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HUMAN RIGHTS COMMITTEE
Eighty-fourth session
11 – 29 July 2005

DECISION

Communication No. 1127/2002

Submitted by:	Elizabeth Karawa, Josevata Karawa and Vanessa Karawa (represented by counsel, Anne O'Donoghue)
Alleged victim:	The authors
State party:	Australia
Date of communication:	19 September 2002 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 17 October 2002. (not issued in document form)
Date of decision:	21 July 2005

* Made public by decision of the Human Rights Committee.

Subject matter – Proposed removal of parents of an Australian minor to Fiji after significant passage of time in Australia

Procedural issues – Exhaustion of domestic remedies

Substantive issues – Arbitrary interference with family – Protection of family unit – Protection of minors

Articles of the Covenant – articles 17, 23, paragraph 1, and 24, paragraph 1

Articles of the Optional Protocol – article 5, paragraph 2(b)

[ANNEX]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-fourth session

concerning

Communication No. 1127/2002[*]

Submitted by:	Elizabeth Karawa, Josevata Karawa, Vanessa Karawa (represented by counsel, Anne O'Donoghue)
Alleged victim:	The authors
State party:	Australia
Date of communication:	19 September 2002 (initial submission)

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

Meeting on 21 July 2005

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Elizabeth and Josevata Karawa, both Fijian nationals born in Fiji in 1968 and 1967, respectively. They bring the communication on their own behalf and on behalf of their daughter Vanessa Karawa, an Australian national at the time the communication was submitted, who was born in Australia on 24 February 1989. The authors claim that their expulsion from Australia to Fiji would amount to a violation by Australia of articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant. They are represented by counsel.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Nigel Rodley, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in the adoption of the present decision.

The facts as presented

2.1 In 1987, the authors, both at that time illegally in Australia after their temporary permits had expired, started a relationship. In February 1989, a daughter was born to them, who later, upon reaching the age of 10, became an Australian citizen. In 1990, Mrs. Karawa applied (including her husband and daughter in the application) for a protection visa on the advice of a migration agent who suggested that an application for refugee status was the only available course to achieve a legal presence in Australia.

2.2 On 31 July 1995, the (then) Department of Immigration and Ethnic Affairs refused the application, finding that the harm or mistreatment claimed in the event of a return to Fiji was not sufficient to amount to persecution. On 22 August 1995, the authors engaged a second migration agent to appeal to the Refugee Review Tribunal (RRT). An application for review was lodged. On 12 January 1996, the RRT received "signed and dated written advice" withdrawing the application. On 2 May 1996, Mr. Karawa, with the support of his employer, made an unsuccessful application for a visa under the Employment Nomination Scheme.

2.3 In 2000, the authors, having allegedly not heard the outcome of the RRT appeal, engaged the second migration agent to add them to a class action. They obtained bridging visas on the basis of the class action application. In May 2001, the migration agent advised that the class action had been refused, but that another class action had been commenced. The authors engaged the agent to add them to this second action. In July 2002, having heard of the decision on the second action, the authors were advised upon inquiry of the agent that they had not been included in the action as they had never applied to the RRT. The authors argue that "it thus appeared that [the agent] had never applied for review to the RRT as [Mrs. Karawa] had requested and paid for".[1]

2.4 As, according to the *Migration* Act, an application to the RRT must be made within 28 days of the relevant decision, the passage of six years meant that review rights of the original immigration decision had been lost. Moreover, the authors were allegedly unable to apply for any other substantive on-shore visas, with the exception, with leave of the Minister, of a further protection visa under section 48B of the *Migration* Act.

2.5 On 24 July 2002, Mrs. Karawa wrote to the Minister for Immigration and Multicultural and Indigenous Affairs and the Minister for Citizenship and Multicultural Affairs, seeking to remain in Australia. She was advised that there was no option but to leave Australia, for which she was granted a bridging visa in order to obtain a Fijian passport and make the necessary arrangements. On 12 August 2002, Vanessa Karawa wrote to the Ministers and, citing provisions of the Convention on the Rights of the Child, requested that her parents be permitted to remain.

2.6 On 10 September 2002, the Minister for Immigration and Multicultural and Indigenous Affairs responded to the effect that he had no legal power to intervene, as no appeal to the RRT had been resolved against the authors. He advised of a number of migration visa applications, including family-based options, that the authors might wish to consider making from outside of Australia.

