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Seventy-second session
9-27 July 2001

VIEWS

Communication No. 930/2000

Submitted by:	Mr. Hendrick Winata and Ms. So Lan Li (represented by counsel, Anne O'Donoghue)
Alleged victims:	The authors and their son, Barry Winata
State party:	Australia
Date of communication:	11 May 2000 (initial submission)
Prior decisions:	Special Rapporteur's rule 91 decision, transmitted to the State party on 23 May 2000 (not issued in document form)
Date of adoption of Views:	26 July 2001

On 26 July 2001, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 930/2000. The text of the Views is appended to the present document.

[ANNEX]

- Made public by decision of the Human Rights Committee.

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

Seventy-second session
concerning

Communication No. 930/2000**

Submitted by:	Mr. Hendrick Winata and Ms. So Lan Li (represented by counsel, Anne O'Donoghue)
Alleged victims:	The authors and their son, Barry Winata
State party:	Australia
Date of communication:	11 May 2000 (initial submission)

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

Meeting on: 26 July 2001,

Having concluded its consideration of communication No. 930/2000 submitted to the Human Rights Committee by Mr. Hendrick Winata and Ms. So Lan Li 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. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Louis Henkin, Mr. Ahmed Tawfik Khalil, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Patrick Vella and Mr. Maxwell Yalden.

Under rule 85 of the Committee's rules of procedure, Mr. Ivan Shearer did not participate in the examination of the case.

The text of a dissenting individual opinion signed by Committee members Prafullachandra Natwarlal Bhagwati, Ahmed Tawfik Khalil, David Kretzmer and Max Yalden is appended to the present document.

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

1. The authors of the communication, dated 4 May 2000, are Hendrik Winata, born 9 November 1954 and So Lan Li, born 8 December 1957, both formerly Indonesian nationals but currently stateless, also writing on behalf of their son Barry Winata, born on 2 June 1988 and an Australian national. The authors complain that the proposed removal of the parents from Australia to Indonesia would constitute a violation of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant by the State party. They are represented by counsel.

The facts as presented

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]

The complaint

3.1 The authors allege that their removal to Indonesia would violate rights of all three alleged victims under articles 17, 23, paragraph 1, and 24, paragraph 1.

3.2 As to the protection of unlawful or arbitrary interference with family life, protected under article 17, the authors argue that de facto relationships are recognized under Australian law, including in migration regulations, and that there should be no doubt that their relationship would be so recognized by the Australian courts. Their relationship with Barry would also be recognized as a "family" by Australia. They contend that it is clear from the psychiatric report that there is strong and effective family life.

3.3 The authors contend that a removal which separates parents from a dependent child, as is claimed could occur in this case if Barry were to remain in Australia, amounts to an "interference" with that family unit. While conceding that the removal of Mr. Winata and Ms. Li is lawful under domestic law by virtue of the Migration Act, the authors cite the Committee's General Comment 16 to the effect that any interference must also be in accordance with the provisions, aims and objectives of the Covenant and be reasonable in the particular circumstances.

3.4 The authors claim that if they are to be removed, the only way to avoid their separation from Barry is for him to leave with them and relocate to Indonesia. They claim however that Barry is fully integrated into Australian society, speaks neither Indonesian nor Chinese, and has no cultural ties to Indonesia since he has always lived in Australia. Barry is described by the psychologist's report as "an Inner Western Sydney multicultural Chinese Australian boy, with all the best characteristics of that culture and subculture [who] would be completely at sea and at considerable risk if thrust into Indonesia". Alternatively, the authors contend it would be unconscionable and very damaging to break up the family unit and set Barry adrift in Australia them if he was to be left there while they returned to Indonesia. Either way, say the authors, the removal would be arbitrary and unreasonable.

3.5 In coming to this conclusion, the authors refer to the jurisprudence of the European Court of Human Rights, which in its interpretation of the analogous article 8 of the European Convention has been generally restrictive towards those seeking entry into a State for purposes of "family creation", while adopting a more liberal approach to existing families already present

in the State. The authors urge that a similar approach be taken by the Committee, while arguing that the right in article 17 of the Covenant is stronger than article 8 of the European Convention in that it is not expressed as subject to any conditions, and that therefore the individual's right to family life will be paramount rather than balanced against any State right to interfere with the family.

