement of article 9 paragraph 4, of the Covenant that a detained person be able "to take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (emphasis added).

7.3 With respect to the second question, the Committee emphasizes that, as a matter of principle, the adjudication of a case by any court of law should take place as expeditiously as possible. This does not mean, however, that precise deadlines for the handing down of judgments may be set which, if not observed, would necessarily justify the conclusion that a decision was not reached "without delay". Rather, the question of whether a decision was reached without delay must be assessed on a case by case basis. The Committee notes that almost three months passed between the filing of the author's appeal, under the Aliens Act, against the decision of the Ministry of the Interior and the decision of the Supreme Administrative Court. This period is in principle too extended, but as the Committee does not know the reasons for the judgment being issued only on 4 March 1988, it makes no finding under article 9, paragraph 4 of the Covenant.

7.4 With respect to the third question, the Committee notes that the Helsinki City Court reviewed the author's detention under the Extradition Act at two-week intervals. The Committee finds that such reviews satisfy the requirements of article 9, paragraph 4, of the Covenant.

- *Giry v. Dominican Republic* (193/1985), ICCPR, A/45/40 vol. II (20 July 1990) 38 at paras. 2, 5.5 and Individual Opinion by Miss Christine Chanet and Messrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren, 42.

...

2. The author claims to be a victim of violations by the Government of the Dominican Republic of article 9, paragraphs 1 and 2, articles 12 and 13 in conjunction with articles 2

and 3 of the International Covenant on Civil and Political Rights. In particular, he contends that his detention of nearly three hours by the Dominican authorities violated article 9, because he was prevented form taking his intended flight to Saint-Barthélemy, thereby depriving him of his right to liberty of movement under article 12, and that he was subjected to an illegal expulsion contrary to article 13 of the Covenant, since he was deported by force without the benefit of any administrative or judicial procedures.

...

5.5 The State party initially submitted that the author was deported from Dominican territory on the basis of an extradition treaty between the Dominican Republic and the United States of America. The State party has also referred to the action as expulsion. Regardless of whether the action against the author is termed extradition or expulsion, the Committee confirms, as it has done in its general comments on the provision in question, a/ that "expulsion" in the context of article 13 must be understood broadly and observes that extradition comes within the scope of the article...

The Committee notes that, while the State party has specifically invoked the exception based on reasons of national security for the decision to force him to board a plane destined for the jurisdiction of the United States of America, it was the author's very intention to leave the Dominican Republic at his own volition for another destination. In spite of several invitations to do so, the State party has not furnished the text of the decision to remove the author from the Dominican Territory or shown that the decision to do so was reached "in accordance with law" as required under article 13 of the Covenant. Furthermore, it is evident that the author was not afforded an opportunity, in the circumstances of the extradition, to submit reasons against his expulsion or to have his case reviewed by the competent authority. While finding a violation of the provisions of article 13 in the specific circumstances of Mr. Giry's case, the Committee stresses that States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must comply with article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case.

...

Notes

a/ "[Article 13] is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise". (Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), annex VI, para. 9.)

Individual Opinion by Miss Christine Chanet and Messrs. Francisco Aguilar Urbina, Nisuke Ando and Bertil Wennergren

In the view of the four signatories of this separate opinion, the communication should be considered in relation to articles 9 and 12 of the Covenant and not to article 13.

It appears from the information available to the Committee at the time when it took its decision that the arrest of Mr. Giry after he had been in the territory of the Dominican republic for two days, his detention at the airport and his forcible transfer to the aeroplane of a foreign state to which he was handed over forthwith and against his will should be regarded as an act of violence.

This concept of administrative law is defined as a decision not capable of being related to an act falling within the competence of the administration.

In the present case, the Dominican Republic was not able to produce or refer to any administrative act ordering the expulsion or extradition of Mr. Giry before or after his arrest at the airport.

Had there been an administrative act, even an irregular one, this might have been a case of expulsion falling within the scope of article 13.

In the absence of such an act, identifiable, *inter alia*, by its date, by the authority taking the decision and by its nature, it appears to the signatories that the arrest of Mr. Giry and his enforced boarding of an Eastern Airlines flight when he wished to travel to Saint-Barthélemy constitute unlawful and arbitrary arrest within the meaning of article 9, paragraph 1, of the Covenant.

Furthermore, since the arbitrary arrest involved not only depriving the author of his liberty but also, and more particularly, preventing him from traveling to another country of his choice and since he was obliged, against his will, to take a flight other than the one which he would have taken, the arrest in question also constitutes, in our opinion, a violation of article 12 of the Covenant.

- *García v. Ecuador* (319/1988), ICCPR, A/47/40 (5 November 1991) 290 (CCPR/C/43/D/319/1988) at paras. 2.1, 2.2, 2.4, 3, 5.2, 6.1 and 6.2.

...
2.1 The author lived in the United States of America for 13 years until 1982, when he returned to Bogotá, Colombia, where he resided until July 1987. On 22 July 1987, he travelled to Guayaquil, Ecuador, with his wife. At around 5 p.m. the same day, while walking with his wife in the reception area of the Oro Verde Hotel, they were surrounded by 10 armed men, reportedly Ecuadorian police officers acting on behalf of Interpol and the

United States Drug Enforcement Agency (D.E.A.), who forced them into a vehicle waiting in front of the hotel. He adds that he asked an Ecuadorian police colonel whether the Ecuadorian police (Policía Nacional Ecuatoriana) had any information about him; he was told that the police merely executed an "order" coming from the Embassy of the United States. After a trip of approximately one hour, they arrived at what appeared to be a private residence, where Mr. Cañón was separated from his wife.

2.2 ...He spent the night handcuffed to a table and a chair, without being given as much as a glass of water. At approximately 8 a.m. the next morning, he was taken to the airport of Guayaquil, where two individuals who had participated in his "abduction" the previous day identified themselves as agents of the Drug Enforcement Agency and informed him that he would be flown to the United States on the basis of an arrest warrant issued against him in 1982.

...

2.4 After it had been ascertained that Mr. Cañón spoke and understood English, the so-called Miranda rights...were read out to him, and he was informed that he was detained by order of the United States Government. The author asked for permission to consult with a lawyer or to speak with the Colombian consul at Guayaquil, but his request allegedly was turned down; instead, he was immediately made to board a plane bound for the United States.

...

3. The author submits that the facts described above constitute a violation of [article]...13...of the International Covenant on Civil and Political Rights. In particular, he contends that, in the light of the existence of a valid extradition treaty between the State party and the United States at the time of his apprehension, he should have been afforded the procedural safeguards provided for in said treaty.

...

5.2 As to the merits, the Human Rights Committee notes that the State party does not seek to refute the author's allegations, in so far as they relate to articles 7, 9 and 13 of the Covenant, and that it concedes that the author's removal from Ecuadorian jurisdiction suffered from irregularities.

6.1 The Human Rights Committee...finds that the facts before it reveal violations of articles 7, 9 and 13 of the Covenant.

6.2 In accordance with the provisions of article 2 of the Covenant, the State party is under an obligation to take measures to remedy the violations suffered by Mr. Cañón García. In this connection, the Committee has taken note of the State party's assurance that it is investigating the author's claims and the circumstances leading to his expulsion from Ecuador, with a view to prosecuting those held responsible for the violations of his rights.

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- *Celepli v. Sweden* (456/1991), ICCPR, A/49/40 vol. II (18 July 1994) 165 (CCPR/C/51/D/456/1991) at paras. 2.1-2.3 and 9.2.

...

2.1 In 1975, the author arrived in Sweden, fleeing political persecution in Turkey; he obtained permission to stay in Sweden but was not granted refugee status. Following the murder of a former member of the Workers Party of Kurdistan (PKK), in June 1984 at Uppsala, suspicions of the author's involvement in terrorist activities arose. On 18 September 1984, the author was arrested and taken into custody under the Aliens Act; he was not charged with any offence. On 10 December 1984, an expulsion order against him and eight other Kurds was issued, pursuant to sections 30 and 47 of the Swedish Aliens Act. The expulsion order was not, however, enforced as it was believed that the Kurds could be exposed to political persecution in Turkey in the event of their return. Instead, the Swedish authorities prescribed limitations and conditions concerning the Kurds' place of residence.

2.2 Under these restrictions, the author was confined to his home municipality (Västerhaninge, a town of 10,000 inhabitants, 25 kilometres south of Stockholm) and had to report to the police three times a week; he could not leave or change his town of residence nor change employment without prior permission from the police.

2.3 Under Swedish law, there exists no right to appeal against a decision to expel a suspected terrorist or to impose restrictions on his freedom of movement. The restrictions of the author's freedom of movement were alleviated in August 1989 and the obligation to report to the police was reduced to once a week. On 5 September 1991 the expulsion order was revoked; the restrictions on his liberty of movement and the reporting obligations were abolished.

...

9.2 The Committee notes that the author's expulsion was ordered on 10 December 1984, but that this order was not enforced and that the author was allowed to stay in Sweden, subject to restrictions on his freedom of movement. The Committee is of the view that, following the expulsion order, the author was lawfully in the territory of Sweden, for purposes of article 12, paragraph 1, of the Covenant, only under the restrictions placed upon him by the State party. Moreover, bearing in mind that the State party has invoked reasons of national security to justify the restrictions on the author's freedom of movement, the Committee finds that the restrictions to which the author was subjected were compatible with those allowed pursuant to article 12, paragraph 3, of the Covenant. In this connection, the Committee also notes that the State party *motu proprio* reviewed said restrictions and ultimately lifted them.

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- *Stewart v. Canada* (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/58/D/538/1993) at paras. 7.4, 7.5, 12.2-12.5, 12.7-12.10, Individual Opinion by Eckart Klein (concurring), 60 and Individual Opinion by Laurel B. Francis (concurring), 60.

...

7.4 As to article 13, the Committee noted that the author's deportation was ordered pursuant to a decision adopted in accordance with the law, and that the State party had invoked arguments of protection of society and national security. It was not apparent that this assessment was reached arbitrarily. In this respect, the Committee found that the author had failed to substantiate his claim, for purposes of admissibility, and that this part of the communication was inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the claim under article 12, the Committee noted the State party's contention that no substantiation in support of this claim had been adduced, as well as counsel's contention that article 12, paragraph 4, was applicable to Mr. Stewart's case. The Committee noted that the determination of whether article 12, paragraph 4, was applicable to the author's situation required a careful analysis of whether Canada could be regarded as the author's country" within the meaning of article 12, and, if so, whether the author's deportation to the United Kingdom would bar him from reentering "his own country", and, in the affirmative, whether this would be done arbitrarily. The Committee considered that there was no a priori indication that the author's situation could not be subsumed under article 12, paragraph 4, and therefore concluded that this issue should be considered on its merits.

...

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.

12.10 The deportation of Mr. Stewart will undoubtedly interfere with his family relations in Canada. The question is, however, whether the said interference can be considered either unlawful or arbitrary. Canada's Immigration Law expressly provides that the permanent residency status of a non-national may be revoked and that that person may then be expelled from Canada if he or she is convicted of serious offences. In the appeal process the Immigration Appeal Division is empowered to revoke the deportation order "having regard to all the circumstances of the case". In the deportation proceedings in the present case, Mr. Stewart was given ample opportunity to present evidence of his family connections to the Immigration Appeal Division. In its reasoned decision the Immigration Appeal Division considered the evidence presented but it came to the conclusion that Mr. Stewart's family connections in Canada did not justify revoking the deportation order. The Committee is of the opinion that the interference with Mr. Stewart's family relations that will be the inevitable outcome of his deportation cannot be regarded as either unlawful or arbitrary when the deportation order was made under law in furtherance of a legitimate state interest and due consideration was given in the deportation proceedings to the deportee's family connections. There is therefore no violation of articles 17 and 23 of the Covenant.

...

Individual Opinion by Eckart Klein (concurring)

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 (concurring)

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.

_____

Notes

...

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".

_____

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 Quiroga, co-signed by Francisco José Aguilar Urbina, 62, Individual Opinion by

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Christine Chanet, co-signed by Julio Prado Vallejo, 64 and Individual Opinion by Prafullachandra Bhagwati, 65.

- *Canepa v. Canada* (558/1993), ICCPR, A/52/40 vol. II (3 April 1997) 115 (CCPR/C/59/D/558/1993) at paras. 11.2-11.5 and Individual Opinion by Martin Scheinin, 123.

  ...

  11.2 The author has claimed that his removal from Canada constituted a violation of article 7 of the Covenant, since the separation of his family amounts to cruel, inhuman and degrading treatment. On the basis of the material before it, the Committee is of the opinion that the facts of the instant case are not of such a nature as to raise an issue under article 7 of the Covenant. The Committee concludes that there has been no violation of article 7 of the Covenant in the instant case.

  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.

  11.4 As regards the author's claim under article 17 of the Covenant, the Committee observes that the author's removal from Canada did interfere with his family life and that this interference was in accordance with Canadian law. The issue for the Committee to examine is whether the interference was arbitrary. The Committee has noted the State party's argument that the decision to remove the author from Canada was not taken arbitrarily as the author had a full hearing with procedural safeguards and his rights were weighed against the interests of society. The Committee observes that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from

his family and its effects on him were disproportionate to the objectives of removal.

11.5 The circumstances are that the author has committed many offences, largely of the break, enter and steal kind, and mostly committed to get money to support his drug habit. His removal is seen as necessary in the public interest and to protect public safety from further criminal activity by the author. He has had an almost continuous record of convictions (except for a period in 1987-88), from age 17 to his removal from Canada at age 31. The author, who has neither spouse nor children in Canada, has extended family in Italy. He has not shown how his deportation to Italy would irreparably sever his ties with his remaining family in Canada. His family were able to provide little help or guidance to him in overcoming his criminal tendencies and his drug-addiction. He has not shown that the support and encouragement of his family is likely to be helpful to him in the future in this regard, or that his separation from his family is likely to lead to a deterioration in his situation. There is no financial dependence involved in his family ties. There appear to be no circumstances particular to the author or to his family which would lead the Committee to conclude that his removal from Canada was an arbitrary interference with his family, nor with his privacy or home.

Notes

...

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

A. Individual Opinion by Martin Scheinin (concurring)

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.

