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# International Covenant on Civil and Political Rights

# Advance unedited version

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**Human Rights Committee**

## Decision adopted by the Committee under the Optional Protocol, concerning Communication No. 2567/2015 *,**

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| *Submitted by:* | A.U. and H.R. (represented by Mr. John Petris) |
| *Alleged victim:* | The authors |
| *State Party:* | New Zealand |
| *Date of communication:* | 11 February 2014 |
| *Document references:* | Special Rapporteur's rules 92 and 97 decision, transmitted to the State party on 12 February 2015 (not issued in document form) |
| *Date of adoption of the decision:* | 3 November 2016 |
| *Subject matter:* | Denial of entry visa to spouse |
| *Procedural issues*: | non-exhaustion of domestic remedies |
| *Substantive issues:* | interference with the family, protection of the family |
| *Articles of the Covenant:* | 17 (1) and 23 (1) |
| *Articles of the Optional Protocol:* | 5 (2)(b) |

1.1 The authors of the communication are Mr. A.U., an Afghan national born in 1971, and Ms. H.R., an Afghan and New Zealand national born in 1986. They claim to be victims of a violation by New Zealand of articles 17 (1) and 23 (1) of the Covenant. They are represented by counsel, Mr. John Petris. The Optional Protocol entered into force for the State party on 26 August 1989.

* Adopted by the Committee at its 118th session (17 October-4 November 2016).

** The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelic, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Yuval Shany and Margo Waterval.

1.2 On 11 November 2015, the Committee, acting through its Special Rapporteur on New Communications and Interim Measures, decided to examine the question of the admissibility of the case separately from the merits.

**Factual background**[1]

2.1 The authors purportedly got married in Afghanistan on 27 April 2004 under the Islamic Sharia law.[2]

2.2 In September 2004, H.R's brother obtained refugee status in New Zealand. On 2 November 2006, H.R. applied for a residence visa to join her brother under the refugee family reunion policy. As a result of this application, H.R was interviewed by an officer of the International Organization for Migration (IOM) in Kabul, on behalf of the government of New Zealand. During the interview, H.R. was asked about her marital status, to which she claims to have responded that she was married but that her husband had been missing and his whereabouts were unknown to her.[3] However, in the Refugee Quota Programme interview report, H.R.'s marital status appeared as "engaged". The report further stated "yes" in response to the question "Is your spouse/partner wanting to migrate with you?".

2.3 On 14 May 2007, H.R. obtained a residence visa entitling her to travel to New Zealand and apply for a residence permit. H.R. arrived in New Zealand on 9 July 2007 and on 1 September 2012 she was granted citizenship.

2.4 On 16 July 2012,[4] A.U. applied for a temporary entry work visa under the "partnership category" while still in Afghanistan. His application was rejected on 5 February 2013 on the basis that A.U. did not meet the requirements set out in the work visa instructions concerning: a) "being a bona fide applicant" because H.R. had not declared her marriage in her residence application, b) being in a "genuine and stable relationship with H.R.", and c) having a "clear pathway to eventual residence" (as his partner had not declared her marriage to him and therefore immigration policy F2.5 e) applied).[5] According to this policy, applicants for residence under the "partnership category" may be rejected if the principal applicant had not declared their spouse in their own application, unless and immigration officer is satisfied that this non-declaration occurred with no intention to mislead and would not have affected the outcome of the first applicant's visa application.[6]

2.5 On 4 June 2013, A.U. wrote to the Associate Minister of Immigration seeking a "special direction and the grant of residence as an exception to immigration instructions". The Associate Minister declined to intervene on 9 June 2013 because "A.U. had not

[1] The factual background has been established on the basis of the authors' account and the State party's submissions.

[2] The authors provide a copy of their marriage certificate.

[3] The authors do not elaborate on this statement.

[4] The authors do not provide any information to justify the time lapsed between H.R.'s migration to New Zealand and A.U.'s application for a visa.

[5] In the letter rejecting A.U.'s visa application, the immigration officer indicated: "While the outcome of your future residence application is not certain at this stage, we remain unsatisfied that you are a bona fide applicant. Should you not be granted a subsequent New Zealand visa, we consider you likely to seek to remain in New Zealand."

