UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/89/D/1368/2005
21 June 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12 to 30 March 2007

VIEWS

Communication 1368/2005

Submitted by:	E. B. (represented by counsel, Mr. Tony Ellis)
Alleged victims:	The author, his daughters, S. and C., and his son, E.
State party:	New Zealand
Date of communication:	24 December 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 February 2005 (not issued in document form)
Date of adoption of Views:	16 March 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Denial of access to children after prolonged access proceedings

Procedural issues: Exhaustion of domestic remedies – parental standing – sufficient substantiation, for purposes of admissibility – exhaustion of domestic remedies

Substantive issues: Fair trial – arbitrary interference with the family – protection of the family unit – rights of children – equality before the law and non-discrimination

Articles of the Optional Protocol: 1; 2 and 5, paragraph 2(b)

Articles of the Covenant: 2; 14, paragraph 1; 17, 23; 24 and 26

On 16 March 2007, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1368/2005.

[ANNEX]

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eighty-ninth session

concerning

Communication No. 1368/2005[**]

Submitted by:	E. B. (represented by counsel, Mr. Tony Ellis)
Alleged victims:	The author, his daughters, S. and C., and his son, E.
State party:	New Zealand
Date of communication:	24 December 2004 (initial submission)

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

Meeting on 16 March 2007,

Having concluded its consideration of communication No. 1368/2005, submitted to the Human Rights Committee by E. B. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

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

An individual opinion signed by Committee member Ms. Ruth Wedgwood is appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 24 December 2004, is E. B.,[1] a New Zealand national. The author advances the communication on his own behalf and on behalf of two daughters, S., born 30 July 1990, and C., born 20 April 1994, as well as his son, E., born on 21 June 1997. He claims he is a victim of breaches by New Zealand of articles 2; 14, paragraph 1; 17, 23; 24 and 26 of the Covenant. He also invokes violations of articles 17, 23 and 24 of the Covenant on behalf of his children. The author is represented by counsel, Mr. Tony Ellis.

Factual background

2.1 In 2000, the author and his wife, with whom he had had two daughters (born in 1990 and 1994) and one son (born in 1997), separated. From 4 November 2000, the author's wife refused him access to the children. On 30 November 2000, the author applied to the Family Court for access to his children.

2.2 In May 2001, the author's wife made an initial statement to the police, alleging that the author had sexually abused the two daughters. In June 2001, she began making a further statement to the police, eventually completing it in October 2001 after several interviews were held. The police investigation of these claims ran from June 2001 to October 2002. Four evidential video interviews with the two daughters were undertaken on 27 June 2001 (with C), 21 August 2001 (with S), 1 July 2002 (with S) and 24 October 2002 (with C). In June 2002 and again in March 2003, a clinical psychologist prepared report directed under section 29A of the Guardianship Act.[2] On 30 January 2003, the police determined that no charges would be laid against the author.

2.3 From 24 to 28 March 2003, the Family Court heard the original application filed in November 2000. Before oral evidence was given by the author, his wife and the clinical psychologist, the evidential videos were replayed, as were the videos of interviews of the author by the police in the presence of the parties and counsel.

2.4 On 24 June 2003, the Family Court dismissed the application for access under section 16B of the Guardianship Act 1968.[3] The judge was not satisfied, on the balance of probabilities, that

[1] Names withheld by agreement of the parties.

[2] Section 29A of the Guardianship Act provided, at material times, as follows:
"29A. **Reports from other persons –**
(1) On any application for guardianship or custody (other than interim custody) or access or on an application made under section 12(1) of the Guardianship Amendment Act 1991, the Court may, if it is satisfied that it is necessary for the proper disposition of the application, request any person whom it consider qualified to do so to prepare a medical psychiatric, or psychological report on the child who is the subject of the application."

[3] Section 16B of the Guardianship Act provided, at material times, as follows:
(1) This section applies to any proceedings relating to an application made under this Act for an order relating to the custody of, or access to, a child [….]

the author did in fact sexually abuse the children. The judge considered however that the author posed "an unacceptable risk" to the safety of the children. He considered that "whatever in fact took place" between the author and the children "had a lasting and profound impact on them". The children had expressed the wish not to have contact with their father. In the circumstances, the judge concluded that it would not be in the welfare of the children to grant access to the author. The judge also noted that the proceeding had unfortunately become prolonged, and that "[t]hroughout these proceedings there has been a concern about delays in getting this matter on for hearing". The judge noted the difficulties posed in resolving access issues when sexual abuse allegations required police investigation.