As to whether there was a violation of the author's rights under article 17, I likewise concur in a finding of non-violation. In addition to the factors mentioned in paragraph 11.5 of the Views, I emphasize that the deportation of the author did not in itself mean that his contacts with his family members in Canada were made impossible. If the author, aged 32 at the time of deportation, and his parents and brother in Canada wish to maintain those contacts, they can do so by correspondence, by telephone and by the other family members visiting Italy, the country of origin of the parents. In due course, the author may also apply for a right to visit his family in Canada, the State party in such a situation being bound by its obligations under article 17 of the Covenant not to interfere arbitrarily or unlawfully with the author's family.

- *Ben Said v. Norway* (767/1997), ICCPR, A/55/40 vol. II (29 March 2000) 161 at paras. 11.2 and 11.3.

...
11.2 It has been confirmed by the author and the State party that the author appeared, on 12 January 1997 at the airport of Oslo, intending to participate in a court hearing at the Oslo City Court in a child custody and visiting rights case, scheduled for 14 January, to which he had received a convocation. It is likewise undisputed that the author was prevented by the administrative authorities of the State party from attending the hearing or from directly contacting the judge. He was, however, able to meet with his lawyer who participated in the hearing held on 14 January while the author had already been deported from Norway.

11.3 The right to a fair trial in a suit at law, guaranteed under article 14, paragraph 1, may require that an individual be able to participate in person in court proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien. In assessing whether the requirements of article 14, paragraph 1, were met in the present case, the Committee notes that the author's lawyer did not request a postponement of the hearing for the purpose of enabling the author to participate in person; nor did instructions to that effect appear in the signed authorisation given to the lawyer by the author at the airport and subsequently presented by the lawyer to the judge at the hearing of the child custody case. In these circumstances, the Committee is of the view that it did not constitute a violation by the State party of article 14, paragraph 1, that the Oslo City Court did not on its own initiative, postpone the hearing in the case until the author could be present in person.

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- *Karker v. France* (833/1998), ICCPR, A/56/40 vol. II (26 October 2000) 144 at paras. 2.1-2.3, 8.6, 9.2 and 9.3.

...

2.1 In 1987, Mr. Karker, who is co-founder of the political movement Ennahdha, fled Tunisia, where he had been sentenced to death by trial in absentia. In 1988, the French authorities recognized him as a political refugee. On 11 October 1993, under suspicion that he actively supported a terrorist movement, the Minister of the Interior ordered him expelled from French territory as a matter of urgency. The expulsion order was not, however, enforced, and instead Mr. Karker was ordered to compulsory residence in the department of Finistère. On 6 November 1993, Mr. Karker appealed the orders to the Administrative Tribunal of Paris. The Tribunal rejected his appeals on 16 December 1994, considering that the orders were lawful. The Tribunal considered that from the information before it, it appeared that the Ministry of the Interior was in possession of information showing that Mr. Karker maintained close links with Islamic organizations which use violent methods, and that in the light of the situation in France the Minister could have concluded legally that Mr. Karker's expulsion was imperative for reasons of public security. It also considered that the resulting interference with Mr. Karker's family life was justifiable for reasons of *ordre public*. The Tribunal considered that the compulsory residence order, issued by the Minister in order to allow Mr. Karker to find a third country willing to receive him, was lawful...in view of the fact that Mr. Karker was a recognized political refugee and could not be returned to Tunisia. On 29 December 1997, the Council of State rejected Mr. Karker's further appeal.

2.2 Following the orders, Mr. Karker was placed in a hotel in the department of Finistère, then he was transferred to Brest. Allegedly because of media pressure, he was then transferred to St. Julien in the Loire area, and from there to Cayres, and subsequently to the South East of France. Lastly, in October 1995, he was assigned to Digne-les-Bains (Alpes de Haute Provence), where he has resided since. According to the order fixing the conditions of his residence in Digne-les-Bains, Mr. Karker is required to report to the police once a day. The author emphasizes that her husband has not been brought before the courts in connection with the suspicions against him.

2.3 The author states that she lives in Paris with her six children, a thousand kilometres away from her husband. She states that it is difficult to maintain personal contact with her husband. On 3 April 1998, Mr. Karker was sentenced to a suspended sentence of six months' imprisonment for having breached the compulsory residence order by staying with his family during three weeks.

...

9.2. The Committee notes that Mr. Karker's expulsion was ordered in October 1993, but that his expulsion could not be enforced, following which his residence in France was subjected to restrictions of his freedom of movement. The State party has argued that the restrictions

to which the author is subjected are necessary for reasons of national security. In this respect, the State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action. It should also be noted that the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area. Moreover, the restrictions on Mr. Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security. Mr. Karker has only challenged the courts' original decision on this question and chose not to challenge the necessity of subsequent restriction orders before the domestic courts. In these circumstances, the Committee is of the view that the materials before it do not allow it to conclude that the State party has misapplied the restrictions in article 12, paragraph 3.

9.3 The Committee observes that article 13 of the Covenant provides procedural guarantees in case of expulsion. The Committee notes that Mr. Karker's expulsion was decided by the Minister of the Interior for urgent reasons of public security, and that Mr. Karker was therefore not allowed to submit reasons against his expulsion before the order was issued. He did, however, have the opportunity to have his case reviewed by the Administrative Tribunal and the Council of State, and at both procedures he was represented by counsel. The Committee concludes that the facts before it do not show that article 13 has been violated in the present case.

- *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.

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.

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

...

2.1 On 24 August 1985 and 6 February 1987, Mr. Winata and Ms. Li arrived in Australia on a visitor's visa and a student visa respectively. In each case, after expiry of the relevant

visas on 9 September 1985 and 30 June 1988 respectively they remained unlawfully in Australia. In Australia Mr. Winata and Ms. Li met and commenced a *de facto* relationship akin to marriage, and have a thirteen year old son, Barry, born in Australia on 2 June 1988.

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

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

2.4 On 25 January 2000, the Refugee Review Tribunal (RRT) affirmed DIMA's decision to refuse a protection visa. The RRT, examining the authors' refugee entitlements under article 1A(2) of the Convention Relating to the Status of Refugees (as amended) only, found that even though Mr. Winata and Ms. Li may have lost their Indonesian citizenship having been absent from that country for such a long time, there would be little difficulty in re-acquiring it. 2/ Furthermore, on the basis of recent information from Indonesia, the RRT considered that while the possibility of being caught up in racial and religious conflict could not be discounted, the outlook in Indonesia was improving and any chance of persecution in the particular case was remote. The RRT specifically found that its task was solely limited to an examination of a refugee's entitlement to a protection visa, and could not take into account broader evidence of family life in Australia.

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

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

report on the authors and possible effects of a removal to Indonesia. 5/ On 6 May 2000, the Minister decided against exercising his discretionary power. 6/

...

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

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

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

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

7.1 As to the claim of violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether Barry will accompany

his parents to Indonesia or remain in Australia, occasioning in the latter case a physical separation, is purely an issue for the family and is not compelled by the State's actions. The Committee notes that there may indeed be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of a family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.

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

7.3 It is certainly unobjectionable under the Covenant that a State party may require, under its laws, the departure of persons who remain in its territory beyond limited duration permits. Nor is the fact that a child is born, or that by operation of law such a child receives citizenship either at birth or at a later time, sufficient of itself to make a proposed deportation of one or both parents arbitrary. Accordingly, there is significant scope for States parties to enforce their immigration policy and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may come to be exercised arbitrarily in certain circumstances. In the present case, both authors have been in Australia for over fourteen years. The authors' son has grown in Australia from his birth 13 years ago, attending Australian schools as an ordinary child would and developing the social relationships inherent in that. In view of this duration of time, it is incumbent on the State party to demonstrate additional factors justifying the removal of both parents that go beyond a simple enforcement of its immigration law in order to avoid a characterisation of arbitrariness. In the particular circumstances, therefore, the Committee considers that the removal by the State party of the authors would constitute, if implemented, arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the alleged victims, and, additionally, a violation of article 24, paragraph 1, in relation to Barry Winata due to a failure to provide him with the necessary measures of protection as a minor.

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

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State Party is under an

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

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Notes

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

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

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

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

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

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

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

- *Müller and Engelhard v. Namibia* (919/2000), ICCPR, A/57/40 vol. II (26 March 2002) 243 (CCPR/C/74/D/919/2000) at paras. 2.1-2.6, 6.7, 6.8 and 8.

...

2.1 Mr. Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken up with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms. Engelhard.

The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms. Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2 The Aliens Act No. 1 of 1937 (hereinafter named the Aliens Act) Section 9, paragraph 1 as amended by Proclamation A.G. No. 15 of 1989, states that it is an offence to assume another surname than a person has assumed, described himself, or passed before 1937, without the authorisation by the Administrator General or an officer in the Government Service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions apply. The listed exception in the Aliens Act Section 9, paragraph 1 (a), is when a woman on her marriage assumes the surname of her husband. Mr. Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13, paragraph 1), his right to equality as to marriage and during the marriage (article 14 paragraph 1), and his right to have adequate protection of his family life by the State party (article 14 paragraph 3).

2.3 Mr. Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms. Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich were he comes from, contained several pages of the surname Müller, and that there were 11 Michael Müller alone in the phonebook for Munich. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr. Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr. Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr. Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about him not being the father.

2.4 Mr. Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that Section 9, paragraph 1 of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the

marriage, and with regard to the right to family life.

2.5 Ms. Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

...

6.7 With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case; that section 9, paragraph 1, of the Aliens Act differentiates on the basis of sex, in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.8/ A different treatment based on one of the specific grounds enumerated in article 26, clause 2 of the Covenant, however, places a heavy burden on the State party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9, paragraph 1, remove this provision from the verdict of being discriminatory.

6.8 The Committee notes the State party's argument that the purpose of Aliens Act section 9, paragraph 1, is to fulfil legitimate social and legal aims, in particular to create legal security. The Committee further notes the States party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surname, while in practice men so far never have wished to assume their wives' surname; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9, paragraph 1, of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the

Covenant.

...

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The State party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

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Notes

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8/ See Views *Danning v. The Netherlands*, Case No. 180/1984.

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- *C. v. Australia* (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at paras. 2.1, 3.1-3.3, 7.4, 8.2-8.5, 9 and 10.

...

2.1 The author, who has close family ties in Australia 3/ but none in Iran, was lawfully in Australia from 2 February 1990 to 8 August 1990 and left thereafter. On 22 July 1992, the author returned to Australia with a Visitor's Visa but no return air ticket, and was detained, as a "non-citizen" without an entry permit, in immigration detention under (then) s.89 *Migration* Act 1958 pending removal ("the first detention").

...

3.1 The author contends that he has suffered a violation of his rights under article 7 in dual fashion. Firstly, he was detained in such a way and for such a prolonged period (from his arrival on 22 July 1992 until 10 August 1994) as to cause him mental illness, from which he did not earlier suffer. The medical evidence was unanimous in concluding that his severe psychiatric illness was brought about by his prolonged incarceration...and this had been accepted by the AAT [Administrative Appeals Tribunal] and the courts. The author contends that he was initially imprisoned without any evidence of a risk of abscondment or other danger to the community. He could have been released into the community with commonly utilized bail conditions such as a bond or surety, or residential and/or reporting requirements. The author also alleges that his current detention is in breach of article 7.20/

3.2 Secondly, the author argues a violation of article 7 by Australia in that his proposed deportation to Iran would expose him to a real risk of a violation of his Covenant rights, at least of article 7 and possibly also article 9, by Iran. He refers in this connection to the Committee's jurisprudence that if a State party removes a person within its jurisdiction, and the necessary and foreseeable consequence is a violation of that person's rights under the Covenant in another jurisdiction, the State party itself may be in violation of the

Covenant.21/ He considers that the Minister's delegate found that the author had a well-founded fear of persecution in Iran because of his religion and because his psychological state may bring him to the notice of the authorities which could lead to the deprivation of his liberty under such conditions as to constitute persecution. Far from being overturned in subsequent proceedings, the AAT in fact affirmed this position. Moreover, the author argues that the pattern of conduct shown by Iran supports the conclusion that he will be exposed to a violation of his Covenant rights in the event of deportation.22/

3.3 The author further claims that his prolonged detention in Australia upon arrival breaches articles 9, paragraphs 1 and 4, of the Covenant, as he was detained upon arrival under the mandatory (non-discretionary) provisions of (then) s.89 *Migration* Act. Those provisions do not provide for any review of detention, either by judicial or administrative means. The author considers his case to fall within the principles laid down by the Committee in its Views in *A v. Australia*, 23/ in which the Committee held that detention, even of an illegal immigrant, which was neither reviewed periodically nor otherwise justified in the particular case violated article 9, paragraph 1, and that the absence of real judicial review including the possibility of release violated article 9, paragraph 4. The author emphasizes that, as in *A*'s case, there was no justification for his prolonged detention, and that the present legislation had the same effect of depriving him of the ability to make an effective judicial application for review of detention. For these violations of article 9, the author seeks adequate compensation for his detention under article 2, paragraph 3. The author also maintains that his current detention is in violation of article 9.24/

...

7.4 As to the claims relating to the first period of detention, the Committee notes that the legislation pursuant to which the author was detained provides for mandatory detention until either a permit is granted or a person is removed. As confirmed by the courts, there remained no discretion for release in the particular case. The Committee observes that the sole review capacity for the courts is to make the formal determination that the individual is in fact an "unlawful non-citizen" to which the section applies, which is uncontested in this case, rather than to make a substantive assessment of whether there are substantive grounds justifying detention in the circumstances of the case. Thus, by direct operation of statute, substantive judicial review which could provide a remedy is extinguished. This conclusion is not altered by the exceptional provision in s.11 of the Act providing for alternative restraint and custody (in the author's case his family's), while remaining formally in detention. Moreover, the Committee notes that the High Court has confirmed the constitutionality of mandatory regimes on the basis of the policy factors advanced by the State party.68/ It follows that the State party has failed to demonstrate that there were available domestic remedies that the author could have exhausted with respect to his claims concerning the initial period of detention, and these claims are admissible.

...

8.2 As to the claims relating to the first period of detention, in terms of article 9, paragraph

1, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.69/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.