3.6 As to articles 23 and 24, the authors do not develop any specific argumentation other than to observe that article 23 is expressed in stronger terms than article 12 of the European Convention, and that article 24 specifically addresses the protection of the rights of the child as such or as a member of a family.

The State party's observations with regard to the admissibility and merits of the communication

4.1 The State party argues that the authors' claims are inadmissible for failure to exhaust domestic remedies, for incompatibility with provisions of the Covenant, and (in part) for insufficient substantiation.

4.2 As to non-exhaustion of domestic remedies, the State party submits that three remedies remain available and effective. Firstly, the authors failed to seek, as provided for in the Migration Act, judicial review in the Federal Court (along with subsequent possible appeals) of the RRT's decision of 25 January 2000. Although the time has now passed for bringing such an application, the State party refers to the Committee's decision in N.S. v. Canada[7] that a failure to exhaust a remedy in time means that available domestic remedies have not been exhausted. Secondly, the authors could apply by way of constitutional remedy for judicial review in the High Court, which could direct the RRT to reconsider the matter according to law if a relevant error of law is established. The State party notes the Committee's jurisprudence that mere doubts as to the effectiveness of a remedy does not absolve an author from pursuing them. In the absence of the legal advice provided to the authors that an application for judicial review would have no prospects of success, the authors cannot be said to have convincingly demonstrated that these remedies would not be effective.

4.3 Finally, the State party notes that the authors have applied for parent visas. While the authors would have to leave the country to await the grant of the visa and would be "queued" with other applicants, they would not have to wait an indefinite period. Barry could live with the authors in Indonesia until the visas were granted, or continue his schooling in Australia.

4.4 As to incompatibility with the provisions of the Covenant, the State party argues that the authors' allegations do not come within the terms of any right recognized by the Covenant. The State party argues that the Covenant recognizes, in articles 12, paragraph 1, and 13, the right of State parties to regulate the entry of aliens into their territories. If the authors are removed from Australia it will be due to the fact that they have illegally remained in Australia after the expiry of their visas. The Covenant does not guarantee the authors the right to remain in Australia or to establish a family here after residing in Australia unlawfully and knowingly.

4.5 As to non-substantiation of the allegations, the State party contends that in relation to articles 23, paragraph 1, and 24, paragraph 1, the authors have provided insufficient evidence to substantiate their claims. The authors simply allege that the State party would breach these

provisions if it removed them, but they provide no details in respect of these allegations. The State party states that both the nature of these particular allegations and the way in which the evidence provided relates to them is unclear from the communication. The evidence and argument supplied relates only to article 17.

4.6 As to the merits of the claim under article 17, the State party notes at the outset its understanding of the scope of the right in that article. Unlike the corresponding provision of the European Convention, limitations on article 17 are not limited to those "necessary" to achieve a prescribed set of purposes, but, more flexibly, must simply be reasonable and not arbitrary in relation to a legitimate Covenant purpose. The State party refers to the travaux préparatoires of the Covenant which are clear that the intent was that States parties should not be unnecessarily restricted by a list of exceptions to article 17, but should be able to determine how the principle should be given effect to.[8]

4.7 Turning to the particular case, the State party, while not objecting to the classification of the authors as a "family", argues that the removal of the authors would not constitute "interference" with that family, and that in any event such a step would not be arbitrary or unreasonable in the circumstances.

4.8 As to "interference", the State party argues that if the authors were removed, it would take no steps to prevent Barry also leaving with them to live in Indonesia, where the family could continue to live together. There is no evidence that they would be unable to live as a family, and the RRT found no danger of persecution for them. While acknowledging a disruption to Barry's education in this event, the State party contends this does not amount to "interference with family".[9] It points out that it is common for children of all ages to relocate with parents to new countries for various reasons.