2.5 In reaching his decision, the judge carefully evaluated and weighed all the available evidence. Upon hearing and seeing the parties give evidence, he decided to give credence to the

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(2) Where … it is alleged that a party to the proceedings has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall, as soon as practicable, determine … whether the allegation of violence is proved.
(3) [….]
(4) Where … the Court is satisfied that a party to the proceedings ["the violent party"] has used violence against the child or a child of the family or against the other party to the proceedings, the Court shall not –
(a) make any order giving the violent party custody of the child to whom the proceedings relate; or
(b) make any order allowing the violent party access (other than supervised access) to that child, - unless the Court is satisfied that the child will be safe while the violent party has custody of or, as the case may be, access to the child.
(5) In considering … whether or not a child will be safe while a violent party has custody of, or access (other than supervised access) to, the child, the Court shall, as far as is practicable, have regard to the following matters:
(a) The nature and seriousness of the violence used;
(b) How recently the violence occurred;
(c) The frequency of the violence;
(d) The likelihood of further violence occurring;
(e) The physical and emotional harm caused to the child by the violence;
(f) Whether the other party to the proceedings –
i. Considers that the child is safe while the violent party has custody of, or access to, the child; and
ii. Consents to the violent party having custody of, or access to, the child;
(g) The wishes of the child, if the child is able to express them, and having regard to the age and maturity if the child;
(h) Any steps taken by the violent party to prevent further violence occurring;
(i) Such other matters as the Court considers relevant.
(6) Notwithstanding subsection (2) of this section, where […]
(a) The Court is unable to determine, on the basis of the evidence presented to it by or on behalf of the parties to the proceedings, whether or not the allegation of violence is proved; but
(b) The Court is satisfied that there is a real risk to the safety of the child, -
the Court shall make such order under this Act as it thinks fit in order to protect the safety of the child.

author's wife, who was prepared to acknowledge shortcomings and her responsibility for what had happened during the marriage, whereas, according to the judge, the author himself was unprepared to concede that he had in any way overstepped boundaries of propriety in the contacts with his children, although evidence indeed suggested that these boundaries had been crossed. In addition, the judgment noted incidents during a number of instances of supervised access the author had with his daughters in the spring of 2001, for which the author was charged with three alleged breaches of the protection order (even though each charge was later dismissed).

2.6 The author appealed to the High Court, inter alia on the basis that the provisions of the Covenant and the European Convention on Human Rights, as interpreted in Sahin v Germany,[4] disclosed a fundamental parental human right of access to children which had been insufficiently taken into account. On 7 November 2003, the High Court upheld the Family Court's decision with respect to access to the two daughters, but decided that the Family Court should reconsider its decision with respect to access to the son, notably as no allegations of abuse against him had been made. As of the date of submission of communication, over a year later, reconsideration of the son's situation had yet to take place, on account of "systemic judicial delays".

2.7 The author applied to the Court of Appeal for leave to appeal the High Court's decision with respect to the daughters, seeking a declaration of inconsistency of the relevant provisions of the Guardianship Act with the Covenant. The appellant cited to the Court the Committee's Views in Hendriks v The Netherlands,[5] where the Committee observed: "…the law should establish certain criteria so as to enable the courts to apply to the full the provisions of article 23 of the Covenant. It seems essential, barring exceptional circumstances, that these criteria should include the maintenance of personal relations and direct and regular contact between the child and both parents".

2.8 The Court of Appeal, on 6 April 2004, refused leave to appeal, holding that a declaration of inconsistency could only be made with respect to the New Zealand Bill of Rights Act. In any event, it held that neither the Family Court's decision nor the process it followed in reaching it was inconsistent with article 23 of the Covenant. It considered the Committee's Views in Hendriks inapposite to the present case, as the Views "do [..] not expressly require that a Court considering access address individually all forms of indirect access [such as by phone and in writing] before refusing access completely".

2.9 On 21 April 2004, the son, E., made allegations of sexual abuse against the author. The police reopened the investigation into the author, and an interview was conducted. In May 2004, the Family Court adjourned the access application with respect to the son, which had been remitted by the High Court, on account of the police investigation. In September 2004, the police decided not to lay charges against the author.

2.10 Thereafter, in November 2004, counsel for the author's wife recommended that the Family Court obtain an updated psychological report in relation to the son. In May 2005, the Court approved the brief for a psychologist, on the basis of a draft prepared by counsel for E. In June, a

[4] Application No. 30943/96, judgment of 11 October 2001.
[5] Communication No 201/1985, Views adopted on 27 July 1988.

psychologist was appointed to prepare this updated report under section 29A of the Guardianship Act. In September 2005, the Court received the updated report and released it to counsel. In March 2006, the author's counsel advised the Court's registrar that report would be critiqued. In April 2006, E's lawyer (Lawyer for the Child) was appointed as lawyer to assist the Court in the critique process. In June 2006, the author's counsel applied to the Court that it was inappropriate for the Lawyer for the Child to be appointed as lawyer to assist the Court in the critique process, given the differing roles and responsibilities of each. In a minute of 19 June 2006, the Court agreed with the application.

2.11 On 6 July 2006, the Family Court Judge, by minute to all counsel, raised his concerns at the time the matter was taking to progress to hearing. He requested all counsel to focus on the need to complete all steps, tender any relevant evidence and have the issues heard. As at 30 August 2006, the Court continued to await completion of the critique of the updated report, which has been delayed by the absence overseas for seven weeks of the medical professional in question.

The complaint

3.1 The author claims violations of articles 2; 14, paragraph 1; 17, 23; 24 and 26 of the Covenant on his own behalf, and violations of articles 17, 23 and 24 on behalf of his children.

