PROTECTION OF THE FAMILY - GENERAL

III. JURISPRUDENCE

ICCPR

- *Mauritian Women v. Mauritius* (35/1978) (R.9/35), ICCPR, A/36/40 (9 April 1981) 134 at paras. 7.2-7.4, 9.2, 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 ...A person can only claim to be a victim in the sense of article 1 of the Optional Protocol if he or she is actually affected. It is a matter of degree how concretely this requirement should be taken. However, no individual can in the abstract, by way of an *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant. If the law or practice has not already been concretely applied to the detriment of that individual, it must in any event be applicable in such a way that the alleged victim's risk of being affected is more than a theoretical possibility.

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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.

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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...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.

- *Mónaco v. Argentina* (400/1990), ICCPR, A/50/40 vol. II (3 April 1995) 10 (CCPR/C/53/D/400/1990) at paras. 2.1-2.4, 10.3-10.5, 11.1 and 11.2.

...

2.1 On 5 February 1977, Ximena Vicario's mother was taken with the then nine-month-old child to the Headquarters of the Federal Police (*Departamento Central de la Policía Federal*) in Buenos Aires. Her father was apprehended in the city of Rosario on the following day. The parents subsequently disappeared, and although the National Commission on Disappeared Persons investigated their case after December 1983, their whereabouts were never established. Investigations initiated by the author herself finally led, in 1984, to locating Ximena Vicario, who was then residing in the home of a nurse, S.S., who claimed to have been taking care of the child after her birth. Genetic blood tests (*histocompatibilidad*) revealed that the child was, with a probability of 99.82 per cent, the author's granddaughter.

2.2 In the light of the above, the prosecutor ordered the preventive detention of S.S., on the ground that she was suspected of having committed the offences of concealing the whereabouts of a minor (*ocultamiento de menor*) and forgery of documents...

2.3 On 2 January 1989, the author was granted "provisional" guardianship of the child; S.S., however, immediately applied for visiting rights, which were granted by order of the Supreme Court on 5 September 1989. In this decision, the Supreme Court also held that the author had no standing in the proceedings about the child's guardianship since, under article 19 of Law 10.903, only the parents and the legal guardian have standing and may directly

participate in the proceedings.

2.4 On 23 September 1989 the author, basing herself on psychiatric reports concerning the effects of the visits of S.S. on Ximena Vicario, requested the court to rule that such visits should be discontinued. Her action was dismissed on account of lack of standing. On appeal, this decision was upheld on 29 December 1989 by the *Cámara Nacional de Apelaciones en lo Criminal y Correccional Federal of Buenos Aires*...

...

10.3 As to Darwinia Rosa Mónaco de Gallicchio's claim that her right to recognition as a person before the law was violated, the Committee notes that, although her standing to represent her granddaughter in the proceedings about the child's guardianship was denied in 1989, the courts did recognize her standing to represent her granddaughter in a number of proceedings, including her suit to declare the nullity of the adoption, and that she was granted guardianship over Ximena Vicario. While these circumstances do not raise an issue under article 16 of the Covenant, the initial denial of Mrs. Mónaco's standing effectively left Ximena Vicario without adequate representation, thereby depriving her of the protection to which she was entitled as a minor. Taken together with the circumstances mentioned in paragraph 10.5 below, the denial of Mrs. Mónaco's standing constituted a violation of article 24 of the Covenant.

10.4 As to Ximena Vicario's and her grandmother's right to privacy, it is evident that the abduction of Ximena Vicario, the falsification of her birth certificate and her adoption by S.S. entailed numerous acts of arbitrary and unlawful interference with their privacy and family life, in violation of article 17 of the Covenant. The same acts also constituted violations of article 23, paragraph 1, and article 24, paragraphs 1 and 2, of the Covenant. These acts, however, occurred prior to the entry into force of the Covenant and of the Optional Protocol for Argentina on 8 November 1986, 4/ and the Committee is not in a position *ratione temporis* to emit a decision in their respect. The Committee could, however, make a finding of a violation of the Covenant if the continuing effects of those violations were found themselves to constitute violations of the Covenant. The Committee notes that the grave violations of the Covenant committed by the military regime of Argentina in this case have been the subject of numerous proceedings before the courts of the State party, which have ultimately vindicated the right to privacy and family life of both Ximena Vicario and her grandmother. As to the visiting rights initially granted to S.S., the Committee observes that the competent courts of Argentina first endeavoured to determine the facts and balance the human interests of the persons involved and that in connection with those investigations a number of measures were adopted to give redress to Ximena Vicario and her grandmother, including the termination of the regime of visiting rights accorded to S.S, following the recommendations of psychologists and Ximena Vicario's own wishes. Nevertheless, these outcomes appear to have been delayed by the initial denial of standing of Mrs. Mónaco to challenge the visitation order.