8.3 As to the author's further claim of a violation of article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to the author was confined purely to a formal assessment of the question whether the person in question was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a court, as indeed held by the Full Court itself in its judgement of 15 June 1994, to review the author's detention in substantive terms for its continued justification. The Committee considers that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

8.4 As to the author's allegations that his first period of detention amounted to a breach of article 7, the Committee notes that the psychiatric evidence emerging from examinations of the author over an extended period, which was accepted by the State party's courts and tribunals, was essentially unanimous that the author's psychiatric illness developed as a result of the protracted period of immigration detention. The Committee notes that the State party was aware, at least from August 1992 when he was prescribed tranquillisers, of psychiatric difficulties the author faced. Indeed, by August 1993, it was evident that there was a conflict between the author's continued detention and his sanity. Despite increasingly serious assessments of the author's conditions in February and June 1994 (and a suicide attempt), it was only in August 1994 that the Minister exercised his exceptional power to release him from immigration detention on medical grounds (while legally he remained in detention). As subsequent events showed, by that point the author's illness had reached such a level of severity that irreversible consequences were to follow. In the Committee's view, the continued detention of the author when the State party was aware of the author's mental condition and failed to take the steps necessary to ameliorate the author's mental deterioration

constituted a violation of his rights under article 7 of the Covenant.

8.5 As to the author's arguments that his deportation would amount to a violation of article 7, the Committee attaches weight to the fact that the author was originally granted refugee status on the basis of a well-founded fear of persecution as an Assyrian Christian, coupled with the likely consequences of a return of his illness. In the Committee's view, the State party has not established that the current circumstances in the receiving State are such that the grant of refugee status no longer holds validity. The Committee further observes that the AAT, whose decision was upheld on appeal, accepted that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". In circumstances where the State party has recognized a protection obligation towards the author, the Committee considers that deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State party's violation of the author's rights would amount to a violation of article 7 of the Covenant.

9. The Human Rights Committee...is of the view that the facts before it disclose violations of articles 7 and 9, paragraphs 1 and 4, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violations of articles 7 and 9 suffered by the author during the first period of detention, the State party should pay the author appropriate compensation. As to the proposed deportation of the author, the State party should refrain from deporting the author to Iran. The State party is under an obligation to avoid similar violations in the future.

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Notes

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3/ The author's mother, along with his brother and sister-in-law reside in Australia, while his father is deceased. Another brother resides in Canada.

...

20/ This is clarified by his subsequent (final) submissions of 21 September 2001. See paragraph 5.3 (with footnote 57), paragraph 6.3 and paragraphs 6.5 to 6.8.

21/ *ARJ v. Australia* (No. 692/1996) and *T. v. Australia* (No. 706/1996), coupled with General Comment 20 on article 7.

22/ In this connection the author supplies reports, dated 14 December 1994, 1 August 1997, and 19 November 1999, by Dr. Colin Rubinstein, Senior Lecturer in Middle East Politics (Monash University) and member of Victorian Ethnic Affairs Commission, detailing "real

and effective discrimination against Christians", "effective intimidation", "the fiercest campaign since 1979 against the small Christian minority", including killings of clerics and arrests of apostates and a "gradual eradication of existing churches under legal pretences". The situation for minorities, including Christians, is "clearly degenerating" and "deteriorating rapidly". Accordingly, the author could expect a "high probability of vindictive retaliation" and "real persecution" in the event of his return.

23/ No. 560/1993.

24/ This is clarified by his subsequent (final) submissions of 21 September 2001. While the initial complaint appears confined to the initial period of detention, the State party's main submissions also address the second detention from the perspective of article 9 (see especially paragraphs 4.22-4.24 and 4.32-4.35).

...

68/ *Lim v. Australia* (1992) 176 CLR 1 (HCA).

69/ *A v. Australia*, op. cit., at para. 9.4.

For dissenting opinions in this context, see C. v. Australia (900/1999), ICCPR, A/58/40 vol. II (28 October 2002) 188 (CCPR/C/76/D/900/1999) at Individual Opinion of Mr. Nigel Rodley, 213, and Individual Opinion of Mr. David Kretzmer, 214.

- *Truong v. Canada* (743/1997), ICCPR, A/58/40 vol. II (28 March 2003) 397 (CCPR/C/77/D/743/1997) at paras. 1.1, 7.4 and 8.

1.1 The author of the communication is Ngoc Si Truong, born in Vietnam on 31 March 1964 but currently allegedly stateless, and under order of deportation from Canada at the time of submission of the communication. He claims to be a victim of a violation by Canada of articles 2, paragraphs 3(a) and (b), 6, paragraph 1, 7, 9, 13, 17 and 23, paragraphs 1 and 2, of the Covenant...

...

7.4 As to the claims under articles 2, 7, 9, 13, 17 and 23, the Committee observes that the author's arguments fall into two categories. Firstly, he argues that his removal would separate him from family in Canada, render him, partly due to his being a non-citizen, unable to pursue his own family life in Vietnam and expose him to deprivations of other rights there. Secondly, he argues that the deportation process in Canada was flawed. On the first point, the Committee notes that, as a Vietnamese citizen, the author would be entitled to reside, work and support a family in Vietnam; indeed, he married a Vietnamese citizen there without any difficulty in 1991. Given the presence of his wife, mother and two brothers, the author

has failed to demonstrate that his removal would, in terms of articles 17 and 23, raise arguable issues of family life under the Covenant. In the light of the Committee's decision in *Stewart*, where, in a case concerning the removal of an individual who had been in Canada for a longer period and from a younger age, and where apart from a single brother the individual's entire family resided in Canada, the Committee found no violation of (*inter alia*) articles 7, 9, 13, 17 and 23, the author has failed to substantiate his claims on the facts.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;
...

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

...
2.1 In July 1988, the author arrived in New Zealand on a temporary visitor's visa to visit his adult daughter, Jamila, and her husband. His wife and four other children remained in Fiji. In February 1989, a son, Robert, was born to Jamila, and in March 1989 he applied for residence in New Zealand for himself, his wife and four children in Fiji. In June 1989, the application for residence was denied. After a series of extensions, the author's final temporary permit expired on 7 June 1991; from that point, he was unlawfully in New Zealand. In May 1992, his daughter and her husband divorced. On 30 November 1992, the author was served with a removal order under the Immigration Act. On 24 December 1992, the author appealed his deportation order to the Removal Review Authority ("the Authority"). In 1995, the author's daughter remarried, divorced, and then remarried again.
...
2.3 On 27 July 1998, the author's representative sought a special direction from the Minister of Immigration, exceptionally to allow him to remain in New Zealand. On 28 August 1998, the author petitioned the Human Rights Committee. On 9 September 1998, the Minister of Immigration declined the request for a special direction for lack of substance. On 9 June 1999, the author was arrested with a view to removal. On 10 June 1999, the High Court, on an application for interim relief to stay removal, directed that the author be released on bail while interviews would be undertaken. On 16 June 1999, following a humanitarian assessment, the authorities decided to proceed with removal. On 1 July 1999, the High Court dismissed the application for interim relief. On 2 July 1999, the author was removed to Fiji.
...
2.4 On 3 July 2000, the Minister of Immigration cancelled the author's removal order, which would allow him to apply in the usual fashion for a temporary or residence visa without waiting out the usual five year period following removal.

...

8.2 As to the admissible claims under article 23, paragraph 1, the Committee notes its earlier decision in *Winata v. Australia*,27/ that, in extraordinary circumstances, a State party must demonstrate factors justifying the removal of persons within its jurisdiction that go beyond a simple enforcement of its immigration law in order to avoid a characterization of arbitrariness. In *Winata*, the extraordinary circumstance was the State party's intention to remove the parents of a minor, born in the State party, who had become a naturalized citizen after the required 10 years' residence in that country. In the present case, the author's removal has left his grandson with his mother and her husband in New Zealand. As a result, in the absence of exceptional factors, such as those noted in *Winata*, the Committee finds that the State party's removal of the author was not contrary to his right under article 23, paragraph 1, of the Covenant.

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Notes

...

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

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

...

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

2.2 The following day, Mr. and Mrs. Rajan migrated to New Zealand. They did not disclose events transpiring in Australia, and were granted New Zealand residence permits on the basis of their Australian permits. On 24 April 1992, Mr. Rajan's brother (Bal) also left Australia for New Zealand. On 30 April 1992, the Australian authorities cancelled Mr. and Mrs. Rajan's Australian permits. On 5 June 1992, the New Zealand authorities were informed that Mr. and Mrs. Rajan were deemed to have absconded from Australia and were prohibited

from re-entering Australia. On 3 July 1992, Mr. Rajan admitted to New Zealand authorities that his original *de facto* relationship in Australia was not genuine. Following investigations by the authorities, including interviews with Mr. and Mrs. Rajan, the Minister of Immigration, on 21 June 1994 revoked Mr. and Mrs. Rajan's residence permits on the basis that Mr. Rajan had failed to disclose that the Australian documentation (upon which the New Zealand permits were founded) was dishonestly obtained.

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

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

...

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

...

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

...

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

- *Baban et al. v. Australia* (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at paras. 1.1, 2.2-2.6, 7.2 and 9.

1.1 The author of the communication is Omar Sharif Baban, born on 3 May 1976 and an Iraqi national of Kurdish ethnicity. He brings the communication on his own behalf and that of his son Bawan Heman Baban, born on 3 November 1997 and also an Iraqi national of Kurdish ethnicity. The author and his son were detained, at the time of presentation of the communication, in Villawood Detention Centre, Sydney, Australia.1/ The author claims that they are victims of violations by Australia of articles 7, 9, paragraph 1, 10, paragraph 1, 19 and 24, paragraph 1, of the Covenant. The author is represented by counsel.

...

2.2 On 15 June 1999, the author and his son arrived in Australia without travel documentation and were detained in immigration detention under section 189(1) Migration Act 1958. On 28 June 1999, they applied for refugee status. On 7 July 1999, the author was interviewed by an officer of the Department of Immigration and Multicultural Affairs (DIMA).

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee

Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

2.4 On 24 July 2000, the author, along with other detainees, participated in a hunger strike in a recreation room at Villawood Detention Centre, Sydney. On 26 July 2000, the hunger strikers were allegedly cut off from power and contact with the outside world. Allegedly drugged bottled water was supplied. Guards were alleged to have forcibly deprived the hunger strikers of sleep by making noise. On 27 July 2000, the hunger strikers (and the author's son) were forcibly removed and transferred to another detention centre in Port Hedland, Western Australia. At Port Hedland, the author and his son were detained in an isolation cell without window or toilet. On the fifth day of his detention in isolation (his son was regularly fed from the day *after* arrival), the author discontinued his hunger strike, and, eight days later, he was removed from the cell. During the period of isolation, the author contends that access to his legal adviser was denied. On 15 August 2000, the author and his son were returned to the Villawood detention centre in Sydney to attend their hearing in the Full Federal Court.

2.5 On 21 September 2000, the Full Court of the Federal Court dismissed the authors' further appeal against the Federal Court's decision. The same day, the authors lodged an application for special leave to appeal in the High Court of Australia.

2.6 In June 2001, the author and his son escaped from Villawood Detention Centre. Their current precise whereabouts are unknown. On 16 July 2001, the Registry of the High Court of Australia listed the author's case for hearing on 12 October 2001. On 15 October 2001, the High Court adjourned the hearing of the author's appeal until the author and his son were located.

...

7.2 As to the claims under article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.14/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia... In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving

the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.15/ In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.

...

9 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including compensation.

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Notes

1/ See, however, paragraph 2.6.

...

14/ *A. v. Australia* [Case No. 560/1993, Views adopted on 3 April 1997] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

15/ *Ibid*.

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For dissenting opinion in this context, see Baban et al. v. Australia (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at Individual Opinion by Ms. Ruth Wedgwood, 344.

- *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 2.1, 2.2, 2.5, 2.6, 2.8-2.10, 2.13, 2.14, 8.4, 9.2-9.7, 10 and 11.

...

2.1 In March 1998, Mr. Bakhtiyari left Afghanistan for Pakistan where he was subsequently joined by his wife, their five children, and Mrs. Bakhtiyari's brother. Rather than being

smuggled to Germany as he had understood, Mr. Bakhtiyari was instead smuggled by an unidentified smuggler to Australia through Indonesia, losing contact with his wife, children and brother-in-law. He arrived unlawfully in Australia by boat on 22 October 1999. On arrival, he was detained in immigration detention at the Port Hedland immigration detention facility. On 29 May 2000, he lodged an application for a protection visa. On 3 August 2000, he was granted a protection visa on the basis of Afghan nationality and Hazara ethnicity.

2.2 Apparently unknown to Mr. Bakhtiyari, Mrs. Bakhtiyari, her children and her brother were also subsequently brought to Australia by the same smuggler, arriving unlawfully by boat on 1 January 2001 and were taken into immigration detention at the Woomera immigration detention facility. On 21 February 2001, they applied for a protection visa, which was refused by a delegate of the Minister of Immigration and Multicultural and Indigenous Affairs ("the Minister") on 22 May 2001 on the ground that language analysis suggested that she was Pakistani rather than Afghan, as claimed by her, and she was unable to give adequate response to questions concerning Afghanistan. On 26 July 2001, the Refugee Review Tribunal ("RRT") dismissed their application for review of the refusal. The RRT accepted that Mrs. Bakhtiyari was Hazara, but was not satisfied that she was an Afghan national, finding her credibility "remarkably poor" and her testimony "implausible" and "contradictory".

...

2.5 On 2 April 2002, the Minister declined to exercise his discretion in Mrs. Bakhtiyari's favour. On 8 April 2002, an application was made to the High Court of Australia in its original jurisdiction constitutionally to review the decisions of government officials. The application challenged (i) the RRT's decision on the ground that it should have been aware of Mr. Bakhtiyari's presence on a protection visa, and (ii) the Minister's decision under s. 417 of the *Migration* Act. The application sought to require the Minister to grant a visa to Mrs. Bakhtiyari and her children based on the visa already granted to Mr. Bakhtiyari.

2.6 On 12 April 2002, as a consequence of receiving information that Mr. Bakhtiyari was not an Afghan farmer, as he had claimed, but rather a plumber and electrician from Quetta, Pakistan, the Department of Immigration and Multicultural and Indigenous Affairs ("the Department") issued him a notice of intention to consider cancellation of his visa and provided him with an opportunity to comment on the allegations. On 26 April 2002, Mrs. Bakhtiyari made a further request to the Minister under s.417 of the *Migration* Act, but was informed that such matters were generally not referred to the Minister while litigation was underway.