3.2 The author complains of a two-fold violation of the right to a fair trial guaranteed in article 14. Firstly, given the nature of the parental and child interests at stake, the protracted proceedings violate the right to duly expeditious determinations. The tardiness of the police in investigating the two abuse complaints, each eventually proving to be unfounded, was particularly causative of delay. Relying on the Committee's Views in Fei v Colombia,[6] the author argues that the lapse of two years to determine the access application for the daughters and the lapse of over three years – and growing – to determine the application for the son is in breach of rights of prompt trial.

3.3 Second, the author argues that there has been a separate violation of article 14 on the basis that the author's appeal was not heard before a lawful, competent court, on the basis that the High Court judge in question was not lawfully appointed. The author argues that the judge continued to act five years after the formal retirement age of 68, while applicable legislation only permits two years of additional work.

3.4 The author alleges a violation of article 17, on the basis that the State has failed to prevent arbitrary interference with the family resulting in parental alienation from the children. On the basis of European case law,[7] he argues that there were no exceptional circumstances requiring complete termination of parental rights of access. The resultant destruction of the family unit breaches both his and his children's rights under this provision. By parallel reasoning, the author argues a violation of articles 23, for failure to respect the family as a fundamental group. He

[6] Communication No. 514/1992, Views adopted on 4 April 1995.

[7] Görgülü v Germany, Application. No. 74969/01, judgment of 26 February 2004, at para. 48: "The Court recalls that it is in a child's interests for its family ties to be maintained, as severing such ties means cutting a child off from its roots, which can only be justified in very exceptional circumstances".

similarly argues a violation of article 24, on account of the children's inability to have access to both parents.

3.5 The author further argues a violation of article 26, on the basis that the Court of Appeal's construction of the Guardianship Act creates an unjustified distinction between persons found not to have committed sexual abuse, who are provided lesser legal protection than those that have been found to have so acted. This is as the Act requires a Court on an access application to consider a series of specific issues where domestic violence or abuse has taken place,[8] but otherwise the matter is left to the court's residual discretion under section 16B(6) of the Guardianship Act.

3.6 The author argues a violation of article 2 in conjunction with the foregoing substantive articles on three distinct bases. First, he argues that the State party has failed to provide for an effective remedy for the breaches of substantive rights detailed in this case. Secondly, the Court of Appeal decided it had no jurisdiction to grant a declaration that New Zealand law was inconsistent with the Covenant, or to grant an effective remedy based thereon. Thirdly, the State party has failed to ensure that the Covenant's guarantees are either expressly incorporated in its law, or ensuring that its law was interpreted so as to respect and give effect to the Covenant rights of the author and his children.

State party's submissions on admissibility and merits

4.1 By submissions of 22 April 2005 and 22 August 2005, the State party contested the admissibility of most of, and the merits of all of, the communication.

4.2 The State party argues that author has not exhausted domestic remedies with respect to the claim under article 14, paragraph 1, to the effect that the author's appeal to the High Court was not before a competent, independent and impartial tribunal. The judge, Justice Neazor, could have been asked to recuse himself on the basis of an alleged lack of competence to hear the appeal. The point could, and should, also have been raised in the application for leave to appeal to the Court of Appeal. It also remains open to the author to file an application for declaratory judgment in the High Court, in order to enable the domestic courts to consider the issue. In any event, the State party disputes that Justice Neazor was without jurisdiction in the High Court, supplying a copy of his warrant of appointment, dated 7 May 2003, for one year, covering the proceedings in this case.

4.3 The State party also argues that domestic remedies remain with respect to all claims made on behalf of the youngest child, E. In November 2003, the High Court remitted the issue of the author's access to E. back to the Family Court. The State party notes that rehearing has yet to take place, arguing it was necessary to await the outcome of the author's application for leave to appeal in respect of the other children, and for the police to investigate the new allegations of abuse. Despite the adjournment, the Family Court's judges and registrars have kept the case under review with regular assessments. As at the date of submission, the State party noted that a psychologist's report was sought for September 2005 and a hearing would likely take place within months thereafter.

[8] See the matters listed in subsection 5 of section 16B of the Guardianship Act, infra.

4.4 The State party argues that the claims under articles 2, 17, 23 and 24 are vague, general, based on assertions and founded on an insufficient evidentiary basis to amount to a proper claim under the Optional Protocol.

4.5 The State party also argues that the claim concerning under article 26 of the Covenant concerning section 16B of the Guardianship Act is insufficiently substantiated, for purposes of admissibility. The State party notes that section 16B of the Act deals, from the view of promoting the welfare of children, both with cases where sexual abuse has been made out as well as cases like the author's, where abuse is not made out but a real risk remains. It is unclear what detriment the author has suffered as a result of having become a person with the "status" of having been found by the Family Court not to have abused his children. The State party also argues, to the extent an issue is raised under article 26, that more limited appeal rights of matters within Family Court jurisdiction, as opposed to general civil and criminal matters, reflect the specialist nature of the former's jurisdiction, as well as the different sorts of decisions made in each jurisdiction. It notes that one significant difference is that because circumstances of the parties can change in family law cases, successive proceedings can be brought in relation to the same issues – thus, for example, an unsuccessful party can renew an application for access to children at any time.