[6] Policy F2.5 e) of the "Immigration New Zealand Operational Manual. Temporary entry" (April 2016) reads "Applications for residence under Partnership Category will also be declined if the principal applicant was a partner to the eligible New Zealand partner but not declared on the eligible New Zealand partner's application for a residence class visa (if applicable), unless an Immigration officer is satisfied the non-declaration occurred with i) no intention to mislead, and ii) would not have resulted in a different outcome in the eligible New Zealand partner's application. If both of these clauses are met, an immigration officer should continue to assess the application and may approve it if all other requirements are met."

exhausted all possible options". The author was advised to apply for residence through the normal procedure and, if that application were unsuccessful, to appeal to the Immigration and Protection Tribunal (IPT).[7] On 5 July 2013, A. U. wrote to the Associate Minister again noting that he had no pathway to residence because of immigration policy F2.5e) and that the process would be unnecessarily prolonged. On 16 July 2013, the Associate Minister advised again that she would not intervene until A.U. had submitted a residence application and tested himself against immigration instructions.

2.6 On 20 September 2013, A.U. filed a complaint with the New Zealand Ombudsperson requesting investigation into policy F2.5e), stating that it operated de facto as an absolute prohibition on a spouse or partner to obtain residence.[8]

2.7 H.R. left New Zealand on 6 August 2014 and returned to Afghanistan, allegedly to join her spouse.

2.8 The authors allege that domestic remedies have been exhausted as there is no appeal to a court or review proceedings available in respect of a declined visa to enter New Zealand, according to Section 186 of the New Zealand Immigration Act.[9] They note that an appeal to the IPT cannot grant residence but merely recommend to the Associate Minister of Immigration granting residence as an exception to the residence policy. In any case, this appeal would take at least five years and does not constitute an effective remedy because it is unreasonably prolonged.

**The complaint**

3.1 The authors submit that by rejecting A.U.'s application for a visa to enter New Zealand, the State party violated the authors' right to family unity under article 23 (1) of the Covenant.

3.2 The authors further submit that New Zealand's immigration policy F2.5e) constitutes an arbitrary interference with the family, contrary to article 17 (1) of the Covenant. They argue that this policy establishes an absolute prohibition on a spouse to join their partner in New Zealand, does not provide for any discretion or time limit in its application and is disproportionate as it has the effect of permanently separating a couple.

**State party's observations on admissibility**

4.1 On 26 May 2015, the State party contested the admissibility of the communication for failure to exhaust domestic remedies. A.U. did not submit an application for residence which would be assessed against relevant immigration policies, including –but not limited to- policy F2.5e). An application for residence is more comprehensive than an application for a temporary entry work visa. In a residence application, the immigration officer must

[7] The Immigration and Protection Tribunal is composed of 18 members, administered by the Ministry of Justice and chaired by a District Court.

[8] No copy of this application has been provided and its outcome is unknown.

[9] New Zealand Immigration Act of 2009, Section 186: "*Limited right of review in respect of temporary entry class visa decisions*. (1) No appeal lies against a decision of the Minister or an immigration officer on any matter in relation to a temporary entry class visa, whether to any court, the Tribunal, the Minister, or otherwise. (2) Subsection (1) applies except to the extent that section 185 provides a right of reconsideration for an onshore holder of a temporary visa in the circumstances set out in that section. (3) A person may bring review proceedings in a court in respect of a decision in relation to a temporary entry class visa except if the decision is in relation to the—(a) refusal or failure to grant a temporary entry class visa to a person outside New Zealand, (b) cancellation of a temporary entry class visa before the holder of the visa arrives in New Zealand."

consider all circumstances, including whether the applicant is bona fide. The State party has established specialist teams that are familiar with Afghani partnership applications.

4.2 The State party notes that A.U. was given reasons for the refusal to grant his temporary entry work visa and was advised that, while the outcome of a future residence application was uncertain, they were not satisfied at that point that he was a bona fide applicant. This advice does not imply that any future application would be declined. On the contrary, an immigration officer would consider in good faith any submissions from A.U., including his marriage situation and any other matter, including any humanitarian issues that he wished to raise.

4.3 The State party challenges the authors' submission that policy F.2e) does not contain an element of discretion. If A.U. were to apply for a residence visa, the government would, in assessing whether F2.5e) applied, consider whether H.R.'s non-declaration of marriage occurred with no intention to mislead and whether the declaration might have affected the outcome of her own residence application.

4.4 The State party argues that immigration authorities have not yet had the opportunity to consider information supplied by the authors after A.U.'s work visa was refused, including H.R.'s information to the Associate Minister of Immigration stating that she had informed the authorities in 2007 that she was married but her husband's whereabouts were unknown. Ultimately, it remains open to the government to grant A.U. a resident visa. The government's immigration system is highly discretionary when accounting for individual circumstances. In particular, immigration instructions may be dispensed with by special directions when considering residence visa applications.

