HUMAN RIGHTS COMMITTEE

Toala et al. v. New Zealand

Communication No 675/1995

2 November 2000

CCPR/C/70/D/675/1995

VIEWS

Submitted by: Mr. Simalae Toala et al. (represented by Ms. Olinda Woodroffe)

Alleged victim: The authors

State party: New Zealand

Date of communication: 19 October 1995 (initial submission)

Prior decisions: Special Rapporteur's rule 91 decision transmitted to the State party on 21 December 1995 (not issued ib document form); CCPR/C/63/D/675/1995 - decision on admissibility, dated 10 July 1998.

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

Meeting on 2 November 2000,

Having concluded its consideration of communication No. 675/1995 submitted to the Human Rights Committee by Mr. Simalae Toala et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1. The authors of the communication are Mr. Simalae Toala, Mrs. Fa'ai'u Toala, and their adopted child, Eka Toala, born in 1984, Mr. Pita Fata Misa Pitoau Tofaeono and Mrs. Anovale Tofaeono,

all residing in New Zealand at the time of the communication. The authors claim to be victims of violations by New Zealand of articles 2 (1), 2 (3), 12 (4), 14 (3), 17 and 26 of the International Covenant on Civil and Political Rights. They are represented by Mrs. Olinda Woodroffe, of the New Zealand law firm, Woodroffe & Keil.

The facts submitted by the authors

2.1 The authors were all born in Western Samoa: Mr. Toala was born in 1932, Mrs. Toala in 1934, and their adopted child, Eka Toala, in 1984, (1) Mr. Tofaeono in 1934 and Mrs. Tofaeono in 1933. At the time of the communication, the families were residing in New Zealand, where deportation orders were recently issued against them. The families went into hiding in New Zealand, so as to avoid deportation. The authors claim that they are New Zealand citizens, and that the acts of the New Zealand Government which seek to remove them from New Zealand violate the Covenant.

2.2 Mr. Toala arrived in New Zealand in January 1979, and was granted a visitor's permit. He returned to Western Samoa in July 1979. In March 1980, he was convicted of the offence of "carnal knowledge" in Western Samoa, and sentenced to two years' imprisonment. He served nine months and was then released. He again entered New Zealand in December 1986, and applied on several occasions for a permanent residence permit; his applications were denied. In March 1992, a deportation order was issued against him in New Zealand, pursuant to the provisions of the New Zealand Immigration Act of 1987 (as amended). He appealed this order in April 1992, invoking humanitarian reasons. In August 1993, his appeal was dismissed by the Removal Review Authority, and he went into hiding so as to avoid deportation.

2.3 Mrs. Toala and Eka arrived in New Zealand in June 1986 and was granted a visitor's permit which expired in September 1989. She applied several times for permanent residence status. Of her eight children seven have permanent residence status in New Zealand and some are citizens. Deportation orders were issued against her and her adopted son in April 1992. She appealed the orders in May 1992, on her own and her son's behalf, invoking humanitarian reasons. In August 1993, the appeal was dismissed by the Removal Review Authority. It is stated that Mrs. Toala has been informed that she cannot stay in New Zealand because of her husband's conviction in Western Samoa. Mrs. Toala and her son have also gone into hiding to avoid deportation.

2.4 Mr. and Mrs. Tofaeono arrived in New Zealand in May 1993, and were granted residence permits valid until June1995. They have 10 children, five of whom are residing lawfully in New Zealand. It is stated that Mr and Mrs. Tofaeono qualify for "family reunion" status in New Zealand but that they have been denied this status for alleged health problems. The couple has appealed the deportation order issued against them to the Removal Review Authority. Their application was declined on 28 June 1996. They returned to Western Samoa, and Mr. Tofeano died there. Mrs. Tofeano remains in Western Samoa.

2.5 The authors claim that they are New Zealand citizens pursuant to the decision of the Judicial Committee of the Privy Council in Lesa v. The Attorney-General of New Zealand [1983] 2 A.C.20. (2) In this case, the Privy Council held that by virtue of the British Nationality and Status of Aliens (in New Zealand) Act 1928, persons born in Western Samoa between 13 May 1924 and 1 January 1949 (and their descendants) are New Zealand citizens.

2.6 It is stated that there was considerable adverse reaction in New Zealand to the Lesa judgement, which was delivered by the Privy Council in July 1982. It was estimated that some 100,000 Samoans out of a total population of 160,000 would be affected by the decision.