[1] The authors however supply a letter of the RRT, dated 22 August 1995, confirming that an application for review had been lodged with it that day.

2.7 On 30 September 2002, the authors' bridging visas expired and they became unlawful non-citizens, with their whereabouts unknown. Steps will be taken by the Australian authorities to remove them from Australia if they are found.

The complaint

3.1 The authors allege that their removal to Fiji would violate articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant. In their view, to have Vanessa remain in Australia is not an option, while they do not feel they can take her to Fiji with them. They argue that if Vanessa returns to Fiji, she will be isolated and stigmatized in their home village, as a result of an earlier failed marriage of her mother. The authors point out that Vanessa is an above average student, has neither Fijian friends nor any desire to live there. Neither does she possess knowledge of the Fijian language or culture. The authors and their daughter are also "highly involved" in church life and the community.

3.2 The authors contend that an application for a parent visa made from outside Australia would take "several years" to resolve. The Department of Immigration's own documentation indicates that in view of the large number of applicants for the 500 visas annually available in this category, "a very substantial wait" can be expected.

3.3 In the authors' view, the case is "in principle" no different from that in Winata et al. v Australia.[2] They argue that the notion of "family" in the Covenant is to be interpreted broadly, and that the relationship between the authors and their daughter clearly qualifies as such. In addition, an expulsion separating parents from a dependent child, as would in their view occur in the present case, amounts to "interference" within the meaning of article 17.[3] Finally, while lawful under Australian law, the removal of the parents is arbitrary. They explain that the only means by which separation may be avoided would be for Vanessa to leave with them and relocate to Fiji. In their view, this would not be in accordance with the provisions, aims or objectives of the Covenant, nor be reasonable in the circumstances, as Vanessa is fully integrated into Australian society, has never been to Fiji and has no cultural ties to that country. It would also be unreasonable, in their view, to expect Vanessa to remain in Australia while the parents are removed. Thus, the authors regard their removal as being contrary to articles 17, 23, paragraph 1, and 24, paragraph 1, of the Covenant.

3.4 The authors support this conclusion by referring to articles 8 and 12 of the European Convention on Human Rights and Fundamental Freedoms, although they regard these provisions as providing a lesser protection than the Covenant. The authors suggest that the interpretation of the Covenant should take a liberal approach, as allegedly taken by the European Court, to cases of non-citizens in existing families who are present in a State.

3.5 On 7 January 2003, the authors supplied a consultant psychiatrist's report on the family, dated 29 September 2002. The report states that Mrs. Karawa has no significant family connections to Fiji, having only a step-brother there. She felt rejected by her extended family as a result of a failed marriage. Her father lives in Sydney, Australia. Mr. Karawa has three married sisters living in Fiji, but no family or friends there that could support his family if he was returned to Fiji. According to the psychiatrist, Vanessa is "very close" to her parents, and, while proud of her Fijian background, "does not identify strongly with Fijian society". In his view, Vanessa remaining alone in Australia is "hard to imagine" and would be "emotionally and psychologically catastrophic". On the other hand, moving to Fiji would be

[2] Case No 930/2000, Views adopted on 26 July 2001.
[3] The authors cite Moustaquim v Belgium (European Court of Human Rights, judgment of 18 February 1991) for this proposition.

"extremely difficult". Her education "would probably cease or be abbreviated" on account of the costs, while she would be "quite lost" in the culture due to a lack of language or cultural knowledge. Her Indian physical features, while not pronounced, "could lead to difficulties". Transferring her from a positive multicultural society to a bicultural society with recent racist experiences would be "extremely cruel", the effects of which would be compounded by her family being "economically crippled".

The State party's submissions on the admissibility and merits of the communication

4.1 By submissions of 10 September 2003, the State party disputed both the admissibility and the merits of the communication. On the facts, the State party observes that in 1986 Mrs. Karawa was served, and signed an undertaking to comply with, a "Requirement to Leave Australia" form, following expiry of her temporary permit. This was after an application for divorce in 1986 by Mrs. Karawa's first husband, in circumstances where she had arrived in Australia and only stayed with him a few days. She did not depart and, with her parents in Australia, ceased contact with the Australian Department of Immigration. Between 1986 and 1988, numerous attempts were made to locate her.