4.5 If a residence visa is refused, there are further domestic remedies that should be exhausted before submitting a communication to the Committee, including an appeal to the IPT, which may inter alia reverse any refusal decision -thereby clearing the way for the grant of a visa- or cancel the refusal decision and refer the matter back for reconsideration on the basis of additional information provided to the Tribunal.[10]

[10] The State party cites section 188 of the Immigration Act: "*Determination of appeal in relation to residence class visa.* (1) In determining an appeal under section 187, the Tribunal may— (…) (b) reverse the decision as having been incorrect in terms of the residence instructions applicable at the time the application for the visa was made by the appellant; or (c) note the correctness of the original decision in terms of the residence instructions applicable at the time the visa application was made on the basis of the information provided to the Minister or the immigration officer before the time of the decision, but reverse that decision on the basis of any information properly made available to the Tribunal that reveals that the grant of the visa would have been correct in terms of the applicable residence instructions; or (d) note the correctness of the original decision in terms of the residence instructions applicable at the time the visa application was made on the basis of the information provided to the Minister or the immigration officer before the time of the decision, but determine the appeal by cancelling the decision and referring the matter back to the Minister, if he or she made the decision, or the chief executive, in any other case, for consideration under those residence instructions as if a new visa application had been made that included any additional information properly provided to the Tribunal; or (e) determine the appeal by cancelling the decision and referring the application back to the Minister, if he or she made the decision, or the chief executive, in any other case, for correct assessment in terms of the applicable residence instructions, where the Tribunal— (i) considers that the decision appealed against was made on the basis of an incorrect assessment in terms of the residence instructions applicable at the time the application was made; but (ii) is not satisfied that the appellant would, but for that incorrect assessment, have been entitled in terms of those instructions to the visa or entry permission; or (f) confirm the decision as having been correct in terms of the residence instructions applicable at the time the visa application was made, but recommend that

4.6 The State party submits that domestic remedies are not unreasonably prolonged. The average time for processing a residence application from Afghanistan is approximately six to eight months. The IPT reports in its 2014 Annual report that at 30 June 2014 the average number of days from receipt of appeal to decision is 364. These time periods are reasonable in the circumstances, including A.U.'s non-residence status, the complexity of the facts, the value of residence visas generally and the government's legitimate need to ensure that visas are granted on the basis of the applicant's true situation, expert decision-makers having full information before them, the principled application of in-built policy discretions, the proper use of regular immigration processes, and impartial and authoritative appeal procedures.

4.7 On the facts, the State party argues that the author did not declare to the IOM officer who interviewed her that she was married and that, "although the notes from her interview were unclear, they may show that she declared that she was engaged and that her partner/spouse was willing to accompany her to New Zealand".

**Authors' comments to the State party's observations on admissibility**

5.1 On 24 June 2015, the authors insist that there is no possible appeal in respect of A.U.'s declined work visa application. Filing an application for residence is very difficult while the author is in Afghanistan. The usual practice is to allow a spouse to enter New Zealand and lodge a residence application while in New Zealand. Additionally, the immigration officer that rejected A.U.'s work visa application stated that a future residence application was likely to be declined because of policy F2.5e). Section 72 of the Immigration Act provides that a decision on a residence application must be made in accordance with immigration instructions.

5.2 The authors challenge the State part's assertion that policy F2.5e) allows for discretion. They note that such policy affects mainly persons from countries such as Afghanistan and Somalia who were allowed to enter New Zealand under refugee policies but were required to be single to meet those policies. This policy's effect is to keep families separated.

5.3 The authors insist that the IPT cannot grant residence but only recommend residence to the Associate Minister based on special circumstances. In the case of A.U.it is unlikely that the IPT would make such recommendation because this would be contrary to policy F2.5e). Additionally, the authors already made a request to the Associate Minister, which was rejected, and it is very unlikely that the Associate Minister would intervene again in this case.

5.4 Regarding the length of proceedings, the authors allege that, according to an official response given to them,[11] the average time for immigration authorities to deal with residence applications ranged between 387 and 576 days. Given the complexity of their application, it is possible that the processing time would be three years. An appeal would involve a further 12 months. This period is unreasonable prolonged considering the likely negative outcome and the fact that A.U. will have to remain in Afghanistan all this time.

**Additional submissions from the parties**

6.1 On 12 August 2015, the State party submits that the authors have failed to raise an action that could constitute a breach of the Covenant. General allegations in the abstract or

the special circumstances of the applicant are such as to warrant consideration by the Minister as an exception to those instructions. (…)".

[11] The authors do not specify what authority provided this response nor do they attach a copy of such response.

based on future, hypothetical situations are not sufficient basis to found a breach of the Covenant.

