CHILDREN'S RIGHTS - LEGAL RIGHTS

III. JURISPRUDENCE

ICCPR

- *Jalloh v. The Netherlands* (794/1998), ICCPR, A/57/40 vol. II (26 March 2002) 144 (CCPR/C/74/D/794/1998) at paras. 2.1-2.4, 8.3 and 9.

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2.1 The author states that he is a national of the Ivory Coast and was born in 1979. He arrived in the Netherlands on or around 3 September 1995. The author had no identification documents in his possession on arrival, but on 15 October 1995 the immigration authorities recorded that he was 15 years of age. Earlier on 4 September 1995, he applied for asylum to the State Secretary for Justice. From this date until June 1996, the author was under the responsibility of the guardianship agency, which is appointed as the legal guardian of all unaccompanied minor asylum seekers and aliens. The author was received and accommodated at an open facility.1/

2.2 In August 1996, the author absconded from his reception facility and went into hiding out of fear of an immediate deportation.2/ His lawyer advised him to apply again for refugee status, in order to bring an end to his illegal status and to regain access to refugee accommodation. On 4 September 1996, the author made a second application for refugee status with the State Secretary for Justice. On 12 September 1996, following an interview with the Aliens Department, his detention was ordered for the following reasons: because he did not have a valid permit, because he did not possess a document proving his identity, because he did not have any financial means to live nor to return to his home country, and because of a serious suspicion that he would fail to cooperate with his removal.3/ On 17 September 1996, the author's second application for refugee status was dismissed.

2.3 On 24 September 1996, the author's request for a ruling that he was being unlawfully detained was rejected by the District Court of 's-Hertogenbosch, though the issue of his status as a minor was allegedly raised by counsel. From the judgement of the Court it appears that the author was brought before the representative of the Ivory Coast in Brussels to ascertain his identity, but with negative result. It also appears from the judgement that he was then presented to the Consulates of Sierra Leone and Mali, with equally negative results. On 8 November 1996, counsel filed a request to have the author's detention reviewed once more. On 2 December 1996, the same Court rejected the author's second request partly because a further identity investigation was being prepared to determine his nationality. However, on 9 January 1997, the State Secretary for Justice terminated the author's detention, as at that point there was no realistic prospect of expelling him. Notice was then served on the author that he must leave the Netherlands immediately.

2.4 On 5 February 1997, the author appealed against the refusal to grant him refugee status on the basis of his second application. The same Court, on 23 April 1997, decided to reopen proceedings to allow the author to undergo a medical examination. This examination took place in May 1997. On 4 June 1997, the report of a psychological examination and the results of X-ray tests to determine the author's age were made available to the Court. As a result, the Court declared the author's appeal well-founded and the State Secretary for Justice granted him a residence permit "admitted as an unaccompanied minor asylum-seeker" with effect from the date of his second asylum application.4/

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8.3 The author has raised a...claim against his detention in so far as it violated the State party's obligation under article 24 of the Covenant to provide special measures of protection to him as a minor. In this connection, while the author's counsel alleges that the issue of "mental underdevelopment" was raised before the State party's authorities, he does not specify the authorities before which the issue was raised. Moreover, the judgement of the Court concerning the lawfulness of the author's detention does not reveal that the issue was actually raised in Court during the proceedings. The State party has argued that there were doubts about the author's age, that it was not certain that he was a minor until the Court's judgement following the medical examination of 4 June 1997, and that in any event article 26 of the Aliens Act does not preclude the detention of minors. The Committee notes that apart from a statement that the author was detained, he does not provide any information on the type of detention facility he was accommodated, or his particular conditions of detention. In this respect, the Committee notes the State party's explanation that the detention of minors is applied with great restraint. The Committee further notes that the detention of a minor is not per se a violation of article 24 of the Covenant. In the circumstances of this case, where there were doubts as to the author's identity, where he had attempted to evade expulsion before, where there were reasonable prospects for expulsion, and where an identity investigation was still ongoing, the Committee concludes that the author has failed to substantiate his claim that his detention for three and a half months entailed a failure by the State party to grant him such measures of protection as are required by his status as a minor. The Committee therefore finds that the facts before it do not disclose a violation of article 24(1) of the Covenant.