...

2.8 On 2 August 2002, an application was filed with the Family Court in Adelaide on behalf of Almadar and Montazer, seeking orders against the Minister under s.67ZC of the *Family Law* Act 1975 2/ for the release of the boys from detention and for them to be made available for examination by a psychologist.

2.9 On 30 August 2002, following Mr. Bakhtiyari's institution of legal proceedings to compel the Department to release to him details of his alleged visa fraud, the Department informed him of the additional information obtained in relation to his identity and nationality, including an application by him for Pakistani identification documentation in 1975, family registration documents of 1973 and 1982 listing his birthplace, citizenship and permanent residence as Pakistani. The letter also referred to pieces of investigative journalism published in major Australian newspapers, where journalists were unable to find any person in the Afghan area from where he claimed to be who knew him, or any further evidence that he had lived there. On 20 September 2002, Mr. Bakhtiyari replied to these issues.

2.10 ...On 5 December 2002, Mr. Bakhtiyari's protection visa was cancelled, and he was taken into custody at the Villawood immigration detention facility, Sydney. The same day he lodged an application for review of this decision with the RRT, as well as an application with the Department for bridging visa seeking his release pending determination of the RRT proceedings. On 9 December 2002, a Minister's delegate refused the request for a bridging visa. On 18 December 2002, the Migration Review Tribunal upheld the decision to refuse a bridging visa.

...

2.13 On 4 March 2003, the RRT affirmed the decision to cancel Mr. Bakhtiyari's protection visa. On 22 May 2003, the Federal Court (Selway J) dismissed the author's application for judicial review of the RRT's decision, finding its conclusion open to it on the evidence. He lodged an appeal from this decision to the Full Bench of the Federal Court.

2.14 On 19 June 2003, the Full Bench of the Family Court held, by a majority, that the Court did have jurisdiction to make orders against the Minister, including release from detention, if that was in the best interests of the child. The case was accordingly remitted for hearing as a matter of urgency as to what orders would be appropriate in the particular circumstances of the children. On 8 July 2003, the Full Bench of the Family Court granted the Minister leave to appeal to the High Court, but rejected the Minister's application for a stay on the order for rehearing as a matter of urgency. On 5 August 2003, the Family Court (Strickland J) dismissed an application for interlocutory relief, that is, that the children be released in advance of the trial of the question of what final orders would be in their best interests. On 25 August 2003, the Full Bench of the Family Court allowed an appeal and ordered the release of all of the children forthwith, pending resolution of the final application. They were released the same day and have resided with carers in Adelaide since.

...

8.4 Referring to the arguments that Mrs. Bakhtiyari and her children, if removed to Afghanistan, would be in fear of being subjected to treatment contrary to article 7 of the Covenant, the Committee observes that as the authors have not been removed from Australia, the issue before the Committee is whether such removal if implemented at the present time

would entail a real risk of treatment contrary to article 7 as a consequence. The Committee also observes that the State party's authorities, in the proceedings to date, have determined, as a matter of fact, that the authors are not from Afghanistan, and hence they do not stand in fear of being returned to that country by the State party. The authors on the other hand have failed to demonstrate that if returned to any other country, such as Pakistan, they would be liable to be sent to Afghanistan, where they would be in fear of treatment contrary to article 7. Much less have the authors substantiated that even if returned to Afghanistan, directly or indirectly, they would face, as a necessary and foreseeable consequence, treatment contrary to article 7. The Committee accordingly takes the view that the claim that, if the State party returns them at the present time, Mrs. Bakhtiyari and her children would have to face treatment contrary to article 7, has not been substantiated before the Committee, for purposes of admissibility, and is inadmissible under article 2 of the Optional Protocol.

...

9.2 As to the claims of arbitrary detention, contrary to article 9, paragraph 1, the Committee recalls its jurisprudence that, in order to avoid any characterization of arbitrariness, detention should not continue beyond the period for which a State party can provide appropriate justification. 18/ In the present case, Mr. Bakhtiyari arrived by boat, without dependents, with his identity in doubt and claiming to be from a State suffering serious internal disorder. In light of these factors and the fact that he was granted a protection visa and released two months after he had filed an application (some seven months after his arrival), the Committee is unable to conclude that, while the length of his first detention may have been undesirable, it was also arbitrary and in breach of article 9, paragraph 1. In the light of this conclusion, the Committee need not examine the claim under article 9, paragraph 4, with respect to Mr. Bakhtiyari. The Committee observes that Mr. Bakhtiyari's second period of detention, which has continued from his arrest for purposes of deportation on 5 December 2002 until the present may raise similar issues under article 9, but does not express a further view thereon in the absence of argument from either party.

9.3 Concerning Mrs. Bakhtiyari and her children, the Committee observes that Mrs. Bakhtiyari has been detained in immigration detention for two years and ten months, and continues to be detained, while the children remained in immigration detention for two years and eight months until their release on interim orders of the Family Court. Whatever justification there may have been for an initial detention for the purposes of ascertaining identity and other issues, the State party has not, in the Committee's view, demonstrated that their detention was justified for such an extended period. Taking into account in particular the composition of the Bakhtiyari family, the State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions which would take into account the family's particular circumstances. As a result, the continuation of immigration detention for Mrs. Bakhtiyari and her children for length of time described above, without appropriate justification, was arbitrary and contrary

to article 9, paragraph 1, of the Covenant.

9.4 As to the claim under article 9, paragraph 4, related to this period of detention, the Committee refers to its discussion of admissibility above and observes that the court review available to Mrs. Bakhtiyari would be confined purely to a formal assessment of whether she was a "non-citizen" without an entry permit. The Committee observes that there was no discretion for a domestic court to review the justification of her detention in substantive terms. The Committee considers that the inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4.

9.5 As to the children, the Committee observes that until the decision of the Full Bench of the Family Court on 19 June 2003, which held that it had jurisdiction under child welfare legislation to order the release of children from immigration detention, the children were in the same position as their mother, and suffered a violation of their rights under article 9, paragraph 4, up to that moment on the same basis. The Committee considers that the ability for a court to order a child's release if considered in its best interests, which subsequently occurred (albeit on an interim basis), is sufficient review of the substantive justification of detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. Accordingly, the violation of article 9, paragraph 4, with respect to the children came to an end with the Family Court's finding of jurisdiction to make such orders.

9.6 As to the claim under articles 17 and 23, paragraph 1, the Committee observes that to separate a spouse and children arriving in a State from a spouse validly resident in a State may give rise to issues under articles 17 and 23 of the Covenant. In the present case, however, the State party contends that, at the time Mrs. Bakhtiyari made her application to the Minister under section 417 of the *Migration* Act, there was already information on Mr. Bakhtiyari's alleged visa fraud before it. As it remains unclear whether the attention of the State party's authorities was drawn to the existence of the relationship prior to that point, the Committee cannot regard it as arbitrary that the State party considered it inappropriate to unite the family at that stage. The Committee observes, however, that the State party intends at present to remove Mrs. Bakhtiyari and her children as soon as "reasonably practicable", while it has no current plans to do so in respect of Mr. Bakhtyari, who is currently pursuing domestic proceedings. Taking into account the specific circumstances of the case, namely the number and age of the children, including a newborn, the traumatic experiences of Mrs. Bakhtiyari and the children in long-term immigration detention in breach of article 9 of the Covenant, the difficulties that Mrs. Bakhtiyari and her children would face if returned to Pakistan without Mr. Bakhtiyari and the absence of arguments by the State party to justify removal in these circumstances, the Committee takes the view that removing Mrs. Bakhtiyari and her children without awaiting the final determination of Mr. Bakhtiyari's proceedings would constitute arbitrary intereference in the family of the authors, in violation of articles

17, paragraph 1, and 23, paragraph 1, of the Covenant.

9.7 Concerning the claim under article 24, the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant. The Committee observes that in this case children have suffered demonstrable, documented and on-going adverse effects of detention suffered by the children, and in particular the two eldest sons, up until the point of release on 25 August 2003, in circumstances where that detention was arbitrary and in violation of article 9, paragraph 1, of the Covenant. As a result, the Committee considers that the measures taken by the State party had not, until the Full Bench of the Family Court determined it had welfare jurisdiction with respect to the children, been guided by the best interests of the children, and thus revealed a violation of article 24, paragraph 1, of the Covenant, that is, of the children's right to such measures of protection as required by their status as minors up that point in time.

10. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Australia of articles 9, paragraphs 1 and 4, and 24, paragraph 1, and, potentially, of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy. As to the violation of article 9, paragraphs 1 and 4, continuing up to the present time with respect to Mrs. Bakhtiyari, the State party should release her and pay her appropriate compensation. So far as concerns the violations of articles 9 and 24 suffered in the past by the children, which came to an end with their release on 25 August 2003, the State party is under an obligation to pay appropriate compensation to the children. The State party should also refrain from deporting Mrs. Bakhtiyari and her children while Mr. Bakhtiyari is pursuing domestic proceedings, as any such action on the part of the State party would result in violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

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Notes

...

2/ Section 67ZC provides:

"(1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.

(2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration."

...
18/ *A. v. Australia* [Case No. 506/1993, Views adopted on 4 March 1993] and *C. v. Australia* [Case No. 900/1999, Views adopted on 28 October 2002].

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For dissenting opinion in this context, see Bakhtiyari v. Australia (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at Individual Opinion by Sir Nigel Rodley, 319.

- *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.

- *Ahani v. Canada* (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at paras. 2.1-2.10, 8.1, 8.2, 10.2-10.10, 11 and 12.

...
2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection

under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, (i) that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment and Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security ("MIS"), both certified, under section 40 (1) of the *Immigration Act* ("the Act"), that they were of the opinion that the author was inadmissible to Canada under section 19 (1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40 (1) (2) (b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

2.3 On 22 June 1993, in accordance with the statutory procedure set out in section 40 (1) of the Act for a determination of whether the Ministers' certificate was "reasonable on the basis of the information available", the Federal Court (Denault J) examined the security intelligence reports in camera and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond.

2.4 Rather than exercising his right to be heard under this procedure, the author then challenged the constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. On 12 September 1995, the Federal Court (McGillis J) rejected his challenge, holding that the procedure struck a reasonable balance between competing interests of the State and the individual, and that the detention upon the Ministers' certification pending the Court's decision on its reasonableness was not arbitrary. The author's further appeals against that decision were dismissed by the Federal Court of Appeal and the Supreme Court on 4 July 1996 and 3 July 1997, respectively.

2.5 Following the affirmation of the constitutionality of section 40 (1) procedure, the Federal Court (Denault J) proceeded with the original reasonableness hearing, and, following extensive hearings, concluded on 17 April 1998 that the certificate was reasonable. The evidence included information gathered by foreign intelligence agencies which was divulged to the Court in camera in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate. The Court found that there were grounds to believe that the author was a member of the MIS, which "sponsors or undertakes directly a wide range of terrorist activities including the assassination of political dissidents worldwide". The Federal Court's decision on this matter was not subject to appeal or review.

2.6 Thereafter, in April 1998, an immigration adjudicator determined that the author was inadmissible to Canada, and ordered the author's deportation. On 22 April 1998, the author was informed that the Minister of Citizenship and Immigration would assess the risk the author posed to the security of Canada, as well as the possible risk that he would face if returned to Iran. The Minister was to consider these matters in deciding under section 53 (1) (b) of the Act1/ (which implements article 33 of the Convention on the Status of Refugees) whether the prohibition on removing a Convention refugee to the country of origin could be lifted in the author's case. The author was accordingly given an opportunity to make submissions to the Minister on these issues.

2.7 On 12 August 1998, the Minister, following representations by the author that he faced a clear risk of torture in Iran, determined, without reasons and on the basis of a memorandum attaching the author's submissions, other relevant documents and a legal analysis by officials, that he (a) constituted a danger to the security of Canada, and (b) could be removed directly to Iran. The author applied for judicial review of the Minister's opinion. Pending the hearing of the application, the author applied for release from detention pursuant to section 40(1)(8) of the Act, as 120 days has passed from the issue of the deportation order against him2/. On 15 March 1999, the Federal Court (Denault J), finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly Iranian dissidents, denied the application for release. The Federal Court of Appeal upheld this decision.

2.8 On 23 June 1999, the Federal Court (McGillis J) rejected the author's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. The Court also dismissed procedural constitutional challenges, including to the process of the provision of the Minister's danger opinion. On 18 January 2000, the Court of Appeal rejected the author's appeal. It found that "the Minister could rightly conclude that the [author] would not be exposed to a serious risk of harm, let alone torture" if he were deported to Iran. It agreed that there were reasonable grounds to support

the allegation that the author was in fact a trained assassin with the Iranian secret service, and that there was no basis upon which to set aside the Minister's opinion that he was a danger to Canada.

2.9 On 11 January 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that the author was a danger to the security of Canada. It further found the Minister's decision that he only faced a "minimal risk of harm", rather than a substantial risk of torture, in the event of return to Iran to be reasonable and "unassailable". On the constitutionality of deportation of persons at risk of harm under section 53 (1) (b) of the Act, the Court referred to its reasoning in a companion case of *Suresh v. Canada (Minister of Citizenship and Immigration)*3/ decided the same day, where it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice". As *Suresh* had established a *prima facie* risk of torture, he was entitled to enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister. In the author's case, however, the Court considered that he had not cleared the evidentiary threshold required to make a *prima facie* case and access these protections. The Court was of the view that the author, in the form of the letter advising him of the Minister's intention to consider his danger to Canada as well as the possible risks to him in the event of expulsion, "was fully informed of the Minister's case against him and given a full opportunity to respond". The process followed, according to the Court, was therefore consistent with principles of fundamental justice and not prejudicial to the author even though it had not followed the *Suresh* requirements.