4.6 Finally, the State party, "without necessarily disputing the standing of the author as a non-custodial parent to raise issues on behalf of the three children", argues that the communication falls within the Committee's decision in Rogl v Germany,[9] where the Committee relied in part on the fact that the child in question, aged 15, had not given any indication of agreeing that there had been a violation of the child's rights, to declare a parental claim inadmissible.

4.7 As to the merits of the claim of undue delay under article 14, paragraph 1, of the Covenant, the State party submits that the time taken to determine the author's application for access and to determine his appeal and application for leave to appeal was not excessive in the circumstances. First, the State party argues that a substantial part of the time taken by the Family Court to determine the application at first instance was necessary in order to allow the police investigation to proceed, arguing that the postponement of the hearing until completion of the investigation was necessary for the proper administration of justice. The State party also argues, second, that the author's application was factually and legally complex and procedurally intensive, requiring a five day hearing at first instance, further written submissions and a lengthy judgment. Third, the State party argues that the complexity of the proceedings and the proper appellate role of the courts made for an appropriate duration of that component of the proceedings.

4.8 With respect to the youngest child, E., where the proceedings were remitted, the State party argues that the rehearing was postponed pending the outcome of the appeal to the Court of Appeal, given the possible interlinkage of issues. The new allegations of sexual abuse in April 2004, also required investigation until September 2004, during which time all parties agreed to adjournment of the proceedings. The State party argues that since then, the case has been under constant review and that given serious allegations of abuse, careful balancing is necessary to ensure both the safety and welfare of children and the administration of justice.

[9] Communication No. 808/1998, Decision adopted on 25 October 2000.

4.9 On the claims under articles 17, 23 and 24 in general, the State party noted that the judge assessed, as a factual matter, that although allegations of sexual abuse had not been made out the author posed an unacceptable risk to the welfare of the children, and accordingly denied access. The State party invites the Committee to defer to this evidentiary assessment, there being no evidence of bad faith or other manifest unfairness.

4.10 As to the specific claim under article 17, the State party notes that the actions taken were lawful and in accordance with applicable legislation. It also concedes that the dismissal of the application for access could constitute "interference" within the meaning of article 17, though argues that such interference was in the best interests of the child. Section 16B of the Guardianship Act seeks to ensure that children are afforded the highest level of safety where there is family violence and/or allegations of abuse. The decision to refuse access was not arbitrary, as it was considered necessary by the Family Court to protect the children, and it was proportionate to the real risk posed by the author to his children.

4.11 As to the claims under article 23 and 24, the State party additionally argues that the regime established under section 16B of the Guardianship Act, setting out a residual capacity for the Court to assess real risk even if abuse allegations have not been established, is quite different from the broad discretion that was criticised by the Committee in its Views in Hendriks. The State party also refers to article 9 of the Convention on the Rights of the Child, for the proposition that no parental right of contact is absolute, and that protection of children from unacceptable risk is an exceptional circumstance which justifies departure from the usual position under article 23 that children should have direct and regular contact with parents. The State party also argues that if the author considered that circumstances had changed, it was open to him to bring a fresh application to the Family Court.

4.12 As to the claims under article 2, the State party argues that in the absence of a substantive breach of the Covenant, a breach of article 2 is not established. Its law is in compliance with the Covenant, as remedies exist to address any issue of compliance with Covenant rights. The right to fair trial and non-discrimination are expressly implemented by legislation. The courts also apply unincorporated international obligations in relation to the exercise of official powers, such as determination of the application for access. Arguments on protection of the family and children under the Covenant were raised before and considered by both appellate courts. The unavailability of a declaration of inconsistency with the Covenant is, so argues the State party, irrelevant to the availability of an adequate remedy, as required by article 2 – the unavailability of one particular kind of remedy does not necessarily lead to such a conclusion, as the Covenant is not prescriptive as to the manner in which a State party meets its obligations. The Court of Appeal also left open the existence of a declaration of inconsistency with the New Zealand Bill of Rights Act (which implements a number of Covenant rights), though there being no breach of the Bill of Rights on the facts it was unnecessary to decide definitively.

Author's comments on the State party's submissions

5.1 On 17 November 2005, the author disputed the State party's submissions on the issue of delay and denies that the length of time required for the two police investigations was justified. Although the issues were, albeit sensitive, neither factually nor legally complex, the first investigation took 18 months, the second six months. The author points out that there were no

independent witnesses that would prolong the investigation. He emphasises the importance of prompt justice where the rights of children are at issue, and argues instead that the reason an investigation requiring evidential interview(s) of a child and an interview of each parent can take 18 months is due to inadequate police resources and lack of appropriate prioritisation. The author emphasises the systemic difficulties at issue by reference to a series of media articles examining serious staff shortages in the police and Governmental moves to sharply increase police staff. The author notes that the State party's reply provided no detail whatsoever as to the process and mechanics of the police investigations in the author's cases which would explain the length of delay, and notes the concern expressed by the Family Court itself on the delay in this case.