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10.5 While the Committee appreciates the seriousness with which the Argentine courts endeavoured to redress the wrongs done to Ms. Vicario and her grandmother, it observes that the duration of the various judicial proceedings extended for over 10 years, and that some of the proceedings have not yet been completed. The Committee notes that in the meantime Ms. Vicario, who was 7 years of age when found, reached the age of maturity (18 years) in 1994, and that it was not until 1993 that her legal identity as Ximena Vicario was officially recognized. In the specific circumstances of this case, the Committee finds that the protection of children stipulated in article 24 of the Covenant required the State party to take affirmative action to grant Ms. Vicario prompt and effective relief from her predicament. In this context, the Committee recalls its General Comment on article 24, 5/ in which it stressed that every child has a right to special measures of protection because of his/her status as a minor; those special measures are additional to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant. Bearing in mind the suffering already endured by Ms. Vicario, who lost both of her parents under tragic circumstances imputable to the State party, the Committee finds that the special measures required under article 24, paragraph 1, of the Covenant were not expeditiously applied by Argentina, and that the failure to recognize the standing of Mrs. Mónaco in the guardianship and visitation proceedings and the delay in legally establishing Ms. Vicario's real name and issuing identity papers also entailed a violation of article 24, paragraph 2, of the Covenant, which is designed to promote recognition of the child's legal personality.

...

11.1 The Human Rights Committee...is of the view that the facts which have been placed before it reveal a violation by Argentina of article 24, paragraphs 1 and 2, of the Covenant.

11.2 In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and her granddaughter with an effective remedy, including compensation from the State for the undue delay of the proceedings and resulting suffering to which they were subjected. Furthermore, the State party is under an obligation to ensure that similar violations do not occur in the future.

Notes

...

4/ See the Committee's decision on admissibility concerning Communication No. 275/1988, *S.E. v. Argentina*, declared inadmissible *ratione temporis* on 26 March 1990, para. 5.3.

5/ General Comment No. 17, adopted at the thirty-fifth session of the Committee, in 1989.

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- *Fei v. Colombia* (514/1992), ICCPR, A/50/40 vol. II (4 April 1995) 77 (CCPR/C/53/D/514/1992) at paras. 2.4, 2.6, 2.11, 2.12, 2.14 and 8.4-8.7.

...

2.4 On 26 September 1985, Mrs. Fei's children, during a visit to her mother, were allegedly kidnapped by the father, with the help of three men said to be employees of the Colombian Embassy in Paris...Between September 1985 and September 1988, the author did not have any contact with her children and knew nothing of their whereabouts, as Mr. Segovia Salas allegedly refused to cooperate...In September 1988, accompanied by the Italian Ambassador to Colombia the author was finally able to see her two children for five minutes...

...

2.6 Mrs. Fei contends that, since September 1985, she has received, and continues to receive threats. As a result, she claims, she cannot travel to Colombia alone or without protection. In March 1989, therefore, the Italian Foreign Ministry organized a trip to Bogotá, for her; after negotiations, she was able to see her children for exactly two hours, "as an exceptional favour"...Thereafter, the author was only allowed to communicate with her children by telephone or mail; she contends that her letters were frequently tampered with and that it was almost impossible to reach the girls by telephone.

...

2.11 Mrs. Fei's counsel initiated proceedings in the Supreme Court of Colombia, directed against the Family Court No. 19 of Bogotá, against the office of the Procurator-General and against the judgement of 24 November 1992, for non-observance of the author's constitutional rights...