2.10 The same day, the Committee indicated its request pursuant to rule 86 of its rules of procedure for interim measures of protection, however the State party's authorities proceeded with arrangements to effect removal. On 15 January 2002, the Ontario Superior Court (Dambrot J) rejected the author's argument that the principles of fundamental justice, protected by the *Charter*, prevented his removal prior to the Committee's consideration of the case. On 8 May 2002, the Court of Appeal for Ontario upheld the decision, holding that the request for interim measures was not binding upon the State party. On 16 May 2002, the Supreme Court, by a majority, dismissed the author's application for leave to appeal (without giving reasons). On 10 June 2002, the author was deported to Iran.

...

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated a priori

by the Committee's request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

...

10.2 As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes, consistent with its earlier jurisprudence, that detention on the basis of a security certification by two Ministers on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1. However, given that an individual detained under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Ministers' security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted 4 years and 10 months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the author's rights

under article 9, paragraph 4, of the Covenant.

10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

10.5 As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those articles in the manner the Federal Court's "reasonableness" hearing was conducted.

10.6 Concerning the author's claims under the same articles with respect to the subsequent decision of the Minister of Citizenship and Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of *Suresh*, that the process of the Minister's determination in that case of whether the affected individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned. The Committee further observes that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. The Committee emphasizes that this risk was highlighted in this case by the Committee's request for interim measures of

protection.

10.7 In the Committee's view, the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of *Suresh*, on the basis that the present author had not made out a *prima facie* risk of harm fails to meet the requisite standard of fairness. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed. The Committee emphasizes that, as with the right to life, the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties.

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.

10.9 The Committee notes that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly.

10.10 As a result of its finding that the process leading to the author's expulsion was deficient, the Committee thus does not need to decide the extent of the risk of torture prior to his deportation or whether the author suffered torture or other ill-treatment subsequent to his return. The Committee does however refer, in conclusion, to the Supreme Court's holding in *Suresh* that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither

been determined by the State party's domestic courts or by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.

11. The Human Rights Committee...is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

12. 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, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture was in fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

Notes

...

1/. Section 53 (1) (b) reads, in relevant part: "…[N]o person who is determined…to be a Convention refugee…shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

> …
> (b) the person is a member of an inadmissible class described in paragraph 19 (1) (e), (f), (g), (j), (k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada".

2/. Section 40 (1) provides, in material part:

> "(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days of after the making of a removal order relating to that person, the person may apply to the [Federal Court].
>
> (9) On [such] an application, the [Federal Court] may, subject to such terms and

conditions as the [Federal Court] deems appropriate, order that the person be released from detention if the [Federal Court] is satisfied that:

(a) The person will not be removed from Canada within a reasonable time; and

(b) The person's release would not be injurious to national security or the safety of persons."

3/. [2002] 1 SCR.

For dissenting opinion in this context, see Ahani v. Canada (1051/2002), ICCPR, A/59/40 vol. II (29 March 2004) 260 at Individual Opinion of Mr. Nisuke Ando, at 280, and Individual Opinion of Sir Nigel Rodley, Mr. Roman Wieruszewski and Mr. Ivan Shearer, at 282.

- *Ngambi v. France* (1179/2003), ICCPR, A/59/40 vol. II (9 July 2004) 558 at paras. 2.1-2.4, 6.3-6.5 and 7.1.

...

2.1 Mr. B. Ngambi states that he married Ms. M.-L. Nébol in Cameroon on 15 January 1983. After engaging in political activity, he was arrested by the police on two occasions and fled Cameroon in 1993. He submitted an application for refugee status in France in 1994.

2.2 On 8 March 1995, the French authorities accorded refugee status to Mr. B. Ngambi and, on 16 May 1995, issued a record of civil status acknowledging his marriage to Ms. M.-L. Nébol.

2.3 Nevertheless, in a decision dated 19 September 1999, the Consul General of France in Douala, Cameroon, denied the application for a visa for Ms. M.-L. Nébol on the ground of family reunification, as the Cameroonian authorities had indicated that the authors' marriage certificate was not genuine. The decision states that the denial did not constitute a disproportionate interference with the right to privacy and to a family life owing to the circumstances indicated above, and to the fact that in practice Ms. M.-L. Nébol and Mr. B. Ngambi had no conjugal life together; the latter had in fact had a relationship with Ms. M.K., with whom he had had a child.

2.4 On 23 May 2001, in a ruling on Ms. M.-L. Nébol's appeal against the decision by the Consul General of France, the Council of State found that the fact that the marriage certificate submitted by the authors was not genuine, and that this circumstance became known subsequent to recognition by the French authorities of the authors' marriage certificate, constituted legal justification for the denial of a visa for Ms. M.-L. Nébol. The

Council concluded that, since the authors did not cohabit as spouses, the decision of 19 September 1999 was not a disproportionate interference with the right of the party to respect for private and family life, as guaranteed by article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

...

6.3 With regard to the claimed violation of article 23 of the Covenant, the Committee has noted the arguments of the authors and of the State party. Although the authenticity of the authors' "marriage certificate" was not at first questioned either by OFPRA or by the Ministry of Foreign Affairs in a letter dated 30 December 1997, nonetheless, marriage certificate No. 117/83 of 15 January 1983 purporting to be from the municipality of Douala was determined by the municipality on 30 March 1998 to be inauthentic and this report was invoked by the Consul General of France in Douala on 19 September 1999 as a ground for denial of Ms. Nébol's visa application. In addition, the birth certificates supplied by Ms. Nébol to authenticate the family relation of the authors' two claimed sons, Franck Ngambi and Emmanuel Ngambi, as well as her own birth certificate, were also determined by the Consul General to be inauthentic.

6.4 Article 23 of the Covenant guarantees the protection of family life including the interest in family reunification. The Committee recalls that the term "family", for purposes of the Covenant, must be understood broadly as to include all those comprising a family as understood in the society concerned. The protection of such family is not necessarily obviated, in any particular case, by the absence of formal marriage bonds, especially where there is a local practice of customary or common law marriage. Nor is the right to protection of family life necessarily displaced by geographical separation, infidelity, or the absence of conjugal relations. However, there must first be a family bond to protect. The Committee notes that the authors submitted to the French authorities documents supposedly attesting to the family relationship, but these documents were determined by the French authorities to be fabricated. The Committee further notes that the authors have not effectively refuted these findings, thus giving the French authorities sufficient basis to deny the authors' applications for a long-term visa and family reunification. The Committee considers that the authors have not substantiated their allegation that the right to protection of family life has been infringed by the French authorities.

6.5 With regard to the alleged violation of article 17 of the Covenant, that is, interference with private and family life, the Committee notes that the inquiries conducted by the French authorities as to Ms. Nébol's status and family relations followed upon her request for a visa for family reunification, and necessarily had to cover considerations relating to the private and family life of the authors. The Committee considers that the authors have not demonstrated that these inquiries amounted to arbitrary and illegal interference in their private and family life. Nor have the authors substantiated their allegations of pressure and intimidation on the part of the French authorities aimed at undermining their so-called

marriage.

...

7.1 Accordingly, the Committee finds the complaints inadmissible under article 2 of the Optional Protocol.

- *Borzov v. Estonia* (1136/2002), ICCPR, A/59/40 vol. II (26 July 2004) 369 at paras. 2.1, 2.2, 7.2-7.4 and 8.

...

2.1 From 1962 to 1967, the author attended the Sevastopol Higher Navy College in the specialty of military electrochemical engineer. After graduation, he served in Kamchatka until 1976 and thereafter in Tallinn as head of a military factory until 1986. On 10 November 1986, the author was released from service with rank of captain due to illness. The author has worked, since 1988, as a head of department in a private company, and he is married to a naturalized Estonian woman. In 1991, Estonia achieved independence.

2.2 On 28 February 1994, the author applied for Estonian citizenship. In 1994, an agreement between Estonia and the Russian Federation entered into force which concerned the withdrawal of troops stationed on the former's territory (the 1994 treaty). In 1995, the author obtained an Estonian residence permit, pursuant to the Aliens Act's provisions concerning persons who had settled in Estonia prior to 1990. In 1996, an agreement between Estonia and the Russian Federation entered into force, concerning "regulation of issues of social guarantees of retired officers of the armed forces of the Russian Federation in the territory of the Republic of Estonia" (the 1996 treaty). Pursuant to the 1996 treaty, the author's pension has been paid by the Russian Federation. Following delays occasioned by deficiencies of archive materials, on 29 September 1998, the Estonian Government, by order No. 931-k, refused the application. The refusal was based on section 8 of the Citizenship Act of 1938, as well as section 32 of the Citizenship Act of 1995 which precluded citizenship for a career military officer in the armed forces of a foreign country who had been discharged or retired therefrom.

...

7.2 Turning to the substance of the admissible claim under article 26, the Committee refers to its jurisprudence that an individual may be deprived of his right to equality before the law if a provision of law is applied to him or her in arbitrary fashion, such that an application of law to an individual's detriment is not based on reasonable and objective grounds 3/. In the present case, the State party has invoked national security, a ground provided for by law, for its refusal to grant citizenship to the author in the light of particular personal circumstances.

7.3 While the Committee recognizes that the Covenant explicitly permits, in certain circumstances, considerations of national security to be invoked as a justification for certain

actions on the part of a State party, the Committee emphasizes that invocation of national security on the part of a State party does not, *ipso facto*, remove an issue wholly from the Committee's scrutiny. Accordingly, the Committee's decision in the particular circumstances of *V.M.R.B* 4/ should not be understood as the Committee divesting itself of the jurisdiction to inquire, as appropriate, into the weight to be accorded to an argument of national security. While the Committee cannot leave it to the unfettered discretion of a State party whether reasons related to national security existed in an individual case, it recognizes that its own role in reviewing the existence and relevance of such considerations will depend on the circumstances of the case and the relevant provision of the Covenant. Whereas articles 19, 21 and 22 of the Covenant establish a criterion of necessity in respect of restrictions based on national security, the criteria applicable under article 26 are more general in nature, requiring reasonable and objective justification and a legitimate aim for distinctions that relate to an individual's characteristics enumerated in article 26, including "other status". The Committee accepts that considerations related to national security may serve a legitimate aim in the exercise of a State party's sovereignty in the granting of its citizenship, at least where a newly independent State invokes national security concerns related to its earlier status.

7.4 In the present case, the State party concluded that a grant of citizenship to the author would raise national security issues generally on account of the duration and level of the author's military training, his rank and background in the armed forces of the then USSR. The Committee notes that the author has a residence permit issued by the State party and that he continues to receive his pension while living in Estonia. Although the Committee is aware that the lack of Estonian citizenship will affect the author's enjoyment of certain Covenant rights, notably those under article 25, it notes that neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization, and that the author did enjoy a right to have the denial of his citizenship application reviewed by the courts of the State party. Noting, furthermore, that the role of the State party's courts in reviewing administrative decisions, including those decided with reference to national security, appears to entail genuine substantive review, the Committee concludes that the author has not made out his case that the decision taken by the State party with respect to the author was not based on reasonable and objective grounds. Consequently, the Committee is unable, in the particular circumstances of this case, to find a violation of article 26 of the Covenant.

8. The Human Rights Committee...is of the view that the facts before it do not disclose a violation of article 26 of the Covenant.

Notes

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3/ See *Kavanagh v. Ireland* (No. 1), case No. 819/1998, Views adopted on 4 April 2001.

4/ [Case No. 236/1987, decision adopted on 18 July 1988.]

- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at paras. 2.1-2.7, 9.1-9.9, 10 and 11.

...

2.1 On 21 October 1989, Francesco Madafferi arrived in Australia on a tourist visa, which was valid for six months from the date of entry. He came from Italy, where he had served a two-year prison term and was released in 1986. On entering Australia, Mr. Madafferi had no outstanding criminal sentence or matters pending in Italy.

2.2 After April 1990, Mr. Madafferi became an unlawful non-citizen. On 26 August 1990, he married Anna Maria Madafferi, an Australian national. He believed that his marriage had automatically granted him residence status. The couple had four children together, all born in Australia. Mr. Madafferi's extended family are all residents in Australia.

2.3 In 1996, having been brought to the attention of the Department of Immigration and Multicultural Affairs (hereinafter "DIMIA"), Mr. Madafferi filed an application for a spouse visa to remain permanently in Australia. In this application, he disclosed his past convictions and included details of sentences handed down, *in absentia*, in Italy which only became known to him following his initial interview with the immigration officers. Extradition was never sought by the Italian authorities.

2.4 In May 1997, DIMIA refused the application for a spouse visa, as he was considered to be of "bad character", as defined by the Migration Act, in light of his previous convictions. This decision was appealed to the Administrative Appeals Tribunal (hereinafter referred to as "AAT").

2.5 On 7 June 2000, and after a two-day hearing, the AAT set aside the decision under review and remitted the matter to the Minister of DIMIA (hereinafter "the Minister") for reconsideration in accordance with a direction that Mr. Madafferi "not be refused a visa on character grounds solely on the basis of the information presently available..."2/. In July 2000, rather than reconsidering the matter in accordance with the direction of the AAT, the Minister gave notice of his intention under a separate section of the Migration Act 1958 - subsection 501A - to refuse Mr. Madafferi's request for a visa.

2.6 In August 2000, the Italian authorities, on their own motion, extinguished part of the outstanding sentences and declared that the remainder of the outstanding sentences would be extinguished in May 2002.3/ According to the authors, the Minister did not take these

actions of the Italian authorities into account.

2.7 On 18 October 2000, the Minister used his discretionary power, under subsection 501A, to overrule the AAT decision and refused Mr. Madafferi a permanent visa. On 21 December 2000, following an application by Mr. Madafferi's lawyer, the Minister gave his reasons, claiming that since Mr. Madafferi had prior convictions and an outstanding term of imprisonment in Italy, he was of "bad character" and that therefore it would be in the "national interest" to remove him from Australia. According to the authors, the Minister failed to make proper enquiries with the Italian authorities and relied incorrectly on the assumption that Mr. Madafferi had an outstanding sentence of over four years. Further clarification was asked of the Minister and provided by him in January 2001. On 16 March 2001, Mr. Madafferi surrendered himself to the authorities and was placed in the Maribyrnong Immigration Detention Centre in Melbourne for an indefinite period.

...