4.9 The State party observes that Barry has no relatives in Australia other than his parents, whereas there are a significant number of close relatives in Indonesia, with whom the authors stay in contact with and who would if anything enhance Barry's family life. The State party submits therefore that, like the European Convention, the Covenant should be construed not so as to guarantee family life in a particular country, but simply to effective family life, wherever that may be.

4.10 Alternatively, if Barry were to remain in Australia, the family would be able to visit him and in any case maintain contact with him. This is the same situation as many children face at boarding schools, and such physical separation cannot mean that the family unit does not exist. In any event, the decision as to which of these options the parents elect is purely theirs and not the result of the State party's actions, and therefore does not amount to "interference". Moreover, whatever the decision, the State party will do nothing to prevent the family's relations from continuing and developing.

4.11 Even if the removal can be considered an interference, the State party submits, the action would not be arbitrary. The authors came to Australia on short-term visas fully aware that they were required to leave Australia when the visas expired. Their removal will be the result of the applicants having overstayed their visas which they were aware only allowed temporary residence, and remaining unlawfully in Australia for over 10 years.[10] The laws which require

their removal in these circumstances are well-established and generally applicable. The operation of these laws regulating removal is neither capricious nor unpredictable, and is a reasonable and proportionate means of achieving a legitimate purpose under the Covenant, that is immigration control.

4.12 In the circumstances, the authors knew when Barry was born that that there was a risk that they would not be able to remain and raise Barry in Australia. It has not been shown that there are any significant obstacles to establishing a family in Indonesia, and they will be re-granted Indonesian citizenship if they apply for it. Both authors received their schooling in Indonesia, speak, read and write Indonesian and have worked in Indonesia. They will be able to raise Barry in a country whose language and culture they are familiar with, close to other family members. Barry understands a significant amount of domestic Indonesian, and hence any language barrier that Barry would face would be fairly minor and, given his young age, could be quite easily overcome. Nor would it be unreasonable if the authors elected for him to remain in Australia, for he would be able to maintain contact with his parents and have access to all the forms of support provided to children separated from their parents.

4.13 Further evidence of the reasonableness of removal is that the authors' requests for protection visas were determined on their facts according to law laying down generally applicable, objective criteria based on Australia's international obligations, and confirmed upon appeal. In due course, the authors' applications for parent visas will be made according to law, and it is reasonable that the authors' request be considered along with others making similar claims.

4.14 The State party refers to the Committee's jurisprudence where it has found no violation of article 17 (or article 23) in deportation cases where the authors had existing families in the receiving State.[11] Furthermore, a factor of particular weight is whether the persons in question had a legitimate expectation to continuing family life in the particular State's territory. The cases decided before the European Court support such a distinction between cases of families residing in a State lawfully and unlawfully respectively.

4.15 By way of example, in Boughanemi v. France[12] the European Court found the applicants' deportation compatible with article 8 where he had been residing in France illegally, even though he had an existing family in France. In the circumstances of Cruz Varas v. Sweden,[13] similarly, the Court found expulsion of illegal immigrants compatible with article 8. In Bouchelka v. France,[14] where the applicant had returned to France illegally after a deportation and built up a family (including having a daughter), the Court found no violation of article 8 in his renewed deportation. By contrast, in Berrehab v. The Netherlands,[15] the Court found a violation in the removal of the father of a young child from the country where the child lived where the father had lawfully resided there for a number of years.[16]

4.16 Accordingly, the State party argues that the element of unlawful establishment of a family in a State is a factor weighing heavily in favour of that State being able to take action which, if the family had been residing lawfully in the State, might otherwise have been contrary to article 17. As the European Court has noted, article 8 of the European Convention does not guarantee the most suitable place to live,[17] and a couple cannot choose the place of residence for its family simply by unlawfully remaining in the State it wishes to raise its family and having

children in that State. It follows that the authors, residing in Australia unlawfully and fully aware of the risk that they might not be able to remain and raise a family in Australia, cannot reasonably expect to remain in Australia, and their removal is not arbitrary contrary to article 17.