The High Court was also troubled with the delay, the judge explicitly noting his regret that the parties had had to wait for the decision and attributing that to unspecified events during preparation of the judgment that were beyond his control.

5.2 Referring to the jurisprudence of the European Court of Human Rights in Zawadka v Poland,[10] the author argues that the procedural delays have determined the issue or at least very substantially prejudiced the author, who has not seen his son for half of the latter's natural life. The State party has not taken reasonable steps to facilitate contact, but rather is responsible for prolonged delay. A violation of article 14, paragraph 1, of the Covenant thus continues to occur, and the possibility of appealing the Family Court decision, once rehearing takes place, holds out the prospect of further delay.

5.3 At the appellate stage, the author notes that the rehearing directed by the Family Court has still not taken place, despite the passage of two years, a plainly prolonged period. The State party has failed to give, in the author's view, sufficient priority to child access applications. The explanation of the State party – that a psychologist's brief was concluded in May 2005, that the interview would take place in September 2005, and that the hearing would take place a few months thereafter – reveals either a shortage of psychologists or an extraordinary length of time for the process, either way a responsibility of the State party. The author points out that both the High Court and Court of Appeal delivered judgment within one month, undermining any claim that the cases were factually and legally complex.

5.4 As to exhaustion of domestic remedies with respect to E., the author argues that the State party cannot be responsible for protracted delay in the domestic judicial process and then hold non-exhaustion against the author. There are no effective remedies for the delays which have already occurred, and, in any event, there are no Covenant remedies available in the State party for breaches of the Covenant. It is not appropriate for Covenant remedies to depend on a prior breach of the New Zealand Bill of Rights Act, where that legislation does not reflect all the provisions of the Covenant and in any event gives way to inconsistent legislation.

[10] Application. No. 48542/88, judgment of 12 October 2005, at paras. 62 to 64: "The key consideration is whether those [national] authorities have taken all necessary steps to facilitate contact [between children and non-custodial parents] as can reasonably be demanded in the special circumstances of each case. Other important factors in proceedings concerning children are that time takes on a particular significance as there is always a danger that any procedural delay will result in the *de facto* determination of the issue before the court, and that the decision-making procedure provides requisite protection of parental interests" [internal citations omitted].

5.5 On the issue of the lawfulness of the appointment of the High Court judge, the author notes that the issue had been advanced before the High Court and the Court of Appeal, without a concluded view yet being reached.

5.6 As to the overlapping claims under articles 17, 23 and 24, the author notes that he was denied total access to the children by the court, without lesser forms of intervention, such as parental training, indirect access or denial of access for a limited time, being considered. The total denial of access lacks a reasoned judgment, and is wholly disproportionate and arbitrary in the circumstances. The author rejects the State party's argument that the finding that the author posed an "unacceptable risk" amounting to what it described as exceptional circumstances which justified a departure from the usual position under article 23, as circular, vague and uncertain. He observes that largely on the basis of a psychologist report prepared without any observation of the author and his children together, coupled with a vague and undefined residual concern by the Family Court judge despite the absence of a finding of abuse, he was denied any direct or indirect contact with his children.

5.7 On the issue of differing appeal jurisdiction available to the author in the Family Court, as opposed to that of the general civil and criminal courts, the author argues that there is nothing justifying such differentiation, which lacks objective and reasonable grounds, and does not pursue a legitimate Covenant basis. Moreover, the possibility of repeat applications invoked by the State party is equally applicable in numerous proceedings in the general courts, for example, bail and parole proceedings and applications for injunctions. The author notes that no other commonwealth jurisdictions operate such a truncated appeal system for family matters.

5.8 As to the question of the application of section 16B of the Guardianship Act in his case, the author notes that he was worse off not having been found to have abused his daughters than if he had been – had he been so found, the court would have been required to consider the series of specific matters listed in the section 16B of the Act before making a decision on access. Without such a finding, the author was not entitled as a matter of right to, and did not receive the benefit of, consideration of those issues by the judge before it denied him access. The result is, in the author's view, both arbitrary and discriminatory.

5.9 As to the article 2 issue, the author points out that the New Zealand Bill of Rights Act only partially reflects the Covenant, not addressing articles 17 or 26. The State party's courts have not considered the autonomous meanings of the Covenant's provisions.

Supplementary submissions of the parties

6. On 25 November 2005, the author made supplementary submissions, providing further support to the argument of systemic delay in the State party's courts, of which he claims to be victim. The author forwards a copy of the Judicature Amendment Bill, tabled in Parliament in May 2005, whose object is expressed as being alleviating the Court of Appeal's workload and increasing access to it, in order to avoid "an erosion of access to justice". The same Bill also removes limitations of appeal to the Supreme Court, which previously provided limited rights of appeal on family matters as compared to commercial issues, a distinction rejected by the author as discriminatory.