9.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 As to the claim of a violation of article 9, relating to the author's detention, the Committee notes that the author has been detained since 16 March 2001, albeit for part of the period at home. It recalls its jurisprudence that, although the detention of unauthorized arrivals is not *per se* arbitrary, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case: the element of proportionality becomes relevant. It notes the reasons behind the State party's decision to detain Mr. Madafferi and cannot find that his detention was disproportionate to these reasons. It also notes that although Mr. Madafferi did begin to suffer from psychological difficulties while detained at the Maribynong Immigration Centre until March 2002, at which point and on the advice of doctors, the State party removed him to home detention, he had not displayed any signs of such psychological problems on arrival at the detention centre one year earlier. Thus, although it is a matter of concern to the Committee now, after the events, that the detention of Mr. Madafferi apparently greatly contributed to the deterioration of his mental health, it cannot expect the State party to have anticipated such an outcome. Accordingly, the Committee cannot find that the State party's decision to detain Mr. Madafferi from 16 March 2001 onwards, was arbitrary within the meaning of article 9, paragraph 1, of the Covenant.

9.3 As to Mr. Madafferi's return to Maribyrnong Immigration Detention Centre on 25 June 2003, where he was detained until his committal to a psychiatric hospital on 18 September 2003, the Committee notes the State party's argument that as Mr. Madafferi had by then exhausted domestic remedies, his detention would facilitate his removal, and that the flight risk had increased. It also observes the author's arguments, which remain uncontested by the State party, that this form of detention was contrary to the advice of various doctors and

psychiatrists, consulted by the State party, who all advised that a further period of placement in an immigration detention centre would risk further deterioration of Mr. Madafferi's mental health. Against the backdrop of such advice and given the eventual involuntary admission of Mr. Madafferi to a psychiatric hospital, the Committee finds that the State party's decision to return Mr. Madafferi to Maribyrnong and the manner in which that transfer was affected was not based on a proper assessment of the circumstances of the case but was, as such, disproportionate. Consequently, the Committee finds that this decision and the resulting detention was in violation of article 10, paragraph 1, of the Covenant. In the light of this finding in respect of article 10, a provision of the Covenant dealing specifically with the situation of persons deprived of their liberty and encompassing for such persons the elements set out generally in article 7, it is not necessary to separately consider the claims arising under article 7.

9.4 The Committee notes the authors' claim that Mr. Madafferi's rights were violated under articles 10, paragraph 1, and 7 also, on the grounds of his conditions of detention, while detained in the detention centre; his alleged ill-treatment including the events surrounding the birth of his child; and, in particular, the State party's failure to address the deterioration of his mental health and to take appropriate action. The Committee recalls that Mr. Madafferi spent a first period in the detention centre between 16 March 2001 and March 2002, and was released into home detention after a decision of the Minister in February 2002, on the basis of medical evidence. Although the Committee considers it unfortunate that the State party did not react more expeditiously in implementing the Minister's decision, which the State party has acknowledged took six weeks, it does not conclude that such delay in itself violated any of the provisions of the Covenant. Equally, the Committee does not find that the conditions of Mr. Madafferi's detention or the events surrounding the birth of his child or return into detention, amount to a violation of any of the provisions of the Covenant beyond the finding already made in the previous paragraph.

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.

9.7 As to a violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether other members of the Madafferi family will accompany Mr. Madafferi to Italy or remain in Australia, is an issue for the family and is not influenced by the State party's actions. The Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.17/

9.8 In the present case, the Committee considers that a decision by the State party to deport the father of a family with four minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family, at least in circumstances where, as here, substantial changes to long-settled family life would follow in either case. The issue thus arises whether or not such interference would be arbitrary and thus contrary to article 17 of the Covenant. The Committee observes that in cases of imminent deportation the material point in time for assessing this issue must be that of its consideration of the case. It further observes that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal. In the present case, the Committee notes that the State party justifies the removal of Mr. Madafferi by his illegal presence in Australia, his alleged dishonesty in his relations with the Department of Immigration and Multicultural Affairs, and his "bad character" stemming from criminal acts committed in Italy 20 years ago. The Committee also notes that Mr. Madafferi's outstanding sentences in Italy have been extinguished and that there is no outstanding warrant for his arrest. At the same time, it notes the considerable hardship that would be imposed on a family that has been in existence for 14 years. If Mrs. Madafferi and the children were to decide to emigrate to Italy in order to avoid separation of the family, they would not only have to live in a country they do not know and whose language the children (two of whom are already 13 and 11 years old) do not speak, but would also have to take care, in an environment alien to them, of a husband and father whose mental health has been seriously troubled, in part by acts that can be ascribed to the State party. In these very specific circumstances, the Committee considers that the reasons advanced by the State party for the decision of the Minister overruling the Administrative Appeals Tribunal, to remove Mr. Madafferi from Australia are not pressing enough to justify, in the present case, interference to this extent with the family and infringement of the right of the children to such measures of protection as are required by their status as minors. Thus, the Committee considers that the removal by the State party of Mr. Madafferi would, if

implemented, constitute arbitrary interference with the family, contrary to article 17, paragraph 1, in conjunction with article 23, of the Covenant in respect of all of the authors, and additionally, a violation of article 24, paragraph 1, in relation to the four minor children due to a failure to provide them with the necessary measures of protection as minors.

9.9 In the light of the Committee's finding of a violation of article 17 in conjunction with articles 23 and 24 of the Covenant, partly related to the Minister's decision to overrule the AAT, the Committee considers that it need not address separately the claim that the same decision was arbitrary, in violation of article 26 of the Covenant.

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

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective and appropriate remedy, including refraining from removing Mr. Madafferi from Australia before he has had the opportunity to have his spouse visa examined with due consideration given to the protection required by the children's status as minors. The State party is under an obligation to avoid similar violations in the future.

Notes

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2/ According to this decision, although the Deputy President initially remarked that Mr. Madafferi is not of good character he went on to say that, "There is no reliable evidence that he has committed any crime since the mid-1980's. He was only 23 years old at the time of the second attempted extortion and 24 years old at the time of the fight in prison. He is now 39 years old…I think it would be inappropriate to judge him by the crimes that he committed long ago in another country." The Tribunal also pointed out that some of the convictions in Italy were conducted *in absentia* and possibly subject to appeal and reversal should he choose to pursue such remedies. In addition, it added that such convictions conducted *in absentia* are intolerable under Australian law and accordingly should not be given weight under Australian jurisprudence. Appropriate attention was also paid to Mr. Madafferi's children who "…must be regarded as a primary consideration." The weight attached to the interests of the children, is in accordance with the High Court's decision in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 CLR 273. The presiding judge concluded that, "...the factors weighting in favour of the granting of a visa, particularly the interests of

the children, should predominate over the factors weighting in favour of refusing one".

3/ On 22 June 2002 the Italian authorities notified Mr. Madafferi that they had extinguished his outstanding sentence and cancelled the outstanding warrant for his arrest.

...

17/ *Winata v. Australia*, case No. 930/2000.

- *Byahuranga v. Denmark* (1222/2003), ICCPR, A/60/40 vol. II (1 November 2004) 247 at paras. 2.1-2.3, 3.1, 3.2, 11.2-11.9, 12 and 13.

...

2.1 The author served as an officer in the Ugandan army during the rule of Idi Amin. He fled Uganda in 1981, after he had been unlawfully detained and allegedly tortured several times by military forces. In December 1984, he entered Denmark, where he was granted asylum on 4 September 1986, under section 7 (1) (ii) 2/ of the Aliens Act. On 24 July 1990, he was issued a permanent residence permit.

2.2 In 1997, the author married a Tanzanian national. Together with the author's daughter from a former marriage (born in 1980), his wife united with him in Denmark in 1998. She has meanwhile become a Danish citizen and has two children with the author, who were born in Denmark in 1999 and 2000, respectively.

2.3 By judgement of 23 April 2002, the Copenhagen City Court convicted the author of drug-related offences (section 191 of the Danish Criminal Code), and sentenced him to two years and six months' imprisonment. It also ordered the author's expulsion from Denmark,3/ finding that such expulsion would not amount to a violation of the right to family life under article 8 of the European Convention, and permanently barred him from re-entering Denmark. It based its decision on an opinion dated 19 April 2002 of the Danish Immigration Service, which considered that there were no circumstances which would constitute a decisive argument against the author's expulsion within the meaning of section 26 4/ of the Aliens Act. It based itself on (a) the fact that, at the age of 45 years, the author had resided in Denmark for 17 years and four months; (b) the author's good health, i.e. the absence of any diseases which could not be treated in Uganda; (c) the fact that his expulsion would not affect the right of his spouse and children to continue residing in Denmark, given that his wife and his older daughter had meanwhile been granted permanent residence permits; (d) the absence of any risk that, in cases other than those mentioned in section 7 (1) and (2) of the Aliens Act, he would be ill-treated in Uganda. The Immigration Service did not object to the prosecutor's claim to expel the author, despite the latter's loose ties with his Ugandan family and the fact that he had not returned to Uganda since 1981.

...

3.1 The author claims (a) that his expulsion would amount to a violation of his rights under article 7 of the Covenant, as it would expose him to a real and immediate danger of being subjected to ill-treatment upon return to Uganda; and (b) that it would constitute an arbitrary interference with his right to family life under article 17 of the Covenant and a violation of the State party's duty to respect and protect the family as the natural and fundamental group unit of society, as prescribed by article 23, paragraph 1.

3.2 The author emphasizes that he has lived in Denmark for 18 years without ever having returned to Uganda, that he has no contact with relatives in Uganda, that his wife and children are living with him; the two youngest children were born in Denmark and have never been to Uganda.

...

11.2 The first issue before the Committee is whether the author's expulsion to Uganda would expose him to a real and foreseeable risk of being subjected to treatment contrary to article 7. The Committee recalls that, under article 7 of the Covenant, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement* 10/ It takes note of the author's detailed account as to why he fears to be subjected to ill-treatment at the hands of the Ugandan authorities, and concludes that he has made out a *prima facie* case of such a risk.

11.3 The Committee observes that the State party, while challenging the author's claim under article 7, does not submit any substantive grounds for its position. Instead, it merely refers to the risk assessments of the Danish Immigration Service under articles 26 (opinions dated 19 April 2002 and 18 September 2003) and 31 (decision of 19 January 2004, as affirmed by the Danish Refugee Board on 28 June 2004) of the Aliens Act. After an examination of the documents, the Committee notes, firstly, that the Immigration Service's scrutiny under article 26(1)(vii) of the Aliens Act was limited to an assessment of the author's personal circumstances in Denmark, as well as his risk of being subjected to punishment for the same offence for which he had been convicted in Denmark, without addressing the broader issues under article 7 of the Covenant, such as ill-treatment which may give rise to an asylum claim under article 7 (1) and (2) of the Aliens Act. Secondly, in its decision of 19 January 2004, the Immigration Service merely relies on an assessment made by the Ministry for Foreign Affairs concerning the risk of double jeopardy in Uganda and an amnesty for supporters of former President Amin to conclude that the author would not face a risk of being tortured or ill-treated upon return to Uganda. Similarly, the Refugee Board, after giving a detailed account of the author's statements as to his fear of being subjected to ill-treatment upon return to Uganda, dismissed his appeal on the basis of the same opinion by the Ministry, without providing any substantive reasons of its own, in its decision of 28 June 2004. In particular, the Board merely dismissed, because of late

submission, the author's claim that his political activities in Denmark were known to the Ugandan authorities, thereby placing him at a particular risk of being subjected to ill-treatment upon return to Uganda. The State party has not furnished the Committee with the opinion of its Ministry for Foreign Affairs or with other documents that would make out the factual basis for the Ministry's assessment. In sum, before the Committee the State party seeks to refute the alleged risk of treatment contrary to article 7 merely by referring to the outcome of the assessment made by its own authorities, instead of commenting the author's fairly detailed account on why such a risk in his opinion exists.

11.4 In the light of the State party's failure to provide substantive arguments upon which the State party relies to rebut the author's allegations, the Committee finds that due weight must be given to his detailed account of the existence of a risk of treatment contrary to article 7. Consequently, the Committee is of the view that the expulsion order against the author would, if implemented by returning him to Uganda, constitute a violation of article 7 of the Covenant.

11.5 As to the alleged violation of the author's right to family life under articles 17 and 23, paragraph 1, the Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference 11/.

11.6 In the present case, and as the State party has conceded that the author's removal would constitute an interference with his family life, the Committee considers that a decision by the State party to deport the father of a family with two minor children and to compel the family to choose whether they should accompany him or stay in the State party is to be considered "interference" with the family. Although the author's life with his family was interrupted for a considerable period of time because of his incarceration and subsequent custody on remand pending deportation, he received regular visits from his wife during that period and was able to visit his children several times during prison leave. Moreover, he resumed his family life after the Copenhagen City Court's decision to release him on 6 August 2004.

11.7 The issue therefore arises whether or not such interference would be arbitrary or unlawful and thus contrary to article 17, read in conjunction with article 23, paragraph 1, of the Covenant. The Committee observes that the author's expulsion was based on section 22 of the Aliens Act. However, it recalls that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances 12/. In this regard, the Committee reiterates that in cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific

interference with family life can be objectively justified must be considered, on the one hand, in light of the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal 13/.

11.8 The Committee notes that the State party justifies the author's removal (a) by the fact that he was convicted of drug-related offences, and (b) on the assumption that the serious nature of these offences is reflected by the length of the prison sentence imposed on him. It also takes note of the author's argument that his wife and children live in Denmark under stable and reliable conditions and would, therefore, not be able to follow him, if he were to be expelled to Uganda. While it may well be that the author's expulsion would constitute a considerable hardship for his wife and children, whether they remain in Denmark, or whether they decide to avoid separation of the family by following the author to a country they do not know and whose language the children do not speak, the Committee notes that the author has submitted the communication solely in his own right and not on behalf of his wife or children. It follows that the Committee can only consider whether the author's rights under articles 17 and 23 would be violated as a result of his removal.

11.9 In the present case, the Committee notes that the State party has sought to justify its interference with the author's family life by reference to the nature and severity of the author's offences. The Committee considers that these reasons advanced by the State party are reasonable and sufficient to justify the interference with the author's family life. The Committee therefore concludes that the author's expulsion, if implemented by returning him to Uganda, would not amount to a violation of his rights under articles 17 and 23, paragraph 1.

...

12. The Human Rights Committee...is of the view that the author's expulsion to Uganda would, if implemented, violate his rights under article 7 of the Covenant.