2.7 The response of the New Zealand Government was to negotiate a Protocol to the Treaty of Friendship between New Zealand and Western Samoa. The Protocol was ratified on 13 September 1982 by the two parties. Within one month, the New Zealand Government passed into law the Citizenship (Western Samoa) Act of 1982, which gave effect to the Protocol in New Zealand, and nullified the effect of the "Lesa" decision, except for Ms. Lesa herself and a very limited number of persons.

The complaint

3.1 The authors claim that the Citizenship (Western Samoa) Act 1982 has created a situation of mass denationalisation of about 100,000 Samoans, in violation of articles 12, paragraph 4, and 26 of the Covenant, and denies them their lawful New Zealand citizenship.

3.2 The authors claim that the 1982 Protocol is void under article 53 of the Vienna Convention on the Law of Treaties, to the extent that it authorises the enactment of the 1982 Act, because it violates a norm of jus cogens, insofar as it allows New Zealand to practice racial discrimination against Samoans.

3.3 In this context, the authors refer to statements made by the New Zealand Human Rights Commission in 1982, to the effect that "the Human Rights Commission considers that the Citizenship (Western Samoa) Bill involves the denial of basic human rights in that it seeks to deprive a particular group of New Zealanders of their citizenship on the basis that they are Polynesians of Samoan descent. ... The Bill as it stands has an unfortunate racist implication. ... There appears to be a confusion between the principle of citizenship rights, and the practical consequences of large-scale entry of people from Western Samoa ...".

3.4 The authors furthermore invoke the parliamentary debates which preceded the adoption of the 1982 Act in support of their claim that the Act has racist implications. They quote from the debates: "... We have many other citizens with dual citizenship, I would say, the greatest number being from the U.K. ... almost all the people to whom the Bill relates are nonwhites." and: "The Human Rights Commission drew attention to article 12 of the International Covenant on Civil and Political Rights. That Covenant provides that no person shall be arbitrarily deprived of the right to enter his own country. I should be surprised if New Zealand were not in breach of that right in refusing to allow free entry to New Zealand of Western Samoans deemed to be, and always to have been, New Zealand citizens."

3.5 The authors also refer to a statement of the Chief Justice of New Zealand, Justice Ryan (3) "[The legislation] clearly discriminates against persons who were declared by the highest New Zealand Court to be citizens of New Zealand." The authors further invoke the discussion concerning New Zealand's Initial Report to the Human Rights Committee dated 11 January 1982, where the representatives of the state, in connection with the Lesa case referred, inter alia, to the Mandate created by the League of Nations. They note that it was declared that the inhabitants of mandated

territories could not become citizens of the State which administered the Mandate.

3.6 The authors have close ties to New Zealand in that both families have several of their children living in New Zealand. Mr. and Mrs Toala have eight children, seven have permanent residence status in New Zealand and some are citizens. Mr and Mrs Tofaeono have ten children of which five are living in New Zealand. Both are close-knit families. Counsel claims that the denial of citizenship to the authors constitutes a violation of their right to family reunification under article 17 of the Covenant.

3.7 Concerning the requirement of exhaustion of domestic remedies the authors claim that there is no remedy available in New Zealand to someone whose rights have been infringed by Statutes which violate or are said to violate the Covenant. A Statute duly enacted by Parliament cannot be declared invalid by any New Zealand Court or other tribunal. The authors refer to the New Zealand Bill of Rights Act 1990, where it is stated that "[N] o court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or effective; or (b) Decline to apply any provisions of the enactment - by reasons only that the provisions are inconsistent with any provisions of this Bill of Rights." The authors contend that this section has been interpreted as meaning that any statute, whether enacted before or after the passage of the Bill of Rights Act 1990, shall be superior to that Act. Since there are references, in the title of the Bill of Rights Act, to "New Zealand's commitment to the International Covenant on Civil and Political Rights", any statute (whether enacted before or after the Bill of Rights Act 1990) has precedence over any Covenant protection as reflected in the Bill of Rights Act 1990.

3.8 The authors claim that since there are no domestic remedies to exhaust where an author is aggrieved by a Statute which violates the Covenant, the State party has violated article 2 (3) of the Covenant.

3.9 Furthermore, the authors claim that the fact that there is no provision for legal aid for the preparation of communications to the Human Rights Committee, under the New Zealand Legal Services Act of 1991, amounts to a violation of article 14, paragraph 3 (d), of the Covenant.