2.12 On 14 April 1993, family court No. 19 of Bogotá handed down its judgement concerning the request for modification for visiting rights. This judgement placed certain conditions on the modalities of the author's visits to her children, especially outside Colombia, inasmuch as the Government of Colombia had to take the measures necessary to guarantee the exit and the re-entry of the children.

...

2.14 In December 1993, the author's children, after presumed pressure from their father, filed proceedings pursuant to article 86 of the Colombian Constitution (*acción de tutela*...) against their mother...Mrs. Fei claims that she was never officially notified of this action...

...

8.4 The concept of a "fair trial" within the meaning of article 14, paragraph 1...includes other elements. Among these, as the Committee has had the opportunity to point out, 22/ are the respect for the principles of equality of arms, of adversary proceedings and of expeditious proceedings. In the present case, the Committee is not satisfied that the requirement of equality of arms and of expeditious procedure have been met. It is noteworthy that every court action instituted by the author took several years to adjudicate - and difficulties in communication with the author, who does not reside in the State party's territory, cannot

account for such delays, as she had secured legal representation in Colombia. The State party has failed to explain these delays. On the other hand, actions instituted by the author's ex-husband and by or on behalf of her children were heard and determined considerably more expeditiously. As the Committee has noted in its admissibility decision, the very nature of custody proceedings or proceedings concerning access of a divorced parent to his children requires that the issues complained of be adjudicated expeditiously. In the Committee's opinion, given the delays in the determination of the author's actions, this has not been the case.

8.5 The Committee has further noted that the State party's authorities have failed to secure the author's ex-husband's compliance with court orders granting the author access to her children, such as the court order of May 1982 or the judgement of the First Circuit Court of Bogotá of 13 March 1989. Complaints from the author about the non-enforcement of such orders apparently continue to be investigated, more than 30 months after they were filed, or remain in abeyance; this is another element indicating that the requirement of equality of arms and of expeditious procedure has not been met.

8.6 Finally, it is noteworthy that in the proceedings under article 86 of the Colombian Constitution instituted on behalf of the author's daughters in December 1993, the hearing took place, and judgement was given, on 16 December 1993, that is, before the expiration of the deadline for the submission of the author's defence statement. The State party has failed to address this point, and the author's version is thus uncontested. In the Committee's opinion, the impossibility for Mrs. Fei to present her arguments before judgement was given was incompatible with the principle of adversary proceedings, and thus contrary to article 14, paragraph 1, of the Covenant.

8.7 The Committee has noted and accepts the State party's argument that in proceedings which are initiated by the children of a divorced parent, the interests and the welfare of the children are given priority. The Committee does not wish to assert that it is in a better position than the domestic courts to assess these interests. The Committee recalls, however, that when such matters are before a local court that is assessing these matters, the court must respect all the guarantees of fair trial.

Notes

...

22/ Views on Communications Nos. 203/1986 (*Muñoz v. Peru*), para. 11.3; and 207/1986 (*Morael v. France*), para. 9.3.

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- *Stewart v. Canada* (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/59/D/558/1993) at para. 12.10.

...

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.

For dissenting opinions in this context, see Stewart v. Canada (538/1993), ICCPR, A/52/40 vol. II (1 November 1996) 47 (CCPR/C/59/D/558/1993) at Individual Opinion by Elizabeth Evatt, Cecilia Medina Quiroga and Francisco José Aguilar Urbina, 62 at paras. 8-10.

- *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, 11.4, 11.5 and Individual Opinion by Martin Scheinin (concurring), 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.

...

11.4 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.

...

A. Individual Opinion by Martin Scheinin

...

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.

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- *Hopu et al. v. France* (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at para. 10.3.

  ...
  10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

For dissenting opinion in this context, see Hopu et al. v. France (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at Individual Opinion by David Kretzmer, Thomas Buergenthal, Nisuke Ando and Lord Colville, 81 at paras. 1-7.

- *Buckle v. New Zealand* (858/1999), ICCPR, A/56/40 vol. II (25 October 2000) 175 at paras. 2.1, 2.2 and 9.1-9.3.

  ...
  2.1 The author's six children (aged at the time between 8 and 1 year of age) were removed from her care in 1994 allegedly because of her inability to look after them adequately.