9. The Human Rights Committee ... is of the view that the facts before it do not reveal a breach of any articles of the Covenant.

Notes

1/ On 15 October 1995, the immigration authorities recorded that the author was 15 years of age.

2/ It appears that the Aliens Department attempted to contact the author on 9 August 1996

but he had already fled.

3/ No further details on the type of detention facility or on the specific conditions of his detention have been provided.

4/ This information was provided by counsel after the initial submission to the Human Rights Committee.

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- *Baban et al. v. Australia* (1014/2001), ICCPR, A/58/40 vol. II (6 August 2003) 331 (CCPR/C/78/D/1014/2001) at paras. 1.1, 2.2, 2.3, 2.5, 2.6, 6.8, 7.2 and 9.

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

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

2.3 On 13 July 1999, DIMA rejected the author's claim. On 6 September 1999, the Refugee Review Tribunal (RRT) dismissed the author's appeal against DIMA's decision. On 10 September 1999, DIMA advised the author that his case did not satisfy the requirements for an exercise of the Minister's discretion to allow a person to remain in Australia on humanitarian grounds. On 12 April 2000, Federal Court (Whitlam J) dismissed the author's application for judicial review of the RRT's decision.

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

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

the High Court adjourned the hearing of the author's appeal until the author and his son were located.

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6.8 As to the claim under article 24, the Committee notes the State party's argument that in the absence of other family in Australia, the best interests of the author's infant son were best served by being located together with his father. The Committee considers, in the light of the State party's explanation of the efforts undertaken to provide children with appropriate educational, recreational and other programs, including outside the facility, that a claim of violation of his rights under article 24 has, in the circumstances, been insufficiently substantiated, for purposes of admissibility. Insofar as the claim under article 24 concerns his subjection to the mandatory detention regime, the Committee considers this issue is most appropriately dealt with in the context of article 9, together with his father's admissible claim under that head.

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7.2 As to the claims under article 9, the Committee recalls its jurisprudence that, in order to avoid a characterization of arbitrariness, detention should not continue beyond the period for which the State party can provide appropriate justification.14/ In the present case, the author's detention as a non-citizen without an entry permit continued, in mandatory terms, until he was removed or granted a permit. While the State party advances particular reasons to justify the individual detention...the Committee observes that the State party has failed to demonstrate that those reasons justified the author's continued detention in the light of the passage of time and intervening circumstances such as the hardship of prolonged detention for his son or the fact that during the period under review the State Party apparently did not remove Iraqis from Australia...In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions. The Committee also notes that in the present case the author was unable to challenge his continued detention in court. Judicial review of detention would have been restricted to an assessment of whether the author was a non-citizen without valid entry documentation, and, by direct operation of the relevant legislation, the relevant courts would not have been able to consider arguments that the individual detention was unlawful in terms of the Covenant. Judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.15/ In the present case, the author and his son were held in immigration detention for almost two years without individual justification and without any chance of substantive judicial review of the continued compatibility of their detention with the Covenant. Accordingly, the rights of both the author and his son under article 9, paragraphs 1 and 4, of the Covenant were violated.

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

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Notes

1/ See, however, paragraph 2.6.

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

15/ Ibid.

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

- *Derksen v. The Netherlands* (976/2001), ICCPR, A/59/40 vol. II (1 April 2004) 173 at paras. 1, 2.1-2.4, 9.3, 10 and 11.

1. The author of the communication is Cecilia Derksen, a Dutch national. She submits the communication on her own behalf and on behalf of her child Kaya Marcelle Bakker, born on 21 April 1995, and thus 5 years old at the time of the initial submission. She claims that she and her child are the victims of a violation by the Netherlands of article 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

2.1 The author shared a household with her partner Marcel Bakker from August 1991 to 22 February 1995. It is stated that Mr. Bakker was the breadwinner, whereas Ms. Derksen took care of the household and had a part-time job. They had signed a cohabitation contract and when Ms. Derksen became pregnant, Mr. Bakker recognized the child as his. The author states that they intended to marry. On 22 February 1995, Mr. Bakker died in an accident.