3.10 Finally, the authors request the Committee to adopt interim measures of protection so as to prevent irreparable damage, and, in particular, to request the New Zealand Government not to take any steps to deport the authors, pending the Committee's determination of the merits of the communication. (4)

State party's comments and counsel's observations thereon:

4.1 In a submission dated 6 June 1996, the State party contends that the communication should be declared inadmissible for non-exhaustion of domestic remedies. It contends that Mr Toala, his wife and son have indicated their intention to apply to the Courts to seek judicial review of the removal orders, while the other two authors Mr. and Mrs Tofaeono are engaged in domestic proceedings. With respect to the allegation made by the authors that there are no domestic remedies available to them in violation of the Covenant the State party contends that the reason the authors can find no remedies available for their claims is because these do not fall within the scope of the Covenant,

rather than because New Zealand does not provide remedies for possible violations of the Covenant.

4.2 The State party contends that the communication should be declared inadmissible *ratione temporis* since the Optional Protocol came into force for New Zealand on 26 August 1989 and the events complained of by the authors occurred in 1982. It further contends that the only circumstances under which the Committee would be competent to consider this case would be if there were continuing effects, which in themselves constituted a violation of the Covenant, and the State party categorically denies that continuing effects exist.

4.3 The State party further contends that the communication should be declared inadmissible *ratione materiae* as incompatible with the provisions of the Covenant. With respect to the allegations under article 12, paragraph 4, of the Covenant, the State party contends that the authors' complaint is in fact a challenge to the non concession of a residence permit for the authors to stay in New Zealand and the deportation order, but instead of this what the authors have done is to challenge the 1982 Act. The State party contests that the authors have in any way been deprived of the possibility to enter their own country since they have always been Western Samoans and they have no restriction to enter Western Samoa.

4.4 With respect to the allegation of a violation of article 17 and the right to family life in the cases of Mr and Mrs Toala and their son, the State party notes that indeed it did take into consideration family issues, when deciding on the authors' application for residency. However, as the principal applicant was a prohibited migrant, residency was denied to the family.

4.5 With respect to the allegation of violation of article 14, paragraph 3, of the Covenant in respect of the failure of the State party to provide legal aid to pursue their claim before the Human Rights Committee, the State party notes that article 14, paragraph 3, refers to criminal charges only. Furthermore, there is no requirement under the Optional Protocol or its rules of procedure for the provision of legal aid to a communicant.

4.6 With respect to the discrimination claim on the basis of race in violation of articles 26 *juncto* article 2, paragraph 1, of the Covenant because the 1982 Act only applied to Western Samoans, the State party points out that the Act was enacted to resolve the anomaly in New Zealand legislation revealed by the Privy Council in the Lesa decision, related solely to individuals born in Western Samoa between 1924 and 1949. The State party argues that, had the Privy Council found that some other group of people with no genuine and effective link with New Zealand, also inadvertently been given the status of New Zealand citizens, they too would have been treated in the same manner.

5. Counsel reiterates the claims submitted in the original communication regarding denial of access to their own country, deprivation of citizenship, discrimination with regard to obtaining a possible residence permit and the denial of the right to family reunion.

The Committee's admissibility decision:

6.1 At its 63rd session, the Committee considered the admissibility of the communication.

6.2 With regard to the allegation that the authors' right under article 14, paragraph 3, had been

violated since New Zealand did not make legal aid available in order to submit a communication to the Human Rights Committee, the Committee noted that article 14 refers to domestic procedures only and there is no separate provision in the Covenant or the Optional Protocol dealing with the obligation to provide legal aid to complainants under the Optional Protocol. In the instant case, the Committee considered that the authors had no claim under article 3 of the Optional Protocol, and accordingly this part of the communication was inadmissible.

6.3 The authors claimed that they were, pursuant to the Lesa ruling, New Zealand citizens and consequently, had the right to freely enter and reside in New Zealand territory, despite the 1982 Act which stripped them of their New Zealand citizenship. The legislation in question was enacted in 1982 after New Zealand had ratified the International Covenant on Civil and Political Rights, but before it ratified the Optional Protocol in 1989. The Committee considered, however, that the legislation in question may have continuing effects which in themselves could constitute a violation under article 12, paragraph 4, of the Covenant. The issue of whether these continuing effects were in violation of the Covenant was one which should be examined on the merits. The Committee considered therefore that it was not precluded ratione temporis from declaring the communication admissible.