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2.2 In August 1997 the author appealed, to the Court of Appeal, the decision of the New Zealand Family Court that had deprived her of her guardianship rights. On 25 February 1998, the Court of Appeal confirmed the decision of the Family Court. The author's request for leave to appeal to the Privy Council against the decision of February 1998 was rejected. Notwithstanding this Mrs Buckle travelled to the United Kingdom and secured a hearing in May 1998, before the Judicial Committee of the Privy Council. The application was unsuccessful.

...

9.1 Concerning the author's claim under article 17 of the Covenant, the Committee notes the information provided by the State party with respect to the extensive procedures followed in the author's case. The Committee also notes that the situation is under regular review and that the author has been given the opportunity to retain access to her children. In the circumstances, the Committee finds that the interference with the author's family has not been unlawful or arbitrary and is thus not in violation of article 17 of the Covenant.

9.2 The author has also claimed a violation of article 23 of the Covenant. The Committee recognizes the weighty nature of the decision to separate mother and children, but notes that the information before it shows that the State party's authorities and the Courts considered carefully all the material presented to them and acted with the best interests of the children in mind and that nothing indicates that they violated their duty under article 23 to protect the family.

9.3 With respect to the alleged violation of article 24 of the Covenant, the Committee is of the opinion that the author's arguments and the information before it do not raise issues that would be separate from the above findings.

- *Rojas García v. Colombia* (687/1996), ICCPR, A/56/40 vol. II (3 April 2001) 48 at paras. 2.1, 10.3, 10.4, 11 and 12.

...

2.1 On 5 January 1993, at 2 a.m., a group of armed men wearing civilian clothes, from the Public Prosecutor's Office (Cuerpo Técnico de Investigación de la Fiscalía), forcibly entered the author's house through the roof. The group carried out a room-by-room search of the premises, terrifying and verbally abusing the members of the author's family, including small children. In the course of the search, one of the officials fired a gunshot. Two more persons then entered the house through the front door; one typed up a statement and forced the only adult male (Alvaro Rojas) in the family to sign it; he did not allow him to read it, or to keep a copy. When Alvaro Rojas asked whether it was necessary to act with such brutality, he was told to talk to the Public Prosecutor, Carlos Fernando Mendoza. It was at this juncture that the family was informed that the house was being searched as part of an investigation into

the murder of the mayor of Bochalema, Ciro Alonso Colmenares.

...

10.3 The Committee must first determine whether the specific circumstances of the raid on the Rojas García family's house (hooded men entering through the roof at 2 a.m.) constitute a violation of article 17 of the Covenant. By submission of 28 December 1999, the State party reiterates that the raid on the Rojas García family's house was carried out according to the letter of the law, in accordance with article 343 of the Code of Criminal Procedure. The Committee does not enter into the question of the legality of the raid; however, it considers that, under article 17 of the Covenant, it is necessary for any interference in the home not only to be lawful, but also not to be arbitrary. The Committee considers, in accordance with its General Comment No. 16 (HRI/GEN/1/Rev.4 of 7 February 2000) that the concept of arbitrariness in article 17 is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. It further considers that the State party's arguments fail to justify the conduct described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, insofar as there was arbitrary interference in the home of the Rojas García family.

10.4 In view of the fact that the Committee has found a violation of article 17 in respect of the arbitrariness of the raid on the author's house, it does not consider it necessary to decide whether the raid constituted an attack on the family's honour and reputation.

...

11. The Human Rights Committee...is of the view that the facts before it disclose a violation by the State party of article 7 and article 17, paragraph 1, of the International Covenant on Civil and Political Rights in respect of the Rojas García family.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide Rafael A. Rojas García and his family with an effective remedy, which must include reparation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

- *Winata v. Australia* (930/2000), ICCPR, A/56/40 vol. II (26 July 2001) 199 at paras. 2.1-2.6, 6.3, 6.4, 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/

...

6.3 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...

...

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.

- *Patera v. Czech Republic* (946/2000), ICCPR, A/57/40 vol. II (25 July 2002) 294 (CCPR/C/75/D/946/2000) at paras. 2.2-2.6, 7.2-7.4 and 8.