2.2 On 6 July 1995, the author requested benefits under the General Widows and Orphans Law (AWW, Algemene Weduwen en Wezen Wet). On 1 August 1995, her request was rejected because she had not been married to Mr. Bakker and therefore could not be recognized as widow under the AWW. Under the AWW, benefits for half-orphans were included in the widows' benefits.

2.3 On 1 July 1996, the Surviving Dependants Act (ANW, Algemene Nabestaanden Wet) replaced the AWW. Under the ANW, unmarried partners are also entitled to a benefit. On

26 November 1996 Ms. Derksen applied for a benefit under the ANW. On 9 December 1996, her application was rejected by the Social Insurance Bank (Sociale Verzekeringsbank) on the grounds that "(…) only those who were entitled to a benefit under the AWW on 30 June 1996 and those who became widow on or after 1 July 1996 are entitled to a benefit under the ANW".

2.4 Ms. Derksen's request for revision of the decision was rejected by the Board of the Social Insurance Bank on 6 February 1997. Her further appeal was rejected by the District Court Zutphen (Arrondissementsrechtbank Zutphen) on 28 November 1997. On 10 March 1999, the Central Council of Appeal (Centrale Raad van Beroep) declared her appeal unfounded. With this, all domestic remedies are said to be exhausted.

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9.3 The second question before the Committee is whether the refusal of benefits for the author's daughter constitutes prohibited discrimination under article 26 of the Covenant. The State party has explained that it is not the status of the child that determines the allowance of benefits, but the status of the surviving parent of the child, and that the benefits are not granted to the child but to the parent. The author, however, has argued that, even if the distinction between married and unmarried couples does not constitute discrimination because different legal regimes apply and the choice lies entirely with the partners whether to marry or not, the decision not to marry cannot affect the parents' obligations towards the child and the child has no influence on the parents' decision. The Committee recalls that article 26 prohibits both direct and indirect discrimination, the latter notion being related to a rule or measure that may be neutral on its face without any intent to discriminate but which nevertheless results in discrimination because of its exclusive or disproportionate adverse effect on a certain category of persons. Yet, a distinction only constitutes prohibited discrimination in the meaning of article 26 of the Covenant if it is not based on objective and reasonable criteria. In the circumstances of the present case, the Committee observes that under the earlier AWW the children's benefits depended on the status of the parents, so that if the parents were unmarried, the children were not eligible for the benefits. However, under the new ANW, benefits are being denied to children born to unmarried parents before 1 July 1996 while granted in respect of similarly situated children born after that date. The Committee considers that the distinction between children born, on the one hand, either in wedlock or after 1 July 1996 out of wedlock, and, on the other hand, out of wedlock prior to 1 July 1996, is not based on reasonable grounds. In making this conclusion the Committee emphasizes that the authorities were well aware of the discriminatory effect of the AWW when they decided to enact the new law aimed at remedying the situation, and that they could have easily terminated the discrimination in respect of children born out of wedlock prior to 1 July 1996 by extending the application of the new law to them. The termination of ongoing discrimination in respect of children who had had no say in whether their parents chose to marry or not, could have taken place with or without retroactive effect. However, as the communication has been declared admissible only in respect of the period after 1 July 1996,

the Committee merely addresses the failure of the State party to terminate the discrimination from that day onwards which, in the Committee's view, constitutes a violation of article 26 with regard to Kaya Marcelle Bakker in respect of whom half-orphans' benefits through her mother was denied under the ANW.

10. The Human Rights Committee...is of the view that the facts before it relating to Kaya Marcelle Bakker disclose a violation of article 26 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide half-orphans' benefits in respect of Kaya Marcelle Bakker or an equivalent remedy. The State party is also under an obligation to prevent similar violations.

For dissenting opinions this context, *see Derksen v. The Netherlands* (976/2001), ICCPR, A/59/40 vol. II (1 April 2004) 173 at Individual Opinion of Mr. Nisuke Ando, at 181, and Individual Opinion of Sir Nigel Rodley, at 182.