6.4 With respect to the authors' claims under articles 17 and 26 of the Covenant, that they had a right to remain in New Zealand despite the deportation orders and a right to family reunification without discrimination, the Committee noted the State party's contention that the communication should be declared inadmissible for non exhaustion of domestic remedies. It was not apparent to the Committee that any remedies that might still be available to the authors would be effective to prevent their deportation. These claims therefore could raise issues under articles 17 and 26 of the Covenant as well as under article 23, which should be considered on the merits. They could also raise issues under article 16 of the Covenant in respect of Mrs Toala and her son, Eka Toala since they were not treated as persons in their own right but rather as addenda to Mr. Toala who was considered a prohibited migrant, for a criminal offence in Western Samoa; these issues should be considered on the merits. The Committee did not find itself precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.5 The State party and the authors' counsel were requested to inform the Committee of whether any remedies that might be or have been available to the authors would have suspensive effects in respect of their deportation.

7. On 10 July 1998, the Human Rights Committee decided that the communication was admissible in so far as it appeared to raise issues under articles 12, paragraph 4, 17, 23 and 26 in respect of all the complainants and under article 16 of the Covenant in respect of Mrs Toala and her son, Eka Toala.

State party's submission on the merits and the authors' comments thereon

8.1 By submission dated 12 February 1999 the State party submits that the authors' complaints centre on their assertion that the New Zealand Government acted arbitrarily, and improperly, contrary to the Covenant, in enacting theCitizenship (Western Samoa) Act 1982.

8.2 The State party adduces information in detail demonstrating that Western Samoa was not generally considered part of Her Majesty's dominions, and that the inhabitants of Western Samoa were in the periods in question considered not as British subjects/New Zealand citizens respectively but as possessing a special other status in conformity with the special nature of the Mandate and Trusteeship. The State party further submits that the expectation was that on and from its independence in 1962, Western Samoans possessed and should possess only the citizenship of Western Samoa, and that the legislative action taken by the New Zealand Government in 1982 (after consultation with and with the concurrence of the Government of Western Samoa) to correct the outcome of Lesa's case was directed to deal with the large and completely unexpected problem of dual nationality arising therefrom. It further maintains that its actions in that respect were based on reasonable and objective criteria, were in conformity with general international law and for a general purpose legitimate under the Covenant (including Article 1 on self-determination), and thus did not constitute, as to persons affected thereby, a discrimination prohibited by the Covenant. The State party accordingly, maintains that it is not in breach of articles 26 and 2.1 of the Covenant.

8.3 As to article 12, paragraph 4, of the Covenant, the State party submits that the authors of the communication, not being New Zealand citizens, were validly subject to the provisions of New Zealand's Immigration Act 1987 under which their removal from New Zealand has been ordered, that the authors possess an entitlement to enter Western Samoa, and that they have accordingly not been arbitrarily deprived of the right to enter their own country in violation of article 12, paragraph 4.

8.4 In respect of the authors' and the Human Rights Committee's comments that the 1982 citizenship legislation of New Zealand may have "continuing effects" that could in themselves constitute a violation of article 12, paragraph 4, of the Covenant, the State party maintains its position that no such continuing effects exist and consequently this part of the communication should be declared inadmissible *ratione temporis*.

8.5 As to article 17(1) of the Covenant, the State party submits that Mr. and Mrs. Toala and Eka Toala, not being New Zealand citizens, were validly subject to the provisions of the Immigration Act 1987, that their family situation was carefully and reasonably assessed by the New Zealand authorities including a competent appeal tribunal (the Removal Review Authority) which concluded that there are no sufficient grounds to countermand their removal. It submits that the removal orders in regard to the authors did not constitute either an arbitrary or an unlawful interference with the family of the Toalas contrary to Article 17(1) of the Covenant.

8.6 As to article 2(3) of the Covenant, the State party submits that the authors of the communication have not proven their general assertion that there are no local remedies in New Zealand which can be exhausted where an author is aggrieved by a statute which violates or is alleged to violate the Covenant. In this respect, the State party refers to a series of decisions of the New Zealand Courts in which the Covenant has been invoked.. It contends that the authors of the submission err in asserting in general terms that "there is no remedy available in New Zealand to someone who is aggrieved by a Statute which violates or is alleged to violate the Covenant".