4.17 As to article 23, paragraph 1, the State party refers to the institutional guarantees afforded by that article.[18] It states that the family is a fundamental social unit and its importance is given implicit and explicit recognition, including by allowing parents to apply for visas so they can live with their children in Australia (as the authors have done) and providing parents special privileges compared to other immigrants. Article 23, like article 17, must be read against Australia's right, under international law, to take reasonable steps to control the entry, residence and expulsion of aliens. As the RRT found the authors are not refugees and do not suffer a real chance of harm in Indonesia,[19] and as Barry can remain in Australia attending education or return to Indonesia at the authors' discretion, the existence of the family would not be threatened or harmed in the event of a return.

4.18 As to article 24, paragraph 1, the State party refers to a number of legislative measures and programmes designed specifically to protect children and to provide assistance for children at risk.[20] The removal of the authors from Australia is not a measure directed at Barry, who as an Australian citizen (since June 1998 only) is entitled to reside in Australia, regardless of where his parents live. The authors' removal would be a consequence of them residing in Australia illegally, rather than a failure to provide adequate measures of protection for children. When Barry was born, the authors were fully aware of the risk that they would one day have to return to Indonesia.

4.19 The State party argues that removal of the authors would neither involve a failure to adequately protect Barry as a minor or harm him. Both the delegate of the Minister for Immigration and Multicultural Affairs and the RRT found that there was no more than a remote risk that the authors would face persecution in Indonesia, and no evidence has been presented to suggest that Barry would be at any greater risk of persecution if he went to Indonesia with his parents.

4.20 Adopting its argumentation under article 17 on "interference" with the family, the State party argues that there are no significant obstacles to Barry continuing a normal life in Indonesia with his family. The State party disputes the psychiatric opinion to the effect that if Barry returned with the authors he would be "completely at sea and at considerable risk if thrust into Indonesia". It argues that while the interruption to Barry's routine may make the move to Indonesia difficult for him at first, his age, multicultural background[21] and understanding of Indonesian mean he is likely to adjust quickly. Barry could continue a good schooling in Indonesia in the physical and emotional company of the authors (who were born, raised and lived most of their lives there) and other close relatives; alternatively, if he chooses, as an Australian citizen he would also be entitled to complete his high schooling and tertiary education in Australia. While this would mean separation from the authors, it is common for children not to live with their parents during high school and while attending tertiary education, and it is common for children and young adults from south-east Asian countries to attend school and university in Australia. As an Australian citizen, he would be protected to the full extent possible under Australian law and would receive the same protection which is given to other Australian children who are living in Australia without their parents.

Author's comments on the State party's submissions

5.1 As to the admissibility of the communication, the author contests the State party's contentions on exhaustion of local remedies, incompatibility with the Covenant and insufficient substantiation.

5.2 Regarding the exhaustion of local remedies, the author argues that the requirement to exhaust domestic remedies must mean that the particular complaint is presented to any available State organs before that complaint is presented to the Committee. The remedies claimed by the State party still to be available relate to the refugee process and its evaluations of fear of persecution. Yet the complaint here is not related to any refugee issues, bur rather concerns the interference with family life caused by the removal of the authors. Accordingly, the author submits that there can be no requirement to pursue a refugee claim when the complaint relates to family unity.

5.3 As for the joint parent visa application, the author notes that the authors would have to leave Australia pending determination of the application where, even if successful, they would have to remain for several years before returning to Australia. In any event, Department of Immigration statistics show that no parent visas at all were issued by the Australian authorities in Jakarta between 1 September 2000 and 28 February 2001, and the average processing time worldwide for such visas is almost four years. In view of current political disputes regarding these visas, these delays will by the State party's own admission increase.[22] The author regards such delays as clearly unacceptable and manifestly unreasonable.

5.4 As to the State party's submissions that the authors' allegations are incompatible with the provisions of the Covenant, in particular articles 12, paragraph 1, and 13, the authors refers to the Committee's General Comment 15. That states that while the Covenant does not recognize a right of aliens to enter or reside in a State party's territory, an alien may enjoy the protection of the Covenant even in relation to entry or residence where, inter alia, issues of respect for family life arise. The authors consider article 13 not relevant to this context.