7. On 28 April 2006, the State party argued that the author's supplementary submission raised certain new issues not raised in the original communication, and requested that, in accordance with the Committee's approach in Jazairi v Canada,[11] they be declared inadmissible as an abuse of process for not having been raised earlier. The State party further argues that the author raises a number of matters that do not directly relate to or address the author's circumstances and the issues raised by his communication, including the issue of the correct interpretation of judicial appointment provisions being pursued in other litigation unrelated to the author's case. The issue of acting Judges' warrants has been raised before the domestic courts since the communication was lodged, and the courts are yet to reach a concluded view. On 26 September and 20 October 2006, the State party updated the Committee on factual developments up to 1 September 2006.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 As to the issue of the appointment of the High Court judge who heard the author's appeal to that Court, the Committee notes, on the basis of the information before it, that the issue of the lawfulness of such appointments was not raised before the domestic courts in the context of the proceedings that are pending before the Committee. It follows that this issue under article 14, paragraph 1, of the Covenant is inadmissible, for failure to exhaust domestic remedies, as required by article 5, paragraph 2(b), of the Optional Protocol.

8.3 The author has advanced claims under articles 17, 23 and 24 of the Covenant on behalf of his children. In this respect, the Committee notes that while, in principle, a non-custodial parent has sufficient standing to raise such issues on behalf of his or her child(ren).[12], it should be recalled that at the time of submission of the communication, the author's children were, respectively, 14, 10 and 7 years old. Nothing in the file indicates that the author ever sought to obtain his children's authorization to act on their behalf, although it transpires from the material before the Committee (see para 2.4) that the children had expressed the desire not to have contact with their father. In the circumstance, the Committee considers that absent such authorization, the author has no standing to advance claims under articles 17, 23 and 24 on behalf of his children.

8.4 As to the claim under article 26, the Committee is of the view that the author has not made out a sufficiently substantiated argument as to discrimination suffered by him in the present case, and considers that the claims advanced under this head are better addressed in the context of the claims under articles 17 and 23 of the Covenant. Similarly, the Committee considers insufficiently substantiated the claim under article 2 of the Covenant. It follows that these claims are inadmissible under article 2 of the Optional Protocol.

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[11] Communication No. 958/2000, Decision adopted on 26 October 2004.

[12] Balaguer Santacana v Spain Communication No. 417/1990, Views adopted on 15 July 1994, at paras 6.1 and 9.2.

8.5 As to the objections to the remaining claims based on insufficient substantiation, the Committee considers that in the light of its jurisprudence on issues in respect of family relations the claims are sufficiently substantiated for an examination of the merits. The Committee also notes, in connection with the State party's general objection concerning the evaluation of facts and evidence, that its task is not to re-evaluate the facts as determined by the domestic courts, but to assess whether the facts as so determined and the decisions based thereon comport with the requirements of the Covenant. The Committee accordingly proceeds to the examination on the merits of the admissible claims under articles 14, 17 and 23 of the Covenant.

Consideration of the merits

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

9.2 As to the claim of undue delay under article 14, paragraph 1, the Committee recalls its jurisprudence that the right to a fair trial guaranteed by this provision includes the expeditious rendering of justice, without undue delay.[13] The Committee recalls that the issue of delay must be assessed against the overall circumstances of the case, including an assessment of the factual and legal complexity of the case. The Committee notes, in this respect, that the resolution of the author's application for access with respect to the older two children, S. and C., lasted from the application in November 2000 until the Court of Appeal's refusal of leave in April 2004, a period of 3 years and 4 months. Within this timeframe, the allegations of abuse made against the author occupied the police from May 2001, when the author's wife made a statement to police, to January 2003, when the police decided not to prosecute – a period of one year and 8 months. The Committee notes, with respect to the youngest child, E., that the access application also commencing November 2000 was, at least as of September 2006 (the most recent information before the Committee) still unresolved. In this connection, the police investigation of the second set of abuse claims lodged after the author's success in the High Court ran from April to September 2004, a period of six months.

9.3 The Committee refers to its constant jurisprudence that "the very nature of custody proceedings or proceedings concerning access of a divorced parent to [the parent's] children requires that the issues complained of be adjudicated expeditiously".[14] The failure to so ensure may readily itself dispose of the merits of application, notably when – as in the present case – the children are of young age, and irreparably harm the interests of a non-custodial parent. The onus is thus on the State party to ensure that all State actors involved in the resolution of such issues, be they the courts, the police, child welfare authorities and others, are sufficiently well resourced and structured and establish their priorities in order to ensure sufficiently prompt resolution of such proceedings and safeguard the Covenant rights of the parties.

[13] Muñoz Hermoza v Peru, Communication No 203/1986, Views adopted on 4 November 1988; Fei v Colombia, op.cit., and González del Río v Peru, Communication No. 263/1987, Views adopted on 28 October 1992.
[14] Fei v Colombia, op.cit., at para 8.4, and Balaguer Santacana, op.cit.