4.2 The State party regards the claim under article 17 as inadmissible for failure to exhaust domestic remedies. It contends that the family withdrew its application to the RRT on 12 January 1996. Even if the RRT had decided against them, they could have either pursued review in the Federal Court and subsequently the High Court, or alternatively applied directly to the High Court in its original constitutional jurisdiction. The State party also argues that the authors' contentions do not come within the purview of article 17 or any other right recognized by the Covenant, and thus are inadmissible under article 3 of the Optional Protocol, as well as being insufficiently substantiated for purposes of admissibility, and inadmissible under article 2.

4.3 On the merits of the article 17 claim, the State party observes that the proposed action is plainly lawful. The State party regards "interference" with the family unit as an act *inevitably* separating a family unit (rather than simply a substantial change to long-settled family life). In the present case, removal of the parents will not have this effect: the entire family, including Vanessa, are free and have the right to leave Australia and enter Fiji. Doing so would not affect Vanessa's Australian citizenship. In addition, as a child of Fijian nationals, she has been exposed to a degree of Fijian culture in Australia and has developed a level of cultural affinity with Fiji. While moving to Fiji may involve a temporary disruption of the normal pattern of family life, this is not "interference" within the meaning of article 17.

4.4 The State party argues that it does not follow from one family member's entitlement to remain in Australia that other family members, nationals of another State, are also so entitled. Requiring two nationals of another State to return home cannot amount to "interference" with the family simply because they have had a child in Australia. While the family has remained in Australia for fourteen years, it has been there without lawful authority. Mr. and Mrs. Karawa cannot rely on illegal actions as the basis of their claim. The State disputes that Vanessa relocating to Fiji would not be in accordance with the provisions, aims and objectives of the Covenant. Australia is not requiring her to leave or remain in Australia – that is a parental decision. It is also common for families to move interstate or overseas, taking children with them. The purpose of the Covenant cannot be to prohibit children moving with families. Finally, as Vanessa can obtain Fijian citizenship by registration (while

retaining Australian citizenship), all three family members can live in a country of which they are nationals.

4.5 Even if, in the light of these arguments, the Committee were to consider that "interference" occurred, the State party regards it as not arbitrary and thus not contrary to article 17. The notion of arbitrariness includes notions of capriciousness, injustice, unpredictability, disproportionality or unreasonableness. The State party refers to its sovereign right in international law to determine the entry and presence in the country of non-nationals. The right to control migration is regulated by comprehensive laws and policies, which seek to strike a balance between the need to allow people to come and go from Australia, and other aspects of the national interest. The migration program is carefully planned and managed in the national interest, to balance Australia's social, economic, humanitarian and environmental needs. The number of legal migrants and refugees is decided each year by the Government after extensive consultations with the community.

4.6 In order to maintain the integrity of this program, Australian law provides provide for the removal of persons with no right to be or remain in Australia. The consistent application and enforcement of these laws is an important part of maintaining the legitimacy of the migration program and the rule of law in Australia. These laws are reasonable and not arbitrary, are based on sound principles of public policy that are consistent with Australia's standing as a sovereign nation and with its Covenant obligations. They are predictable, widely-known and consistently enforced, without discrimination.

4.7 Accordingly, the State party submits that the Views of the majority in Winata [4] should not be applied, as it does not accept that it should refrain from enforcing its migration laws wherever unlawful non-citizens are said to have established a family life. The State party observes that the dissenting members pointed out that article 17 referred to interference with family, rather than family life. They also observed that the interpretation in effect conferred a right to remain on persons founding a family and managing to escape detection for a sufficiently long period, an interpretation that, in their view, "ignores prevailing standards of international law". The dissenting members also referred to the unfair advantage such an approach conferred on persons who circumvented immigration requirements over those who had not.

4.8 In response to the authors' reference to article 8 of the European Convention, the State party observes that a list of permissible exceptions to the right such as contained there was deliberately omitted from the draft of article 17 of the Covenant, in order to give States a wide discretion to determine permissible forms of interference. In addition, under article 8 of the European Convention, interference must be "necessary" to be consistent with the article, which is a stricter standard than an absence of arbitrariness required under article 17 of the Covenant.