...

2.2 In a preliminary court decision from the Regional Court Prague West of 12 July 1993, confirmed in a further preliminary court decision of 2 October 1995, the author was granted the right to see his son every second weekend from Saturday morning until Sunday evening. However, Ms. R.P. did not comply with the decisions and has refused the author regular access ever since. Only during 1994 and 1995 was the author allowed to see his son on an irregular basis, but then under the surveillance of a family member of Ms. R.P. or armed security officers. Ms. R.P. has been repeatedly fined for her refusal to comply with the courts' decisions.

2.3 In 1994, the author initiated criminal proceedings against her for not complying with the said court decisions, in accordance with the Criminal Code No. 140/1961 Coll., paragraph 171, section 3. The case was dealt with by the Court of Okresní soud Ústí nad Labem, and had at the time of the author's submission to the Committee on 9 February 2002, not yet been decided.

2.4 Subsequently, the author brought new criminal charges against Ms. R.P. for not complying with further preliminary decisions granting the author access to his son from December 1997 to August 1998. The case was held over for two years, from 11 January 1999 until 14 February 2001, when eventually the judge withdrew from the case. The new judge dismissed the charges against Ms. R.P. (2) However, the author alleges that this decision was not delivered to the parties in accordance with law, and it therefore did not enter into force. The author's complaint to the Constitutional Court was dismissed.

2.5 On 18 November 1993, the Kladno Regional Court convicted Ms. R.P. of three criminal acts relating to the child custody case. The decision was appealed, but shortly before the verdict of the Court of Appeal, Ms. R.P. was granted a pardon for two of the criminal acts,

whereas the third remained undecided, and eventually became time-barred. On 20 November 1995, the author submitted a constitutional complaint, which was rejected on the ground that the author had not been a party to the criminal case.

2.6 In a statement of 1 June 1992, a court specialist Dr. J.K., and Dr. J.B., explained that the author's wife suffers from a mental disorder in the development of her personality. In another statement by Dr. J.C. and Mr. H.D. of 11 May 1993, it was stated that the author's wife was damaging the interests of their son by not allowing contact between the father and the son. These statements were supported by statements from a court specialist, Mr. V.F., dated 14 May 1995 and 15 April 1997.

...

7.2 As to the alleged violation of article 17, the Committee notes the State party's contention that there is no documentation of arbitrary or unlawful interference by the State party with the author's family, that the decisions of courts of all instances have complied with the rules of procedure set by law, and that the delay in the resolution of the divorce and custody proceedings is due to the numerous petitions submitted by the author. However, the current communication is not based only on article 17, paragraph 1, of the Covenant, but also on paragraph 2 of the said provision, according to which everyone has the right to the protection of the law against interference or attacks on one's privacy and family life.

7.3 The Committee considers that article 17 generally includes effective protection to the right of a parent to regular contact with his or her minor children. While there may be exceptional circumstances in which denying contact is required in the interests of the child and cannot be deemed unlawful or arbitrary, in the present case the domestic courts of the State party have ruled that such contact should be maintained. Consequently, the issue before the Committee is whether the State party has afforded effective protection to the author's right to meet his son in accordance with the court decisions of the State party.

7.4 Although the courts repeatedly fined the author's wife for failure to respect their preliminary orders regulating the author's access to his son, these fines were neither fully enforced nor replaced with other measures aimed at ensuring the author's rights. In these circumstances and taking into account the considerable delays at various stages of the proceedings, the Committee takes the view that the author's rights under article 17 of the Covenant, in conjunction with article 2, paragraphs 1 and 2 of the Covenant, did not receive effective protection. Consequently, the Committee is of the view that the facts before it disclose a violation of article 17, in conjunction with article 2 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 author with an effective remedy, which should include measures to ensure prompt implementation of the court's orders regarding contact between the author and his son. The State party is also under an obligation to prevent similar violations in the

future.

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Notes

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2/ This point of the submission is unclear.

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For dissenting opinion in this context, see Patera v. Czech Republic (946/2000), ICCPR, A/57/40 vol. II (25 July 2002) 294 (CCPR/C/75/D/946/2000) at Individual Opinion by Mr. Nisuke Ando and Mr. Prafullachandra Natwarlal Bhagwati, 302.