8.7 The State party further notes in any event that it is not open to complainants under the Optional Protocol to assert such a proposition in the abstract, as the Optional Protocol requires complainants

to show that they have been particularly and concretely affected – in this instance by the absence of an effective remedy – in violation of an Article of the Covenant. To the extent that the authors appear to argue that they have no effective remedy against Section 6 of the Citizenship (Western Samoa) Act 1982 which withheld New Zealand citizenship from the class of Western Samoans affected by it, the State party maintains that, as this measure as such did not breach any Article of the Covenant, the question of the absence of an effective remedy against the operation of the Section does not fall for consideration.

8.8 As to the Human Rights Committee's request that the New Zealand Government and the authors' counsel inform the Committee whether any remedies that might be or have been available to the authors would have suspensive effects in respect of their removal, the State party explains the following procedures which apply under the Immigration Act 1987 to persons who have been made the subject of a removal order. These include:

- Appeal to the Removal Review Authority within 42 days of the date on which the removal order was served. An appeal to the Removal Review Authority can be lodged either on the ground that the person is not unlawfully in New Zealand, or on the basis of exceptional humanitarian circumstances. A removal order cannot be executed while an appeal to the Removal Review Authority is pending.

- An appeal against the determination of the Removal Review Authority may be lodged in the High Court, only in relation to questions of law, and within 28 days after the party has been notified of the Removal Review Authority's decision. A removal order cannot be executed while such an appeal is pending.

- Upon leave, a party may appeal the High Court's decision in the Court of Appeal, in respect of a point of law. The execution of a removal order is suspended while such an appeal is pending.

- A party may also apply to the High Court for judicial review of the Removal Review Authority's decision. An application can be made for interim relief to suspend the execution of the removal order. There is no formal time restriction for such an application. The decision of the High Court may also be appealed in the Court of Appeal as being erroneous in point of law.

- A party may also request a special direction from the Minister of Immigration. This avenue is open to complainants even when all other legal avenues have been exhausted.

8.9 As to the extent to which the authors of the communication have availed themselves of the above procedures, the State party notes that both Mr. and Mrs. Toala and their son Eka Toala appealed against removal to the Removal Review Authority. Their appeals were declined by the Removal Review Authority on 13 August 1993. Mr and Mrs Tofeaono both appealed against removal to the Removal Review Authority. Their appeals were declined by the Authority on 28 June 1996. Neither of the authors lodged an appeal against the Removal Review Authority decision to the High Court, nor have they lodged judicial review proceedings. In April 1995 the Tofaeono

representative informed the New Zealand Immigration Service (NZIS) that a case for judicial review was being prepared. No such case was filed. Similarly, in 1993 the NZIS was notified by Mr Toala's representative that the Toalas would be seeking judicial review of the Removal Review Authority decision. No such proceedings were lodged, and the removal orders against the Toala family were reactivated in 1994. Since the decisions of' the Removal Review Authority in 1993 and 1996 respectively, only the Toalas have made an application to the Minister of Immigration for a special direction under Section 130 of the Immigration Act 1987. This application, dated 13 January 1999, seeks the cancellation of the removal orders affecting the Toalas, and the grant of permits to them, so that they may lawfully remain in New Zealand pending the outcome of their existing communication before the Human Rights Committee.

8.10 As to the comment of the Human Rights Committee (5) that the communication may raise issues under Article 16 of the Covenant in respect of Mrs. Toala and her son Eka Toala, the State party contends that a complaint as to article 16 of the Covenant has not been advanced by the authors themselves or their representatives. The State party also observes that the members of the Toala family certainly had and have a right to recognition as individuals before the law when invoking the Immigration Act, but that they chose in 1987 and again in 1989 to apply for permanent residence in New Zealand while seeking to avail themselves of the Government's Family Category residence policy as a family unit, not as individuals, thereby effectively waiving that right as a matter of choice.