4.9 On the basis of these principles, the State party argues that application of its removal laws to the authors would not be arbitrary. Rather it will be the foreseeable, predictable application of laws known to them since 1986. Both had signed government forms recognizing that removal may follow after unlawful presence in Australia, and the effect of the law was explained to them numerous times over a fifteen year period. Such an application

[4] Op.cit.

of law cannot be arbitrary. The State party points out that it was a result of the family's withdrawal of their RRT application, and the subsequent absence of any RRT decision, that the Minister decided he had no power under law to substitute a more favourable decision. Currently, the authors are not lawfully in Australia, and the Covenant does not confer a right to choose a preferred migration destination. During the short periods in which their status in Australia was lawful, they availed themselves of all procedural guarantees and instituted all proceedings available at law to them. Throughout these proceedings, it was made clear that if they did not obtain permanent residency or if visas expired, they would have to leave. In summary, the authors' claims show little more than that they wish to remain in Australia and would experience some disruption if required to move to Fiji.

4.10 The State party argues that the claim under article 23, paragraph 1, is insufficiently substantiated, for purposes of admissibility, as the authors direct their argument towards establishing an alleged interference with the family in breach of the negative obligation in article 17 on the State party to refrain from certain action. Article 23, by contrast, comprises positive obligations on the State party to act to protect the family as an institution, and it is not the case that any breach of article 17 *ipso facto* also establishes a breach of article 23. In the absence of any further argument by the authors as to how a violation of article 23 has been made out, therefore, this claim should be declared inadmissible.

4.11 On the merits of the claim, the State party submits, in detail, that it plainly meets the obligation, at State and federal level, of institutional recognition and support of the family unit and the resource investment commensurate with such recognition, including in the area of child protection. The State party respects the fact that the authors and their daughter are a family unit, and does not seek to separate or destroy that unit. The daughter, who the State party states has the right as a child of Fijian nationals to enter and live in Fiji and become a citizen by registration,[5] may travel with the family. There is nothing to suggest relocation will harm her, and there is little reason to suppose she could not do so successfully, as children commonly do. Even if she experiences some inconvenience or period of adjustment to new surroundings in Fiji, this does not amount to a breach of Covenant rights. If, by contrast, the parents elect for her to remain in Australia, that is a choice of theirs that is not required by the State party.

4.12 The State party submits that article 23, paragraph 1, must also be read against States' acknowledged right in international law to control entry, residence and expulsion of aliens. While Australia protects families within its jurisdiction, this protection must be balanced with the need to take reasonable measures to control immigration. This is a right recognized in articles 12 and 13 of the Covenant. It points out, with reference to its third periodic report under the Covenant, that it implicitly and explicitly recognizes the importance of the family as the fundamental social unit.[6] One significant example in recognition thereof is the creation of a special visa class, with particular privileges, for parents to apply for in order to live in Australia with their children.

4.13 Concerning the claim under article 24, paragraph 1, the State party argues that this claim is also insufficiently substantiated, for purposes of admissibility. As with article 23,

[5] The State party refers to sections 21 and 25 of the Fijian *Citizenship Act (Amendment) Decree* 2000. Section 25 provides for entry and residence into Fiji of any child of a citizen.
[6] CCPR/C/AUS/98/3, at para 1137.

article 24 is a positive obligation on the State party requiring it to act to take measures concerning the protection of children, and a breach thereof is not necessarily established by information directed at establishing a breach of the negative obligation in article 17 to refrain from action. As the authors direct arguments at establishing an interference with article 17 and do not supply additional evidence as to article 24, this claim should be declared inadmissible.

4.14 As to the merits of the claim, the State party argues that, in fulfillment of its positive obligation to provide special protection to children, it has implemented a number of laws and policies designed specifically to protect children and to provide assistance for children at risk. Vanessa is afforded the same measures of protection as other Australian children, aimed at ensuring their health, safety and well-being. There are highly developed systems of family law, child protection law and criminal law, with States and Territories possessing government departments responsible for administering programs and policies of child protection. Special police units are dedicated to preventing and solving crimes against children. These and other measures are outlined in the State party's initial report under the Convention on the Rights of the Child,[7] as well as its third periodic report under the Covenant.[8] If Vanessa remains in Australia, she will continue to enjoy this protection, with or without her parents. There is nothing to suggest that she would not adjust to the changes necessary in relocation, and if she remains in Australia, her parents have the option of applying, from Fiji, for an off-shore parent visa. The authors' claim that the State party has not provided Vanessa with the required measures of protection is therefore without any merit.