- *Coronel et al. v. Colombia* (778/1997), ICCPR, A/58/40 vol. II (24 October 2002) 40 (CCPR/C/76/D/778/1997) at paras. 2.1, 2.3, 9.7, 9.8 and 10.

...

2.1 Between 12 and 14 January 1993, troops of the "Motilones" Anti-Guerrilla Battalion (No. 17), attached to the Second Mobile Brigade of the Colombian National Army, conducted a military operation in the indigenous community of San José del Tarra (municipality of Hacari, department of Norte Santander) and launched a search operation in the region, making incursions into a number of neighbouring settlements and villages. During these operations, the soldiers raided several houses and arrested a number of people, including Ramón Villegas Téllez, Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Ramón Emilio Sánchez, Ramón Emilio Quintero Ropero and Luis Honorio Quintero Ropero. Both the raids and the arrests were carried out illegally, since the soldiers did not have the judicial warrants prescribed by Colombian law on criminal procedure to conduct searches or make arrests.

...

2.3 On 26 January 1993, Luis Ernesto Ascanio Ascanio, aged 16, disappeared while on his way home, abducted by soldiers who, a few days before, had raided the home of the Ascanio Ascanio family, ill-treating and harassing the family members, who included six minors and also a 22-year-old mentally deficient young man, whom they attempted to hang. The soldiers remained in the house until 31 January, holding its inhabitants hostage. Luis Ernesto Ascanio Ascanio was seen for the last time some 15 minutes away from the family home. On the same day, members of the Ascanio family heard shouts and shots coming from outside the house. On 27 January, two of the brothers of Luis Ernesto Ascanio Ascanio succeeded in evading the military guards and fled to Ocaña, where they advised the local authorities and submitted a complaint to the Provincial Office of the Attorney-General. Once the military patrol had withdrawn, the search for Luis Ernesto Ascanio Ascanio began; the outcome was the discovery of a pocket knife belonging to him some 300 metres away from the house.

...

9.7 With regard to the claim under article 17 of the Covenant, the Committee must determine whether the specific conditions in which the raid on the homes of the victims and their families took place constitute a violation of that article. The Committee takes note of the authors' allegations that both the raids and the detentions were carried out illegally, since the soldiers did not have search or arrest warrants. It also takes note of the corroborating testimony gathered from witnesses by the Attorney-General's Office showing that the procedures were carried out illegally in the private houses where the victims were staying. In addition, the Committee considers that the State party has not provided any explanation in this regard to justify the action described. Consequently, the Committee concludes that there has been a violation of article 17, paragraph 1, inasmuch as there was unlawful interference in the homes of the victims and their families or in the houses where the victims were present, including the home of the minor Luis Ernesto Ascanio Ascanio, even though he was not there at the time.

9.8 The Human Rights Committee...is of the view that the facts that have been set forth constitute violations of article 6, paragraph 1; article 7 in respect of Gustavo Coronel Navarro, Nahún Elías Sánchez Vega, Luis Ernesto Ascanio Ascanio and Luis Honorio Quintero Ropero; article 9; and article 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to provide the victims' relatives with effective remedy, including compensation...

- *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.
...

PROTECTION OF THE FAMILY - GENERAL

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

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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.

PROTECTION OF THE FAMILY - GENERAL

...

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.

- *Bakhtiyari v. Australia* (1069/2002), ICCPR, A/59/40 vol. II (29 October 2003) 301 (CCPR/C/79/D/1069/2002) at paras. 9.6, 10 and 11.

...

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 interference in the family of the authors, in violation of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

...

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.

- *Mulezi v. Democratic Republic of the Congo* (962/2001), ICCPR, A/59/40 vol. II (6 July 2004) 159 at paras. 5.4, 6 and 7.

...

5.4 With regard to alleged violations of articles 6, paragraph 1, and 23, paragraph 1, of the Covenant, the Committee notes the author's statement that his wife was beaten by soldiers, that Commander Mortos refused her request to travel to Bangui to receive medical attention, and that she died three days later. The Committee considers that these statements, which the State party has not contested although it had the opportunity to do so, and which the author has sufficiently substantiated, warrant the finding that there have been violations of articles 6, paragraph 1, and 23, paragraph 1, of the Covenant as to the author and his wife.