8.11 The State party contends that there is no compulsion, in processes under the Immigration Act and Regulations, for applicant family members to be combined; the position is that a spouse and children can be included in an applicant's application, in which case the latter becomes the principal applicant. Mrs Toala and Eka Toala could thus have been considered in their own right as principal applicants had they chosen to lodge separate applications. The State party explains that when a generalised application is made, the principal applicant is the person to whom the normal criteria of residence policy are applied, although all persons included in the application must meet the character and health requirements. Mr Toala was the principal applicant in the residence application that included Mrs Toala and Eka Toala, but did not meet character requirements. The State party submits that choices voluntarily made by the Toalas in order to gain consideration of family circumstances under the immigration legislation governed any treatment of them as a group by the New Zealand immigration authorities, and that no breach of Article 16 of the Covenant in relation to them was created by action of the New Zealand authorities. The State party further notes that removal orders were served separately on Mr Toala, and on Mrs Toala and son Eka, respectively. These orders were appealed separately by Mr Toala, and by Mrs Toala and Eka, to the Removal Review Authority. In its decision of 13 August 1993, the Authority specifically refers to Mr Toala's case, as well as "the cases of his wife and son" having had "the fullest consideration".

9.1 In her comments counsel states that the conflict between New Zealand and the authors still stands. She contends that the bulk of the State party's submission is devoted to challenging the Privy Council's decision in Lesa v Attorney General of New Zealand.

9.2 Counsel reiterates the original claim that the authors are Samoan and that the Judicial Committee of the Privy Council made it clear that New Zealand is the authors'own country. She contends that when New Zealand passed a law depriving the authors of New Zealand Citizenship,

it placed the authors into a category of aliens which the New Zealand Government could legitimately exclude from New Zealand. In that sense, she submits that the authors are deprived of their rights under article 12, paragraph 4, of the Covenant. Counsel states that what article 12, paragraph 4, says is that once citizenship is granted to people, they cannot be deprived of it, if depriving them of it means limiting their rights to enter their country of citizenship. That is what the New Zealand Parliament has done to many Samoan people including the authors.

9.3 With respect to the claims under articles 17, 23 and 26 counsel reiterates the allegations made in the original submission, that is to say that the authors were discriminated against because of their Polynesian origins and that the Removal Review Authority did not give due consideration to the family and humanitarian circumstances of the authors' case.

9.4 With regard to the exhaustion of domestic remedies, counsel reiterates that, since the authors' arguments against their removal are based on the invalidity of the Citizenship (Western Samoa) Act 1982, and since no judicial review of a statute is possible under New Zealand law, the remedy of judicial review is not open to the authors.

Review of admissibility

10. The Committee notes that the State party has provided information about the procedures open to the authors to seek judicial review of the decision of the Removal Review Authority. It appears that although the authors had indicated that they intended to make use of this procedure, they did not do so. The authors have not advanced reasons for their failure to pursue these remedies in respect to their claim that their removal from New Zealand would violate their rights under articles 17 and 23, and with respect to Mrs. Toala and son Eka Toala, article 16 of the Covenant. In the circumstances, the Committee considers that the authors have failed to exhaust available domestic remedies in this respect. Consequently, the Committee, in accordance with rule 93(4) of its rules of procedure, reviews its decision on admissibility and declares this part of the communication inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

Examination of the merits

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

11.2 With regard to the authors' claim to enter and remain in New Zealand the Committee notes that this claim depends on whether under article 12, paragraph 4, of the Covenant New Zealand is or has been at any time their own country and if so, whether they have been deprived arbitrarily of the right to enter New Zealand. In this regard, the Committee notes that none of the authors holds New Zealand nationality at present, nor do they have entitlement to that nationality under New Zealand law. It also notes that all the authors are Western Samoan citizens under the nationality law of that country, which has applied since 1959.

11.3 The Committee notes that the effect of the 1982 Lesa decision was to make four of the authors New Zealand citizens, as from the date of their birth. The fifth author Eka Toala was born in 1984,

and appears not to have been affected by Lesa. The four authors who had New Zealand nationality under the Lesa decision, were by virtue of that fact entitled to enter New Zealand. When the 1982 Act took away New Zealand citizenship it removed their right to enter New Zealand as citizens. Their ability to enter New Zealand thereafter was governed by New Zealand immigration laws.

11.4 The Committee's general comment on article 12 observes that "A State party must not by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent that person from returning to his or her own country." In this case, the Committee considers that the circumstances in which the authors gained and then lost New Zealand citizenship need to be examined in the context of the issues which arise under article 12(4).