The authors' comments on the State party's submissions

5.1 By letter of 13 January 2004, the authors disputed the State party's observations. On the admissibility of the case, while counsel describes the application to the RRT as "apparently withdrawn by the applicants", he argues that that proceeding was concerned with refugee status. In his view, requiring the authors to have pursued this avenue on merits review to the RRT and thereafter in the courts by judicial review was rejected in Winata and should again be rejected. Rather, the current claim relates to a "separate and distinct" claim relating to family unity and stability. The authors thus argue that if the State party's argument were taken to its logical conclusion, each author would have to make an application for every conceivable category of visa and exhaust domestic remedies on that application, prior to approaching the Committee.

5.2 On the merits, the authors argue that Vanessa, aged 14 and an Australian citizen since the age of 10, has lived all her life and undertaken all her schooling in Australia. Her parents, by contrast, must be removed "as soon as is reasonably practicable" under the terms of the *Migration* Act. Vanessa is thus left with the choice of leaving Australia with her parents or remaining without them. While conceding that it is "reasonably common" for children to relocate with their parents, the authors argue that in Vanessa's case such relocation would be forced on her as an Australian citizen, "by the pernicious operation of two Australian statutes, as well as by her youth and familial ties." The application of Australian law to this case is thus said to be arbitrary, and to fall factually into the exceptional circumstances identified in Winata.

[7] CRC/C/8/Add.31.
[8] Op.cit.

5.3 The authors dispute the State party's view that "interference" with a family requires the necessary separation of its members. Interference may also result from disruption to its usual way of life, or by causing it to do something it may not otherwise do, such as to relocate or to separate. For the authors, the choice imposed on the family by the combined operation of the *Citizenship* Act and the *Migration* Act violates articles 23 and 24 of the Covenant. The State party's obligations to protect family and children go beyond simple enactment of protective laws to require remedial legislative action to protect the integrity of the families in the authors' situation.

Supplementary submissions by the State party

6. By Note of 31 March 2004, the State party reaffirms its original argument, in addition disputing the characterization of the authors' claim before the Committee as a separate and distinct claim relating to family unity and stability that had nothing to do with their refugee applications. The State party observes that the claim for protection against possible future separation of the family unit was expressly referred to in the claim for a protection visa. Ms. Karawa's application for a protection visa, dated 24 September 1990, expressly stated by way of information relevant to her claim that she had very strong ties with Australia, having been there since 1985, and having an Australian-born child as well as immediate family who were Australian citizens and residents. As a result, a request for review by the RRT was an available domestic remedy that offered a reasonable prospect of success.

Issues and Proceedings before the Committee

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

7.2 The Committee recalls that article 5(2)(b) of the Optional Protocol requires that individual applicants must have exhausted available domestic remedies. The Committee recalls that in the case of Winata v Australia,[9] the authors had sought a review of their case before the independent Refugee Review Tribunal (RRT). On the overall record of that particular case, the Committee went on to subsequently determine that, in the specific circumstances, the authors could not be required to pursue further review of the adverse RRT decision in the courts. In the present case, by contrast, the authors applied to, and then withdrew, their case from the first independent review instance competent to address their case, the RRT. The Committee refers to its jurisprudence that when an author has initiated a remedy before an independent tribunal on his or her own motion, the Committee requires such proceedings to be properly exhausted.[10] This is especially so when the authors have, as in the present case with respect to family life issues, made a live question before the domestic authorities of the same issues as those advanced to the Committee (see paragraph 6, *supra*). The authors' withdrawal of their application before the RRT thus deprived both the State party of any opportunity to address the authors' claims before its own administrative appeals tribunal and through subsequent judicial review. The Committee observes in this respect that

[9] Op.cit.

[10] See, for example, Baroy v The Philippines Case No 1045/2002, Decision adopted on 10 November 2003, and Benali v The Netherlands Case No 1272/2004, Decision adopted on 11 August 2004.

whether the application to the RRT was withdrawn by the authors or by their representative(s) is immaterial, as according to the Committee's jurisprudence the conduct of counsel is generally imputed to the authors. In the absence of any information to suggest why the withdrawal of the application to the RRT is not imputable to the authors, it follows that the communication must be considered inadmissible, pursuant to article 5, paragraph 2(b), because of failure to exhaust domestic remedies.

8. The Committee therefore decides:

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

b) that this decision shall be communicated to the author and to the State party.

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