6. The Human Rights Committee...is of the view that the facts before it reveal violations by the Democratic Republic of the Congo of articles 6, paragraph 1; 7; 9, paragraphs 1, 2 and 4; 10, paragraph 1; and 23, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the State party has an obligation to ensure that the author has an effective remedy available. The Committee therefore urges the

State party (a) to conduct a thorough investigation of the unlawful arrest, detention and mistreatment of the author and the killing of his wife; (b) to bring to justice those responsible for these violations; and (c) to grant Mr. Mulezi appropriate compensation for the violations. The State party is also under an obligation to take effective measures to ensure that similar violations do not occur in future.

- *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.

PROTECTION OF THE FAMILY - GENERAL

- *Madafferi v. Australia* (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at paras. 2.1-2.7, 9.3, 9.7, 9.8, 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.

...

9.3 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.

...

9.7 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.

...

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

...

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. (Para. 9.7)

For dissenting opinion in this context, see Madafferi v. Australia (1011/2001), ICCPR, A/59/40 vol. II (28 July 2004) 208 at Individual Opinion of Ruth Wedgwood, 229.

PROTECTION OF THE FAMILY - GENERAL

- *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 and 11.5-11.9.

...

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.

...

11.5 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.

_____

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."

...

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 opinions in this context generally, see:

- *Toala et al. v. New Zealand* (675/1995), ICCPR, A/56/40 vol. II (2 November 2000) 35 at Individual Opinion by Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Pilar Gaitan de Pombo and Hipólito Solari Yrigoyen, 47.

CEDAW

- *A. T. v. Hungary* (2/2003), CEDAW, A/60/38 part I (26 January 2005) 80 at paras. 2.1-2.7, 3.1 and 9.2-9.6.

...

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain-damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic

in addition to continuing to threaten her physically. Hoping to protect herself and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 2000. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L. F. broke into the apartment using violence.

2.3 L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence. The most recent incident took place on 27 July 2001 when L. F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Főrvărosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended. She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

2.6 The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 at the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter

procedure was initiated by the hospital *ex officio*. The author further states that L. F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him...

2.7 The author also submits that she has requested assistance in writing, in person and by phone, from the local child protection authorities, but that her requests have been to no avail since the authorities allegedly feel unable to do anything in such situations.

The Claim

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its "positive" obligations under the Convention and supported the continuation of a situation of domestic violence against her.
...
9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "...[T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "...discrimination under the Convention is not restricted to action by or on behalf of Governments..." and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's

general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment. Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "...[T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legislation has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the author's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of general recommendation 19...concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was concerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family...". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized *vis-à-vis* the country as a whole. For four years and continuing to the present day, the author has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of

the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

I. Concerning the author of the communication

(a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;

(b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

II. General

(a) Respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;

(b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;

(c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

(d) Take all necessary measures to provide regular training on the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto to judges, lawyers and law enforcement officials;

(e) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would

provide for protection and exclusion orders as well as support services, including shelters;

(f) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(g) Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation;

(h) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

CAT

- *Hanan Ahmed Fouad Abd El Khalek Attia v. Sweden* (199/2002), CAT, A/59/44 (17 November 2003) 234 (CAT/C/31/D/199/2002) at paras. 2.1-2.5 and 12.1 and 12.3.

...

2.1 In 1982, the complainant's husband, Mr. A., was arrested on account of his family connection to his cousin, who had been arrested for suspected involvement in the assassination of the former Egyptian President, Anwar Sadat. Before his release in March 1983, Mr. A. was allegedly subjected to "torture and other forms of physical abuse". Mr. A., active in the Islamic movement, completed his studies in 1986 and married the complainant. He avoided various police searches, but suffered difficulties, such as the arrest of his attorney, upon bringing a civil claim in 1991 against the Ministry of Home Affairs, for suffering during his time in prison.