6.2 The State party submits that policy F 2.5e) is a reasonable policy intended to protect against dishonest declaration of family relationships, and is consistent with articles 17 (1) and 23 (1) of the Covenant. The State party supports a family reunification policy in principle. However, it has the legitimate need, in the public interest, to ensure that any claims based on family status are bona fide. Policy F 2.5e) contains a discretion that can protect an applicant's rights under the Covenant. If the principal applicant had no intention to mislead and the non-declaration of marriage would not have affected their visa application, an immigration officer may approve their partner's application if all other requirements are met. Notwithstanding, officers should not decline an application on the basis of this provision without first offering the principal applicant an opportunity to explain the non-declaration. This discretion ensures that two partners may still be reunited where there has been no dishonesty involved. If A.U. were to apply for a residence visa, the government would, in assessing whether F 2.5e) applied, consider whether H.R.'s non-declaration of marriage occurred with no intention to mislead and whether the declaration might have affected the outcome of her own residence application. Additionally, exceptions to this policy apply in the form of ministerial special directions. The authors may further apply to the IPT.

6.3 The State party notes that the Committee has found that, in some extraordinary circumstances, decisions of immigration authorities have breached articles 17 and 23 but in the context of a decision to remove a person from a jurisdiction.[12] Decisions to remove are more likely to interfere with family rights because it has the effect of separating a family. In any case, even a decision to remove where a family member has the right to stay does not necessarily interfere with those rights.[13] In *AS v Canada*, the Committee declared inadmissible a claim related to the rejection of an entry visa noting that the authors had been separated for 17 years and that family life no longer existed.[14] In the present case, at the time A.U. applied to enter New Zealand, the authors had already been separated for eight years and there were no children involved or any circumstances of dependency of the partners with each other.

7. On 1 February 2016, the authors reiterate their previous submissions relating to the lack of discretion of policy F2.5e) and the unreasonably prolonged nature and little chance of success of residence application proceedings.

**Issues and proceedings before the Committee**

*Consideration of admissibility*

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

8.2 The Committee notes, as required by article 5, paragraph 2 (a) of the Optional Protocol, that the same matter is not being examined under any other international procedure of investigation or settlement.

[12] The State party cites the Committee's Views in *Winata v Australia*, Communication No. 930/2000, 26 July 2001.

[13] The State party cites the Committee's Views in *Hussein v Denmark*, communication No 2243/2013, 24 October 2014.

[14] Communication No. 68/1980, inadmissibility decision of 31 March 1981, para. 5.1.

8.3 The Committee takes note of the State party's argument that domestic remedies have not been exhausted because A.U. could have applied for a residence visa –where the circumstances of his case could have been examined against broader immigration instructions-, and he could have further appealed to the Immigration and Protection Tribunal. The authors have argued that these proceedings would be inaccessible, unreasonably prolonged and ineffective. They have argued, in particular, that filing a residence application from Afghanistan would be difficult, that it would likely be declined, and that proceedings would take excessively long. They have also argued that the IPT cannot grant residence but only recommend residence to the Associate Minister based on special circumstances.

8.4 The Committee recalls its jurisprudence that, although there is no obligation to exhaust domestic remedies if they have no chance of being successful, authors of communications must exercise due diligence in the pursuit of available remedies and that mere doubts or assumptions about their effectiveness do not absolve the authors from exhausting them.[15] In the present case, the Committee is not convinced that the author, who is represented by a counsel in New Zealand, would be unable to submit a residence application as suggested by national immigration authorities. The Committee further considers that, in light of the official average time frames of immigration authorities and the IPT in dealing with residence applications and appeals against those applications respectively, it does not appear that those proceedings would be unreasonably prolonged in the sense of article 5, paragraph 2b) of the Optional Protocol. It notes, in this respect, that the authors had already been separated for eight years at the time A.U. applied for a temporary entry work visa and that no information has been provided as to the reasons for such delay. The Committee also notes the State party's argument that, although A.U.'s work visa was declined because he was not considered to be a bona fide applicant, nothing would prevent immigration authorities from reaching a different conclusion when examining his residence application in light of all circumstances and information provided by the authors. Finally, the Committee notes the State party's statement that, under the 2009 Immigration Act, the IPT may reverse a decision to refuse residence. In light of all the above, the Committee concludes that the authors have not exhausted domestic remedies in relation to their claim that the State party's refusal to grant A.U. a temporary entry work visa constituted a violation of their rights under articles 17(1) and 23(1) of the Covenant.

9. The Human Rights Committee therefore decides:

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

(b) That the decision be transmitted to the State party and to the author.

[15] See, *inter alia*, the Committee's communications Nos. 2072/2011. *V.S. v New Zealand*, decision of 2 November 2015, para. 6.3; 1639/2007, *Zsolt Vargay v Canada*, decision of 28 July 2009, para. 7.3.; 1511/2006, *García Perea et al v Spain*, decision of 26 March 2009, para. 6.2; and 560/1993, *A v Australia*, Views of 3 April 1997, para. 6.4.