5.5 The authors object to the State party's argument that the claim of violation of articles 23, paragraph 1, and 24, paragraph 1, have not been substantiated. The authors state that the facts of the claim relate to those provisions in addition to article 17, and argue that a breach of article 17 may also amount to a breach of the institutional guarantees in articles 23 and 24.

5.6 On the merits, the authors regard the State party's primary submission to be that there is no reason why Barry could not return to Indonesia to live with them if they are removed. The authors contend this is inconsistent with the available psychological evidence provided to the Minister and attached to the communication. The authors also claim, in respect of the suggestion that Barry remain (unsupervised) in Australia pending the outcome of their application for re-entry, that this would be clearly impractical and not in Barry's best interests. The authors do not have access to the funds required for Barry to study at boarding school, and there is no one available to take over Barry's care in their absence.

Issues and proceedings before the Committee

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

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

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

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

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

7.1 As to the claim of violation of article 17, the Committee notes the State party's arguments that there is no "interference", as the decision of whether Barry will accompany his parents to Indonesia or remain in Australia, occasioning in the latter case a physical separation, is purely an issue for the family and is not compelled by the State's actions. The Committee notes that there may indeed be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of a family is entitled to remain in the territory of a State party does

not necessarily mean that requiring other members of the family to leave involves such interference.

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

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

8. The Human Rights Committee, 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 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.

10. Bearing in mind that, by becoming a State 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 to provide an effective and enforceable remedy in case a violation

has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to its Views.

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.

[7] Communication 26/1978, declared inadmissible on 28 July 1978.

[8] Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights (1987), at 347.

[9] The State party refers to the decision of the European Commission of Human Rights in Family X v. the United Kingdom (Decisions and Reports of the European Commission of Human Rights 30 (1983)), which found that the fact that expulsion would prevent the son from continuing his education in the United Kingdom did not constitute an interference with the right to respect for family life.

[10] The 10-year period does not include the time the authors have been allowed to remain in Australia while they seek to legalize their status.

[11] Stewart v. Canada (Comm. 538/1993) and Canepa v. Canada (Comm. 558/1993).

[12] (1996) 22 EHRR 228.

[13] Judgment of 20 March 1991 (Case 46/1990/237/307).

[14] Judgment of 27 January 1997.

[15] (1988) 11 EHRR 322.

[16] The State party points out that in that case, unlike the present circumstances, the proposed action would have split the two parents between two countries.

[17] Ahmut v. The Netherlands (Application No. 21702/93, judgment of 28 November 1996).

[18] Nowak, United Nations Covenant on Civil and Political Rights: CCPR Commentary, NP Engel (1993) at 460.

[19] The refugee application, so the State party, shows that Mr. Winata was never arrested, detained, imprisoned, interrogated or mistreated in Indonesia, nor that his property was damaged.

[20] Reference is made to its Third Periodic Report under the International Covenant on Civil and Political Rights, at paragraphs 323-332 and 1193.

[21] The State party refers to the psychiatric report's classification of Barry as a "multicultural Chinese Australian boy".

[22] The author supplies a copy of a media release of 11 October 2000 by the Minister for Immigration and Multicultural Affairs to this effect.

[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.]

Individual opinion by Committee members Prafullachandra Natwarlal Bhagwati, Tawfik Khalil, David Kretzmer and Max Yalden (dissenting)

1. The question in this communication is neither whether the case of the authors and their son arouses sympathy, nor whether Committee members think it would be a generous gesture on the part of the State party if it were to allow them to remain in its territory. It is only whether the State party is legally bound under the terms of the International Covenant on Civil and Political Rights to refrain from requiring the authors to leave Australia. We cannot agree with the Committee's view that the answer to this question should be in the affirmative.