2.2 In 1992, Mr. A. left Egypt on security grounds for Saudi Arabia, and thereafter to Pakistan, where the complainant and her children joined him. After difficulties with passport non-renewal and confiscation by the Egyptian Embassy in Pakistan, the family left for Syria under assumed Sudanese identities. There they were visited by family members from Egypt, who were arrested and had their passports confiscated upon their return to Egypt, in order to determine Mr. A.'s whereabouts. In December 1995, the family moved to Iran under the same Sudanese identities.

2.3 In 1998, Mr. A. was tried for terrorist activity in absentia before a higher military court in Egypt, along with 100 other accused. He was found guilty of belonging to an Islamic fundamentalist group, Al-Gihad, having intention to overthrow the Egyptian Government, and was sentenced, without possibility of appeal, to 25 years' imprisonment. In 2000, concerned that warming ties between Egypt and Iran might result in his being returned to

Egypt, Mr. A. and his family purchased air tickets under Saudi Arabian identities for Canada, and claimed asylum during a transit stop in Stockholm, Sweden, on 23 September 2000.

2.4 In his asylum application, he claimed that he had been sentenced to "penal servitude for life" in absentia, and that if returned, he would be executed as other accused allegedly had been. The complainant contended that, if returned, she would be detained for many years, on account of her status as Mr. A.'s wife and corresponding guilt by association. On 23 May 2001, the Migration Board invited the Swedish National Police Board (Special Branch) to submit its opinion in the matter, and the Special Branch subsequently conducted an interview with Mr. A. On 3 October 2001, with legal representation, the Migration Board held a "major inquiry" with Mr. A. and the complainant. On 30 October 2001, the Swedish National Police Board (Special Branch) informed the Migration Board that Mr. A. had a leading position in an organization guilty of terrorist acts and was responsible for activities of the organization. The case of Mr. A. and the complainant was thus remitted, on 12 November 2001, to the Government for decision pursuant to chapter 7, section 11 (2) (2) of the Aliens Act. In the Board's view, on the information before it, Mr. A. could be considered entitled to refugee status, however the Special Branch assessment, which the Board saw no reason to question, pointed in a completely different direction. The necessary weighing of Mr. A.'s possible need for protection, as against the Special Branch's assessment, was thus to be made by the Government. On 13 November 2001, the Aliens Appeals Board, to which the case had been forwarded, shared the Migration Board's assessment of the merits and was also of the view that the Government should decide the matter.

2.5 On 18 December 2001, the Government rejected the asylum applications of Mr. A. and the complainant. The reasons for these decisions are omitted from the text of this decision at the State party's request and with the agreement of the Committee. Accordingly, it was ordered that Mr. A. be deported immediately and the complainant as soon as possible. On 18 December 2001, Mr. A. was deported, while the complainant evaded police custody; her whereabouts remain unknown.

...

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

...

12.3 In the present case, the Committee observes that the complainant's husband, Mr. A., was returned to Egypt in December 2001, almost two years prior to the Committee's consideration of the case. The Committee observes that Mr. A.'s detention has since been monitored by regular visits from the State party's Ambassador, Embassy staff and high-level representatives of the State party, as well as his family, and that his medical care and conditions of detention were reported to be adequate. The Committee observes that the

complainant founds her allegation of a risk of torture solely on her relationship with her husband, Mr. A., and contends that she will be exposed to torture as a result of this link. The Committee refers in this respect to its previous jurisprudence where it rejected a claim of torture arising by virtue of a family relationship to the leadership of an allegedly terrorist organization - such family ties, of themselves, are generally insufficient to ground a claim under article 3.d/ In light of the passage of time, the Committee is also satisfied by the provision of guarantees against abusive treatment,e/ which also extend to the complainant and are, at the present time, regularly monitored by the State party's authorities *in situ*. It is also relevant to the Committee's consideration of the case that Egypt, a State party to the Convention, is directly bound properly to treat prisoners within its jurisdiction, and any failure to do so would be a breach of the Convention. In the light of the above circumstances, the Committee considers that there is not, at this time, a substantial personal risk of torture of the complainant in the event of her return to Egypt.

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Notes

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d/ See, for example, *M.V. v. The Netherlands* case No. 201/2002, decision adopted 30 May 2003.

e/ The Committee against Torture has viewed and considered the provisions of the guarantees provided.

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