9.4 In the present case, the State party has not demonstrated to the Committee the justification for the protracted delay in the resolution of the both sets of applications. In particular, the State party has not shown the necessity of police investigations of the extended period of time that occurred in this case in respect of allegations which, while certainly serious, were not legally complex and which at the factual level involved assessment of oral testimony of a very limited number of persons. The procurement of psychological reports to assist the court has also been particularly prolonged. The Committee notes further the concerns expressed by the domestic courts as to the passage of time in the proceedings. It follows, given the priority accorded to resolution of such matters and in light of the Committee's jurisprudence in comparable cases (see Fei), that the author's right to an expeditious trial under article 14, paragraph 1, of the Covenant was violated with respect to the application concerning S. and C., and continue to be violated given the still outstanding (as of September 2006) resolution of the application concerning E.

9.5 As to the author's own claims under articles 17 and 23 of the Covenant, the Committee notes that the Family Court found that it could not be shown that the author had abused his children. Nonetheless, the judge decided, on the basis of all the evidence available to and reviewed by him (see paragraphs 2.4 and 2.5 above), that to reinstate the author's access to his children would amount to an 'unacceptable risk to the welfare of the children'. The Committee notes that the trial judge in the Family Court proceeded to a full and balanced evaluation of the situation, on the basis of testimony of the parties and expert advice, and that, while acknowledging the far reaching nature of the decision to deny the author's application for access, the trial judge decided that it was in the children's best interest to do so. In the particular circumstances of the case, the Committee cannot conclude that the trial judge's decision violated the author's rights under articles 17, paragraph 1, and article 23, paragraph 1, of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by the State party of the author's rights under article 14, 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 author with an effective remedy, which includes the expeditious resolution of the access proceedings in relation to E. The State party should also ensure that such violations do not recur in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee expects to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

APPENDIX

Individual opinion (dissenting) of Committee member Ms. Ruth Wedgwood

This case concerns a family court proceeding and criminal investigation arising from allegations that a father presented a serious danger to the welfare of his young children. The Committee has concluded that so far as the Covenant is concerned, the family court judge was entitled to deny visitation rights to the father. The Committee has rejected the claim by the father, as author of this communication, that the judge's actions violated articles 17 and 23 of the International Covenant on Civil and Political Rights.

The claim of any parent to continued contact with a child deserves great weight under the standards of articles 17 and 23 of the Covenant. Nonetheless, the Committee has appropriately declined to substitute its own judgment for that of the Family Court. The court engaged in detailed fact-finding concerning allegations of inappropriate sexual activity by the father in regard to the children, and assessed whether continued contact with the parent would endanger the well-being of the affected children.

Though the Court acted within its competence in refusing the father's claim for visitation, the Committee announces that there was a violation of article 14 of the Covenant because, it is said, the Family Court at Wanganui, New Zealand took too long in reaching this conclusion and because the State party's ultimate decision in respect of the author's son was further delayed.

The dreary facts of this case are not fully explicated in the Views of the Committee. In particular, the potential gravity of harm to a child surely has some bearing on the appropriate process of investigation and assessment, as well as the remedy granted.

First, it should be noted that the author's application to the Family Court for access to his children was not the first step in this confrontation. (Compare Views of the Committee, at paragraph 2.1). Rather, in May 2000, the wife had moved for an order of protection against the author, after he allegedly threatened to shoot her and the children, and to put "the children in the car and gassing himself and the children."[15] The author was previously convicted for unlawfully discharging a shotgun at another person. The author declined to participate in the four month court proceeding on the protection order. A final order of protection in favor of the wife and children was entered in August 2000. Only thereafter, did the author apply for access to the children, despite the final protection order.

In considering the author's application for visitation with the children, the Family Court was confronted by several disturbing allegations. The eight-year-old daughter (designated as "C" in the court's judgment and in the Committee's Views) reported in two interviews in June 2001 and October 2002 that her father had had genital contact and sexual intercourse with her on a number of occasions. The eleven-year-old daughter (designated as "S") also stated that her father had touched her sexually on repeated occasions.

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[15] Reserved Judgment of Judge A.P. Walsh, in matter between E.R., Applicant, and F.R., Respondent, Family Court at Wanganui, New Zealand, June 24, 2003, at pp. 2-3 (slip opinion). The Committee has given a different set of initials to the father, who is the author of the complaint before us, calling him "E.B.".

In a June 26, 2002 report, a clinical psychologist informed the court that the older daughter "reported significant fear of ER. She did not want any contact with him".[16] In another report dated March 19, 2003, this same daughter "remained opposed to any contact with ER".[17]

So, too, the younger girl ("C") stated in March 2003 that "she did not want any contact because she did not trust him to keep her safe".[18] A younger brother ("E"), who had allegedly witnessed the father's kitchen table massage of the younger daughter "advised he did not want to see his father".[19]

On June 2003, the New Zealand Family Court rendered a detailed judgment of 57 pages, analyzing the interviews and psychological evaluations of the children. The Court's evaluation also included the psychological assessment of both parents, testimony by both parents, and affidavits from four other persons. The judge took note of the evidentiary standard of New Zealand law that "the more serious the allegation … the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability". [20] In part, because there was no corroborative medical evidence of the claimed incidents of abuse, the Court ultimately decided that it could not find, by a balance of probabilities, that the father had sexually abused the children.