11.5 The Committee notes that in 1982 the authors had no connection with New Zealand by reason of birth, descent from any New Zealander, ties with New Zealand or residence in New Zealand. They were unaware of any claim to New Zealand citizenship at the time of the Lesa decision and had acquired New Zealand citizenship involuntarily. It also appears that, with the exception of Mr Toala, none of the authors had ever been in New Zealand. All these circumstances make it arguable that New Zealand did not become their "own country" by virtue of the Lesa decision. But in any event, the Committee does not consider that the removal of their New Zealand citizenship was arbitrary. In addition to the circumstances already mentioned, none of the authors had been in New Zealand between the date of the Lesa decision and the passage of the 1982 Act. They had never applied for a New Zealand passport or claimed to exercise any rights as New Zealand citizens. The Committee is therefore of the view that article 12(4) was not violated in the authors' case.

11.6 As to the claim that the 1982 Act was discriminatory, the Committee observes that the Act applied only to those Western Samoans were not resident in New Zealand and that the authors at that time were not resident in New Zealand and had no ties with that country. There is no basis for concluding that the application of the Act to the authors was discriminatory contrary to article 26 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any of the articles of the Covenant.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. Davit Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, Mr. Abdallah Zakhia.
The text of an individual opinion signed by members Amor, Bhagwati, Gaitan de Pombo and Solari Yrigoyen is appended to this document.

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

Appendix

Individual opinion by Abdelfattah Amor, Prafullachandra Natwarlal Bhagwati, Pilar Gaitan de Pombo and Hipólito Solari Yrigoyen

The majority members have reviewed the admissibility of the communication and taken the view that on account of non-exhaustion of domestic remedies, the communication must be held to be inadmissible. We find it difficult to take this apparently easy route in order to by-pass a decision on merits which might possibly lead to a rather inconvenient result. The Committee considered the question of admissibility at the stage of admission and held it admissible inter alia under articles 17 and 23. We do not see any reason to change this view. We have gone through the case of Tavita v. the Minister of Immigration [1994] as also the case of Puli'uvea v. Removal Authority [1996]. We find that in those cases the decision of the Minister of Immigration in one case and the decision of the Removal Review Authority in the other were challenged in the Court of Appeal on merits on the ground that they were in violation of the international obligations undertaken by New Zealand. But here in the present case, it was a Parliamentary legislation of New Zealand which stood in the way of the authors so far as the claim under article 12(4) of the Covenant was concerned and it is extremely doubtful whether the Court of Appeal would have jurisdiction to ignore a Parliamentary Statute and give relief to the authors. Moreover, the decision of the Removal Review Authority was given in August 1992 and at that date, it was extremely doubtful whether international obligations would be enforceable by the Courts in New Zealand in the absence of domestic legislation. It was only in 1994 when Tavita's case was decided that the position became clear but by that time, the period of limitation for filing an appeal before the Court of Appeal under Section 115A had expired. We are therefore of the view that the communication cannot be regarded as inadmissible on the ground of non-exhaustion of domestic remedies.

We note that Mr. and Mrs. Toala have no children in Western Samoa who can take care of them and that the children in New Zealand are the only care providers. The authors have lived in New Zealand since 1986 and have developed effective family ties there. The refusal by the State party to regularize the stay of all three authors is mainly based on Mr. Toala's criminal conviction in 1980. The material before the Committee does not show that adequate weight was given to the family life of the authors. We are of the view that in the particular circumstances of the case, to refuse to allow the authors to reside in New Zealand with the adult/children of Mr. and Mrs. Toala who are their only care providers is disproportionate and would, hence constitute arbitrary interference with their family. Consequently we find a violation of articles 17 and 23 in regard to Mr. and Mrs. Toala and their son Eka.

Abdelfattah Amor [signed]

Prafullachandra Natwarlal Bhagwati [signed]

Pilar Gaitan de Pombo [signed]

Hipólito Solari Yrigoyen [signed]

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

Notes

1. It is stated that Eka Toala is adopted by Mr. and Mrs. Toala, and as a descendent to them entitled to all rights that they are entitled to; reference is made to the New Zealand Adoption Act 1955, Section 16 (2): "The adopted child shall be deemed to become the child of the adoptive parent, and the adoptive parent shall be deemed to become the parent of the child, as if the child had been born to that parent in lawful wedlock."

2. Judgment delivered on 28 July 1982.

3. Constitutional Reference: In re: Application by Father Ioane Vito and Others [1988], S.P.L.R. 429 at 435.

4. The Committee declined to adopt such measures.

5. See para 6.4 above.