13. 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, including revocation and full re-examination of the expulsion order against him. The State party is also under an obligation to prevent similar violations in the future.

Notes

...

2/ Section 7 (1) of the Aliens Act then in force read: "Section 7. (1) Upon application, a residence permit shall be issued to an alien in Denmark or at the border, (i) if the alien falls within the provisions of the Convention on the Status of Refugees of 28 July 1951; or (ii) if for reasons similar to those listed in the Convention or for other weighty reasons, the alien cannot be required to return to his country of origin."

3/ Section 22 of the Aliens Act then in force read, in pertinent parts: "Section 22. An alien who has lawfully stayed in Denmark for more than the past seven years or an alien issued with a residence permit under sections 7 or 8 may be expelled if: [...] (iv) the alien is sentenced, pursuant to the Drugs and Narcotics Act or pursuant to sections 191 or 191a of the Criminal Code, to imprisonment […]."

4/ Section 26 of the Aliens Act then in force read: "Section 26. (1) In deciding on expulsion, regard must be had to the question whether the expulsion must be presumed to be particularly burdensome, in particular because of:

(i) the alien's ties with the Danish community [...];
(ii) the duration of the alien's stay in Denmark;
(iii) the alien's age, health and other personal circumstances;
(iv) the alien's ties with persons living in Denmark;
(v) the consequences of the expulsion for the alien's close relatives living in Denmark;
(vi) the alien's weak or non-existing ties with his country of origin or any other country in which he may be expected to take up residence; and
(vii) the risk that, in cases other than those mentioned in section 7 (1) and (2), the alien will be ill-treated in his country of origin or any other country in which he may be expected to take up residence.

(2) An alien may be expelled under section 22 (iv) to (vi) unless the circumstances mentioned in subsection (1) constitute a decisive argument against such expulsion."

...

10/ General comment 20 [44], at para. 9.

11/ Communication No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, at para. 7.1; communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.7.

12/ General comment 16 [32], at para. 4.

13/ See communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, at para. 9.8.

For dissenting opinion in this context, see Byahuranga v. Denmark (1222/2003), ICCPR, A/60/40 vol. II (1 November 2004) 247, Individual Opinion of Ms. Ruth Wedgwood and Mr. Maxwell Yalden, at 258.

ALIENS - GENERAL

CAT

- *Josu Arkauz Arana v. France* (63/1997), CAT, A/55/44 (9 November 1999) 77 at paras. 2.1, 2.3, 11.3-11.5 and 12.

...

2.1 The author, who is of Basque origin, states that he left Spain in 1983 following numerous arrests of persons reportedly belonging to ETA, the Basque separatist movement, by the security forces in his native village and nearby. Many of the persons arrested, some of whom were his childhood friends, were subjected to torture. During the interrogations and torture sessions, the name of Josu Arkauz Arana had been one of those most frequently mentioned. Sensing that he was a wanted person and in order to avoid being tortured, he fled. In 1984 his brother was arrested. In the course of several torture sessions the members of the security forces asked the latter questions about the author and said that Josu Arkauz Arana would be executed by the Anti-Terrorist Liberation Groups (GAL).

...

2.3 In March 1991 the author was arrested on the charge of belonging to ETA and sentenced to eight years' imprisonment for criminal conspiracy ("association de malfaiteurs"). He began serving his sentence in Saint-Maur prison and was due to be released on 13 January 1997. However, on 10 July 1992, he was further sentenced to a three-year ban from French territory. He filed an appeal against the decision to ban him with the Paris Court of Major Jurisdiction in October 1996, but no action was taken.

...

11.3 ...[T]he Committee must determine whether the author's deportation to Spain violated the obligation of the State party, under article 3, paragraph 1, of the Convention, not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. In doing so the Committee must take into account all relevant considerations with a view to determining whether the person concerned is in personal danger.

11.4 The Committee recalls that during the consideration of the third periodic report submitted by Spain under article 19 of the Convention, it had expressed its concern regarding the complaints of acts of torture and ill-treatment which it frequently received. It also noted that, notwithstanding the legal guarantees as to the conditions under which it could be imposed, there were cases of prolonged detention *incommunicado*, when the detainee could not receive the assistance of a lawyer of his choice, which seemed to facilitate the practice of torture. Most of the complaints received concerned torture inflicted during such periods. h/ Similar concerns had already been expressed during the consideration of the second periodic report by the Committee, i/ as well as in the concluding observations of the Human Rights Committee regarding the fourth periodic report submitted by Spain under article 40 of the International Covenant on Civil and Political Rights. j/ Furthermore, the European

Committee for the Prevention of Torture (CPT) also reported complaints of torture or ill-treatment received during its visits to Spain in 1991 and 1994, in particular from persons detained for terrorist activities. The CPT concluded that it would be premature to affirm that torture and severe ill-treatment had been eradicated in Spain. k/

11.5 The Committee notes the specific circumstances under which the author's deportation took place. First, the author had been convicted in France for his links with ETA, had been sought by the Spanish police and had been suspected, according to the press, of holding an important position within that organization. There had also been suspicions, expressed in particular by some non-governmental organizations, that other persons in the same circumstances as the author had been subjected to torture on being returned to Spain and during their *incommunicado* detention. The deportation was effected under an administrative procedure, which the Administrative Court of Pau had later found to be illegal, entailing a direct handover from police to police, l/ without the intervention of a judicial authority and without any possibility for the author to contact his family or his lawyer. That meant that a detainee's rights had not been respected and had placed the author in a situation where he was particularly vulnerable to possible abuse. The Committee recognizes the need for close cooperation between States in the fight against crime and for effective measures to be agreed upon for that purpose. It believes, however, that such measures must fully respect the rights and fundamental freedoms of the individuals concerned.

12. In the light of the foregoing, the Committee is of the view that the author's expulsion to Spain, in the circumstances in which it took place, constitutes a violation by the State party of article 3 of the Convention.

Notes

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h/ A/53/44, paras. 129 and 131.

i/ A/48/44, paras. 456 and 457.

j/ CCPR/C/79/Add.61 of 3 April 1996.

k/ CPT/Inf (96) 9, paras. 208-209.

l/ At the time of the consideration of the second periodic report submitted by France pursuant to article 19 of the Convention, the Committee expressed its concern at the practice whereby the police hand over individuals to their counterparts in another country (A/53/44, para. 143).

- *M. S. v. Switzerland* (156/2000), CAT, A/57/44 (13 November 2001) 130 at paras. 2.1-2.4, 6.2 and 6.4-6.9.

...

2.1 The complainant states that, like most Sri Lankans of Tamil origin, he was forced to work from a very early age for the Liberation Tigers of Tamil Eelam (LTTE) movement, particularly in building bunkers and putting up propaganda posters. He says that he had to flee from Kilinochchi to Colombo because he refused to be more active in the movement.

2.2 The complainant maintains that he was arrested several times by the government authorities in Colombo and sometimes held for over a fortnight and that he was tortured on the grounds of being a member of the Tamil Tigers. He says that he was taken before the court on several occasions, the first time being on 15 March 1997, before being released shortly afterwards. He adds that he was arrested again on 3 January 1999 by the Colombo police and detained for a month before being brought before the court again on 10 February 1999. According to the complainant, the judge released him only on condition that he report every Saturday to the office of the Criminal Investigation Department (CID) in order to sign a register.

2.3 The complainant states that he fled Sri Lanka on 28 March 1999 with the help of a trafficker. He adds that, as a result of his flight, a warrant was issued for his arrest, with reference to which a document issued by the Colombo police was produced dated 23 August 1999. He arrived in Switzerland on 29 March 1999.

2.4 The complainant's application for asylum in Switzerland, filed on 30 March 1999, was turned down on 18 August 1999. On 10 December 1999, in response to an appeal lodged by the complainant on 21 September 1999, the Swiss Appeal Commission on Asylum Matters upheld the original decision to refuse asylum...

...

6.2 The issue before the Committee is whether the expulsion of the complainant to Sri Lanka would violate the State party's obligation under article 3 of the Convention not to expel or return a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

...

6.4 The Committee recalls its general comment on the implementation of article 3, which reads as follows: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or supposition. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 229).

6.5 In the present case, the Committee notes that the State party has drawn attention to inconsistencies and contradictions in the complainant's account, casting doubt on the truthfulness of his allegations. It also takes note of the explanations provided by counsel in this respect.

6.6 The Committee also notes that it has not been clearly established that the complainant was wanted by the Sri Lankan police or CID or that the Colombo police document provided as evidence was genuine, it being indeed surprising that this document, dated 23 August 1999, was never shown to the Swiss authorities, even when the complainant applied to have the 20 January deadline for his departure extended.

6.7 Furthermore, the Committee believes that there is insufficient support for the complainant's allegations of having been tortured in Sri Lanka and that, in particular, his allegations are not corroborated by medical evidence, even though the complainant received medical treatment in Switzerland shortly after his arrival.

6.8 The Committee is aware of the seriousness of the human rights situation in Sri Lanka, and of reports alleging the practice of torture there. However, it recalls that, for the purposes of article 3 of the Convention, a foreseeable, real and personal risk must exist of being subjected to torture in the country to which a person is returned. On the basis of the considerations above, the Committee is of the opinion that such risk has not been established.

6.9 The Committee against Torture...concludes that the decision of the State party to return the complainant to Sri Lanka does not constitute a breach of article 3 of the Convention.

- *L. M. T. D. v. Sweden* (164/2000), CAT, A/57/44 (15 May 2002) 147 at paras. 2.1-2.5, 4.3, 4.4 and 8-10.

...

2.1 The complainant worked as a procurator for juveniles in the office of the Attorney-General of the Republic of Venezuela from 1988 to 1997. One of her functions was to regularize the registration of children in the civil registers so that they might later obtain an identity card. This procedure took place on the basis of an authorization by a civil court.

2.2 In 1995, the complainant discovered that some Chinese nationals had obtained Venezuelan identity cards and passports by using forged documents, such as copies of registration decisions bearing her signature and stamp and the stamp of the Civil Court. The complainant reported this fact to the Attorney-General of the Republic for the latter to institute an investigation to determine who was responsible for the forgery. On 22 February 1995, the complainant filed a complaint with Caracas Criminal Court of First Instance No.

15. In 1996, she requested a judicial or eyewitness inspection of the National Identification Office (ONI) and of the files of the Aliens' Department (DEX), where the forged documents were found. The inspection was never carried out because, according to the complainant, the heads of the two bodies in question were linked to the Convergencia political party, which received large amounts of money for granting Venezuelan nationality to Chinese nationals.

2.3 In March 1997, the complainant was dismissed from the Office of the Attorney-General of the Republic with no explanation, but still continued with the investigation. From then on, she started receiving threats by telephone and anonymous threats pushed under her door. Her daughter was the victim of a kidnapping attempt and her husband was brutally pistol whipped on the head and back. She was also warned that she had to stop investigating and filing complaints.

2.4 In August 1997 and as a result of what had happened, the complainant and her family moved from Caracas to Maracaibo. In December 1997, the complainant's car was stolen and later burned. She was also harassed by telephone and told that, if she filed any more complaints, she was the one who would be accused of being responsible for the forgeries. As a result, she and her family fled to the city of Maracay in January 1998. That was when they decided to sell everything they owned and leave the country for Sweden.

2.5 The complainant and her family applied for political asylum in Sweden on 19 March 1998. The Swedish National Migration Board rejected the application on 24 August 1998, claiming that the facts did not in any way constitute grounds for asylum in Sweden and that, in addition, the complainant could prove her innocence through legal channels. An appeal against that decision was submitted to the Aliens' Commission, which upheld the initial decision on 3 March 2000. An application for inhibition was later filed with the Aliens' Commission, but it was denied on 14 March 2000.

...

4.3 With regard to the merits of the complaint, the State party draws a distinction between the general human rights situation in Venezuela and the personal situation of the complainant if she were returned to Venezuela.

> (a) The State party affirms that, with regard to the general human rights situation in Venezuela, although the human rights situation continues to be poor in some respects, there are no grounds for stating that there is a consistent pattern of gross, flagrant or mass violations of human rights. The State party recalls that, although some reports of human rights violations in Venezuela, such as the 1999 United States State Department report on human rights in Venezuela, the 1999 Human Rights Watch report on Venezuela and the 2000 Amnesty International report, refer to extrajudicial executions by the army and the police, as well as to an increase in cases of torture and ill-treatment of detainees, women detainees are held in separate

prisons, where conditions are better than in prisons for men. The State party also reports that, in February 1999, the administration of President Cháávez re-established the articles of the Constitution relating to the prohibition of arrests without a warrant and to freedom of movement. The State party lastly recalls that such reports refer to torture, indicating that the security forces continue to torture and ill-treat detainees both physically and mentally. However, although the general human rights situation in Venezuela leaves much to be desired, particularly with regard to conditions of detention, that does not constitute sufficient grounds for concluding that a person will be tortured if he or she is returned to Venezuela.

(b) With regard to the complainant's personal situation, the State party recalls that, unlike many other authors of complaints submitted to the Committee, the complainant has not belonged to any party or political organization. Her complaint is based on the fact that she was wrongfully suspected of being involved in a bribery scandal, for which she could be sentenced to imprisonment if she returned to Venezuela, in poor conditions of detention. Moreover, she does not claim that she was ever subjected to torture in the past and, more importantly, has not explicitly demonstrated how she would be subjected to torture if she returned to Venezuela. The State party also points out that Venezuela has not requested the complainant's extradition and that there are no grounds for believing that the Venezuelan authorities intend to imprison her. On the contrary, the State party was able to ascertain that the head of the ONI, the primary suspect in the bribery scandal, has not been arrested.

4.4 The State party reports that, in their decisions of 24 August 1998 and 14 March 2000, respectively, the National Migration Board and the Aliens' Commission argued that the fact of being in danger of being tried for a crime or of being subjected to harassment in Venezuela is not a reason for granting asylum in Sweden. Both bodies also ascertain that, if she was tried, the complainant would have a fair trial and would have a good chance of winning her case. The State party adds that it does not question the complainant's testimony about the bribery scandal and the subsequent harassment. However, it does trust the arguments put forward by the two bodies.

...