2. The Committee bases its Views on three articles of the Covenant: articles 17, paragraph 1, in conjunction with article 23, and article 24. The authors provided no information whatsoever on measures of protection that the State party would be required to take in order to comply with its obligations under the latter article. Many families the world over move from one country to another, even when their children are of school age and are happily integrated in school in one country. Are States parties required to take measures to protect children against such action by their parents? It seems to us that a vague value judgment that a child might be better off if some action were avoided does not provide sufficient grounds to substantiate a claim that a State party has failed to provide that child with the necessary measures of protection required under article 24. We would therefore have held that the authors failed to substantiate, for the purposes of admissibility, their claim of a violation of article 24, and that this part of the communication should therefore have been held inadmissible under article 2 of the Optional Protocol.

3. As far as the claim of a violation of article 17 is concerned, we have serious doubts whether the State party's decision requiring the authors to leave its territory involves interference in their family. This is not a case in which the decision of the State party results in the inevitable separation between members of the family, which may certainly be regarded as interference with the family.[22] Rather the Committee refers to "substantial changes to long-settled family life." While this term does appear in the jurisprudence of the European Court of Human Rights,[22] the Committee fails to examine whether it is an appropriate concept in the context of article 17 of the Covenant, which refers to interference in the family, rather than to respect for family life mentioned in article 8 of the European Convention. It is not at all evident that actions of a State party that result in changes to long-settled family life involve interference in the family, when there is no obstacle to maintaining the family's unity. We see no need to express a final opinion on this question in the present case, however, as even if there is interference in the authors' family, in our opinion there is no basis for holding that the State party's decision was arbitrary.

4. The Committee provides no support or reasoning for its statement that in order to avoid characterization of its decision as arbitrary the State party is duty-bound to provide additional factors besides simple enforcement of its immigration laws. There may indeed be exceptional cases in which the interference with the family is so strong that requiring a family member who is unlawfully in its territory to leave would be disproportionate to the interest of the State party in maintaining respect for its immigration laws. In such cases it may be possible to characterize a decision requiring the family member to leave as arbitrary. However, we cannot accept that the

mere fact that the persons unlawfully in the State party's territory have established family life there requires a 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." The implications of this interpretation, adopted by the Committee, are that if persons who are unlawfully in a State party's territory establish a family and manage to escape detection for a long enough period they in effect acquire a right to remain there. It seems to us that such an interpretation ignores prevailing standards of international law, which allow states to regulate the entry and residence of aliens in their territory.

5. As stated above, the State party's decision in no way forces separation among family members. While it may indeed be true that the authors' son would experience adjustment difficulties if the authors were to return with him to Indonesia, these difficulties are not such as to make the State party's decision to require the authors to leave its territory disproportionate to its legitimate interest in enforcing its immigration laws. That decision cannot be regarded as arbitrary and we therefore cannot concur in the Committee's view that the State party has violated the rights of the authors and their son under articles 17 and 23 of the Covenant.

6. Before concluding this opinion we wish to add that besides removing any clear meaning from the terms "interference with family" and "arbitrary", used in article 17, it seems to us that the Committee's approach to these terms has unfortunate implications. In the first place, it penalizes States parties which do not actively seek out illegal immigrants so as to force them to leave, but prefer to rely on the responsibility of the visitors themselves to comply with their laws and the conditions of their entry permits. It also penalizes States parties, which do not require all persons to carry identification documents and to prove their status every time they have any contact with a state authority, since it is fairly easy for visitors on limited visas to remain undetected in the territory of such States parties for long periods of time. In the second place, the Committee's approach may provide an unfair advantage to persons who ignore the immigration requirements of a State party and prefer to remain unlawfully in its territory rather than following the procedure open to prospective immigrants under the State party's laws. This advantage may become especially problematical when the State party adopts a limited immigration policy, based on a given number of immigrants in any given year, for it allows potential immigrants to "jump the queue" by remaining unlawfully in the State party's territory.

[signed] Prafullachandra Natwarlal Bhagwati

[signed] Ahmed Tawfik Khalil

[signed] David Kretzmer

[signed] Max Yalden

[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.]