However, the Court did find that the father's admitted actions and "lack [of] insight as to how the children have been affected" justified the denial of any right of visitation with the children. The judge noted that he found "on the evidence that ER was aware FR [his former wife] had concerns about his lack of boundaries with the children, such as going to bed naked with them and having them sit on his knee while he was sitting on the toilet but he continually ignored those concerns". The judge further noted the psychologist's conclusion that "It was unclear whether ER would ever accept the children's concerns as legitimate concerns" and that "[a]ll the children appeared to be rejecting contact with ER".[21]

The Court reviewed testimony that in cases of inappropriate sexual activity, even a supervised access arrangement could be detrimental to the children.[22] In addition, the Court noted that ER had been "convicted twice for breaches of [a] protection order" with "three other charges dismissed",[23] which might present difficulties for the feasibility of effectively supervised visits.

Each of the factors noted in Section 16B(5) of the New Zealand Guardianship Act 1968 applicable to violent conduct was in fact examined by the Court insofar as they also applied to the admitted instances of inappropriate conduct by the father.

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[16] Id., at p. 20 (slip opinion).
[17] Id., at p. 25.
[18] Id.
[19] Id.
[20] Id. at p. 45.
[21] Id. at p. 56.
[22] Id. at p. 37.
[23] Id. at p. 54.

The Committee now finds this process of evaluation to have taken unduly long, but in so concluding, fails to take adequate account of the real problems involved in parallel civil and criminal proceedings. A criminal proceeding has critical safeguards for the defendant. The right against self-incrimination can be seriously jeopardized by the mandatory processes of a civil proceeding. Therefore, it is appropriate to allow a criminal investigation to be resolved before a civil matter is heard, even in family court. After the criminal complaint against the father was closed by the police on January 2003, the Family Court Judge held a five-day hearing in March 2003 on the application for visitation, receiving written submissions on April 11, 2003, and issued his opinion on June 24, 2003 as to both the daughters and the son. This was not an undue delay.

The Committee chides the state party for the length of time taken in the police examination. But the allegation of an adult's sexual abuse of young children warrants the caution of a careful and deliberate investigation. The consequences to a defendant of such allegations and the damage to children from a failure to take precautionary measures are both so grave, that a hurried investigation is not appropriate.

In the police investigation, an initial written statement by the children's mother was followed by several police interviews, and a 52-page written statement.[24] The children were questioned in five separate videotaped interviews, and affidavits were received from persons familiar with the mother. A police investigation typically calls for officers trained in the handling of children. The suggestion that this case could be handled quickly because it allegedly involved the "assessment of oral testimony of a very limited number of persons", see Views of the Committee, at para. 9.4, does not give weight to the difficulty of assessing delicate facts in the close confines of a family, and the trauma to children that can be caused by the very process of investigation.

The Committee has also concluded that there was undue delay in the Family Court's later proceeding in regard to the son. This additional matter began after the High Court reversed the denial of the father's visitation with the son, and after the author's son (then six years old) alleged sexual abuse regarding the father on April 21, 2004.

According to the State party, "all parties agreed to adjournment of the proceedings" for five months, to permit a further police investigation of the son's allegation.[25] The author's wife then requested an updated psychological report, and the report was received in September 2005. It was not until March 2006 that author's counsel requested a "critique" of the report and then asserted in June 2006 that the son's lawyer could not appropriately assist the court in this critique. It would thus seem that any delay in the disposition of this later allegation is not wholly attributable to the state. The finding of a violation under article 14 is not made out, just because a case could have been handled more quickly.

I do join with my colleagues in concluding that there are indeed serious doubts as to the standing of the father to raise the rights of his children in this proceeding, for there is no indication in the record that the children wished to join in the matter. At the time this

[24] Id. at p. 7.
[25] See Views of the Committee, at para. 4.8.

communication was filed on December 24, 2004, the children were 14, 10, and 7 years old, and were sufficiently articulate to be interviewed by a psychologist. Since they stated that they wished to have nothing further to do with their father, it seems implausible that they would wish him to act in their stead in a complaint before this Committee.

The Covenant protects the family as "the natural and fundamental group unit of society". Article 17 of the Covenant prohibits "arbitrary or unlawful interference with … family", and article 23 provides that the family is "entitled to protection by society and the State".

Yet these articles also permit, and indeed may require, the protection of children against violence and abuse, as well as other significant risks to their well-being. Numerous states that subscribe to the Covenant give weight to "the best interests of the child" in devising solutions to allegations of serious parental misconduct.[26]

This was not a simple custody dispute, but rather a case where an erroneous decision could have threatened the fundamental health and welfare of a child. It is not appropriate for us to deride the conscientious attempt of the State party to reach a just result in this case.

[*Signed*[Ruth Wedgwood

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

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[26] Cf. Articles 3 and 9, United Nations Convention on the Rights of the Child, 1577 UN Treaty Series, 28 International Legal Materials 1456 (1989). New Zealand joined the Rights of the Child Convention on 6 April 1993.