8. The Committee notes the State party's arguments that, although the human rights situation in Venezuela remains poor, particularly with regard to prison conditions, there are no grounds for stating that a consistent pattern of gross, flagrant or mass violations of human rights exists in Venezuela. The Committee also notes the exchange of arguments between the complainant and the State party concerning the alleged risk to the complainant of being subjected to torture and considers that the complainant has not provided sufficient evidence to show that she runs a foreseeable, real and personal risk of being tortured in Venezuela.

9. The Committee agrees with arguments put forward by the State party and takes the view

that the information submitted does not show substantial grounds for believing that the complainant would personally be in danger of being subjected to torture if she was returned to Venezuela.

10. The Committee against Torture...concludes that the decision of the State party to return the complainant to Venezuela does not constitute a violation of article 3 of the Convention.

- *L. S. D. v. France* (194/2001), CAT, A/60/44 (3 May 2005) 118 at paras. 2.1-2.9 and 9.1-9.5.

...
2.1 The complainant states that in 1997, fearing arrest and torture by the Spanish security forces, she took refuge in France. In November 1997, she was arrested by the French police, who brought her before the examining magistrate in the Paris Procurator's Anti-Terrorist Section. She was later charged with possession of false administrative documents and participation in a criminal association and was immediately imprisoned.

2.2 On 12 February 1999, the complainant was sentenced to three years' imprisonment, one of them suspended, for the above-mentioned offences. She appealed to the Paris Court of Appeal.

2.3 On 31 August 1999, the Minister of the Interior issued an order for her expulsion from French territory as a matter of absolute urgency, which was not served on her immediately.

2.4 On 12 October 1999, the Paris Court of Appeal sentenced her without the right to appeal to three years' imprisonment, one of them suspended, and five years' ban on entry into France, in respect of the charges against her.

2.5 The complainant was due to be released on 28 October 1999. She says that, fearing torture by the Spanish security forces and in order to prevent her expulsion to Spain, she began a hunger strike on 28 September 1999. She states that, as a result of her very poor state of health following her long hunger strike, she weighed only 39 kg and was therefore taken to the Fresnes prison hospital.

2.6 At 6 a.m. on 28 October 1999, the day of the complainant's release, the French police served her with the expulsion order issued on 31 August 1999 by the Minister of the Interior, as well as a second decision taken on 27 October 1999 by the Prefect of Val de Marne, specifying Spain as the country of destination. The complainant was immediately taken in an ambulance by the French police from Fresnes prison to the Franco-Spanish border post of La Junquera for expulsion to Spain, and then taken to the Bellvitge hospital in Barcelona.

2.7 The complainant alleges that she was arrested by the Spanish Civil Guard at her home in Hernani, Gipúzcoa, on 30 March 2001 and that on the following day, while being held in custody, she was urgently transferred to the San Carlos hospital in Madrid, where she remained until 7 p.m., because of torture inflicted on her: beatings, *la bolsa*, a/ touching and attachment of electrodes to her body. She adds that she was subjected to 16 hours of questioning and continuous violence, and held in custody without contact with her lawyer or her family for more than five days before being brought before a judge.

2.8 The complainant alleges that on the same day, 31 March 2001, in the presence of an examining magistrate and a court-appointed lawyer, she was obliged to make a statement which the Civil Guards had forced her to learn by heart, by threatening further torture.

2.9 The complainant points out that on 4 April 2001, before the National High Court, she refused to enter a plea and complained of the torture she had suffered. An order to imprison her then arrived, and she was taken to the Soto del Real prison. Following her arrest, she was accused of participating in several acts of violence.

...

9.1 The Committee must determine whether the expulsion of the complainant to Spain violated the State party's obligation under article 3, paragraph 1, of the Convention not to expel or return ("*refouler*") an individual to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In reaching its conclusion, the Committee must take into account all relevant considerations in order to establish whether the individual concerned would be at personal risk.

9.2 The Committee must determine whether the expulsion of the complainant to Spain constituted a failure by the State party to fulfil its obligation under that article not to expel or return ("*refouler*") an individual to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. In reaching its conclusion, the Committee must, pursuant to article 3, paragraph 2, of the Convention, take into account all relevant considerations, including the existence in the State to which the complainant would be sent of a consistent pattern of gross, flagrant or mass violations of human rights, enabling the Committee to establish whether she was at personal risk...

9.3 The issue before the Committee is whether, on the date of the enforcement of the removal measure, the French authorities could have considered that the complainant would be exposed to real risks in the event of her expulsion. In making a determination, the Committee takes into consideration all the facts submitted by the complainant and the State party. Consideration of the facts shows that the complainant has failed to satisfy the burden of proof and demonstrate in that expulsion to Spain placed her at personal risk of torture at the time of her expulsion. In this regard the evidence submitted by the complainant is insufficient, in that the primary focus is an allegation that she was tortured 17 months after

being expelled from the State party.

9.4 The fact of torture does not, of itself, necessarily violate article 3 of the Convention, but it is a consideration to be taken into account by the Committee. The facts as submitted to the Committee show that the complainant, on her return to Spain, recovered her health without any interference and took an active part in political developments in the country, promoting her views without any need for secrecy or flight. Some 17 months went by before the alleged acts of torture. The complainant offers no convincing explanation of why her certain risk of torture, *inter alia* because of her familiarity with intelligence of vital importance to the security of the Spanish State, did not lead to immediate action against her. Neither does the complainant submit evidence concerning events in Spain prior to her expulsion from French territory that might lead the Committee to establish the existence of a substantiated risk. The complainant has not demonstrated any link between her expulsion and the events that took place 17 months later.

9.5 There being insufficient evidence of a causal link between the expulsion of the complainant in 1999 and the acts of torture to which she claims to have been subjected in 2001, the Committee considers that the State party cannot be said to have violated article 3 of the Convention in enforcing the expulsion order.

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Notes

a/ This form of torture consists in covering the head with a plastic bag to cause asphyxia.

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- *Brada v. France* (195/2002), CAT, A/60/44 (17 May 2005) 127 at paras. 1.1-1.3, 2.1-2.7, 6.1, 6.2, 13.1-13.6, 14 and 15.

1.1 The complainant, Mr. Mafhoud Brada, a citizen of Algeria, was residing in France when the present complaint was submitted. He was the subject of a deportation order to his country of origin. He claims that his forced repatriation to Algeria constitutes a violation by France of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment...

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by *note verbale* dated 19 December 2001. At the same time, the Committee, acting in accordance with rule 108, paragraph 9, of its rules of procedure, requested the State party not to deport the complainant to Algeria while his complaint was being considered. The Committee reiterated its request in a *note verbale* dated 26 September 2002.

1.3 In a letter dated 21 October 2002 from the complainant's counsel, the Committee was informed that the complainant had been deported to Algeria on 30 September 2002 on a flight to Algiers and that he had been missing since his arrival in Algeria.

...

2.1 The complainant, a fighter pilot since 1993, was a member of the Algerian Air Force squadron based in Bechar, Algeria. From 1994, the squadron was regularly used as a back-up for helicopter operations to bomb Islamist maquis areas in the region of Sidi Bel Abbes. The fighter aircraft were equipped with incendiary bombs. The complainant and other pilots were aware that the use of such weapons was prohibited. After seeing the destruction caused by these weapons on the ground in photographs taken by military intelligence officers - pictures of dead men, women, children and animals - some pilots began to doubt the legitimacy of such operations.

2.2 In April 1994, the complainant and another pilot declared, during a briefing, that they would not participate in bombing operations against the civilian population, in spite of the risk of heavy criminal sanctions against them. A senior officer then waved his gun at the complainant's colleague, making it clear to him that refusal to carry out missions "meant death". When the two pilots persisted in their refusal to obey orders, the same officer loaded his gun and pointed it at the complainant's colleague, who was mortally wounded as he tried to escape through a window. The complainant, also wishing to escape, jumped out of another window and broke his ankle. He was arrested and taken to the interrogation centre of the regional security department in Bechar third military region. The complainant was detained for three months, regularly questioned about his links with the Islamists and frequently tortured by means of beatings and burning of his genitals.

2.3 The complainant was finally released owing to a lack of evidence of sympathy with the Islamists and in the light of positive reports concerning his service in the armed forces. He was forbidden to fly and assigned to Bechar airbase. Explaining that servicemen who were suspected of being linked to or sympathizing with the Islamists regularly "disappeared" or were murdered, he escaped from the base and took refuge in Ain Defla, where his family lived. The complainant also alleges that he received threatening letters from Islamist groups, demanding that he desert or risk execution. He forwarded the threatening letters to the police.

2.4 Later, when the complainant was helping a friend wash his car, a vehicle stopped alongside them and a submachine was fired in their direction. The complainant's friend was killed on the spot; the complainant survived because he was inside the car. The village police officer then advised the complainant to leave immediately. On 25 November 1994, the complainant succeeded in fleeing his country. He arrived at Marseille, France, and met one of his brothers in Orléans (Indre). In August 1995, the complainant made a request for asylum, which was later denied by the French Office for the Protection of Refugees and

Stateless Persons (OFPRA). Since the complainant had made the request without the assistance of counsel, he was unable to appeal the decision to the Refugee Appeals Commission.

2.5 The complainant adds that, since he left Algeria, his two brothers have been arrested and tortured. One died in police custody. Moreover, since his desertion, two telegrams from the Ministry of Defence have arrived at the complainant's home in Abadia, demanding that he report immediately to Air Force headquarters in Cheraga in connection with a "matter concerning him". In 1998, the complainant was sentenced in France to eight years' imprisonment for a rape committed in 1995. The sentence was accompanied by a 10-year ban from French territory. As the result of a remission of sentence, the complainant was released on 29 August 2001.

2.6 Meanwhile, on 23 May 2001, the Prefect of Indre issued an order for the deportation of the complainant. In a decision taken on the same day, he determined that Algeria would be the country of destination. On 12 July 2001, the complainant lodged an appeal with the Limoges Administrative Court against the deportation order and the decision to return him to his country of origin. In an order dated 29 August 2001, the court's interim relief judge suspended enforcement of the decision on the country of return, considering that the risks to the complainant's safety involved in a return to Algeria raised serious doubts as to the legality of the deportation decision. Nevertheless, in a judgement dated 8 November 2001, the Administrative Court rejected the appeal against the order and the designated country of return.

2.7 On 4 January 2002, the complainant appealed against this judgement to the Bordeaux Administrative Court of Appeal. He points out that such an appeal does not have suspensive effect. He also refers to recent case law of the Council of State which he maintains demonstrates the inefficacy of domestic remedies in two similar cases. a/ In those cases, which involved deportation to Algeria, the Council of State dismissed the risks faced by the persons concerned, but the Algerian authorities subsequently produced death sentences passed *in absentia*. On 30 September 2002, the complainant was deported to Algeria on a flight to Algiers and has been missing since.

...

6.1 The Committee observed that any State party which made the declaration provided for under article 22 of the Convention recognized the competence of the Committee against Torture to receive and consider complaints from individuals who claimed to be victims of violations of one of the provisions of the Convention. By making this declaration, States parties implicitly undertook to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it and, after such examination, to communicate its comments to the State party and the complainant. By failing to respect the request for interim measures made to it, the State party seriously failed in its obligations

under article 22 of the Convention because it prevented the Committee from fully examining a complaint relating to a violation of the Convention, rendering action by the Committee futile and its comments worthless.

6.2 The Committee concluded that the adoption of interim measures pursuant to rule 108 of the rules of procedure, in accordance with article 22 of the Convention, was vital to the role entrusted to the Committee under that article. Failure to respect that provision, in particular through such irreparable action as deporting an alleged victim, undermined protection of the rights enshrined in the Convention.

...

13.1 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture upon return to Algeria. The Committee observes, at the outset, that in cases where a person has been expelled at the time of its consideration of the complaint, the Committee assesses what the State party knew or should have known at the time of expulsion. Subsequent events are relevant to the assessment of the State party's knowledge, actual or constructive, at the time of removal.

13.2 In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return...

13.3 At the outset, the Committee observes that at the time of his expulsion on 30 September 2002, an appeal lodged by the complainant with the Bordeaux Administrative Court of Appeal on 4 January 2002 was still pending. This appeal contained additional arguments against his deportation that had not been available to the Prefect of Indre when the decision of expulsion was taken and of which the State party's authorities were, or should have, been aware still required judicial resolution at the time he was in fact expelled. Even more decisively, on 19 December 2001, the Committee had indicated interim measures to stay the complainant's expulsion until it had had an opportunity to examine the merits of the case, the Committee having established, through its Special Rapporteur on interim measures, that in the present case the complainant had established an arguable risk of irreparable harm. This interim measure, upon which the complainant was entitled to rely, was renewed and repeated on 26 September 2002.

13.4 The Committee observes that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying and giving full effect to the procedure of individual complaint established thereunder. The State party's action in expelling the complainant in

the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.

13.5 The Committee observes, turning to the issue under article 3 of the Convention, that the Bordeaux Administrative Court of Appeal, following the complainant's expulsion, found upon consideration of the evidence presented that the complainant was at risk of treatment in breach of article 3 of the European Convention, a finding which would/could encompass torture...The decision to expel him was thus, as a matter of domestic law, unlawful.

13.6 The Committee observes that the State party is generally bound by the findings of the Court of Appeal, with the State party observing simply that the Court had not considered the State's brief to the Court, which arrived after the relevant litigation deadlines. The Committee considers, however, that this default on the part of the State party cannot be imputed to the complainant and, moreover, that whether the Court's consideration would have been different remains speculative. As the State party itself states...and with which the Committee agrees, the judgment of the Court of Appeal, which includes the conclusion that his expulsion occurred in breach of article 3 of the European Convention, cannot, on the basis of the information before the Committee, be regarded as clearly arbitrary or tantamount to a denial of justice. As a result, the Committee also concludes that the complainant has established that his removal was in breach of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

14. The Committee against Torture...considers that the deportation of the complainant to Algeria constituted a breach of articles 3 and 22 of the Convention.

15. Pursuant to rule 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps the State party has taken in response to the views expressed above, including measures of compensation for the breach of article 3 of the Convention and determination, in consultation with the country (also a State party to the Convention) to which the complainant was returned, of his current whereabouts and state of well-being.

Notes

a/ The complainant refers to the *Chalabi* and *Hamani* cases.
