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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2769/2016*, **

Communication submitted by:	K.S. and N.K. (represented by counsel, R.J. Hooker)
Alleged victims:	The authors and S.M., A.K. and S.S.
State party:	New Zealand
Date of communication:	20 May 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 26 May 2016 (not issued in document form)
Date of adoption of decision:	24 July 2020
Subject matter:	Deportation to India with risk of family separation
Procedural issue:	Level of substantiation of claims
Substantive issues:	Right to family life; best interests of the child; right to an effective remedy
Articles of the Covenant:	2 (3), 17 (1), 23 (1) and 24 (1)
Article of the Optional Protocol:	2

1.1 The authors of the communication are K.S. and N.K., nationals of India born in 1962 and 1980, respectively. They submit the communication on their own behalf and on behalf of their children S.M., A.K. and S.S., born in 2001, 2004 and 2006, respectively. S.M. and S.S. are nationals of India, while A.K. is a national of the State party. At the time of the submission of the communication, the authors and S.M. and S.S. were facing removal to India. The authors claim a violation of their and their children's rights under articles 2 (3), 17 (1), 23 (1) and 24 (1) of the Covenant. The Optional Protocol entered into force for the State party on 26 August 1989. The authors are represented by counsel.

1.2 On 26 May 2016, pursuant to rule 94 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the authors' request for interim measures consisting in the issuance of a

* Adopted by the Committee at its 129th session (29 June–24 July 2020).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

request to the State party to refrain from removing them and their children to India, pending the examination of the communication. K.S. was deported to India on 16 September 2016 and N.K. left New Zealand on 12 November 2016.[1]

Facts as presented by the authors

2.1 The authors are a married couple of Sikh ethnicity and originally from Punjab, India. They left India in 1998 because of violent incidents that were then occurring in the Punjab region and travelled to the Philippines. Their first child was born in the Philippines in 2001. The authors travelled to New Zealand on 2 April 2004 in order to visit relatives. They lived in the State party without residence permits after their visas expired on 15 April 2004. Their daughter A.K. was born in 2004 in New Zealand and she is a national of the State party. The authors' third child was born in New Zealand in 2006, but is not a national of the State party.

2.2 K.S. made an application in June 2004 to be recognized as a refugee under the Convention relating to the Status of Refugees, based on the security situation in Punjab at the time. The application was rejected by the authorities of the State party and upheld on appeal. In March 2007, the authors requested the Minister for Immigration to exercise his discretion under the then applicable Immigration Act 1987 to issue them a visa to allow them to stay in the State party. The application was denied. In March 2013, the authors again applied to the Minister for Immigration for a visa to be issued under the Immigration Act 2009. That application was denied in July 2013. The authors were served with deportation orders in September 2013. They requested that the deportation order against them be cancelled, arguing that their children would be exposed to substantially lower living and educational standards if removed to India. The immigration officer in charge of their case rejected the application in decisions of 14 October 2013 and 28 January 2014 without providing reasons for the rejection, merely noting that the State party's international obligations had been taken into account in coming to a decision. The authors applied for a judicial review of those decisions before the High Court. The High Court dismissed the application on 14 August 2014, finding that the Immigration Act 2009 did not require an immigration officer to provide reasons for the rejection of visa applications and that in the authors' case the immigration officer had made the decision based on the factual material before him, including material on the education and health system in Punjab. It found the decision to be within the scope of the immigration officer's discretion. That decision was upheld on appeal by the High Court of Appeal on 8 December 2015. The authors' application for leave to appeal this decision to the Supreme Court was rejected on 27 April 2016.

Complaint

3.1 The authors submit that their and their children's rights under articles 17 (1), 23 (1) and 24 (1) of the Covenant would be violated by their removal to India. They argue that if forced to choose to leave A.K., who is a national of the State party, in New Zealand while the rest of the family is removed to India, that would be an interference in their family life. They further argue that, should they have to choose to take A.K. with them to India, that would force her to lose all the benefits of her nationality that she currently enjoys in the State party. The authors further note that, at the time of the submission of their complaint, they had lived in New Zealand since 2004, their children had grown up in New Zealand and identified as New Zealanders. The authors argue that the State party has not shown that its interest in enforcing its immigration laws are proportionate to, or greater than, the family's interest in maintaining their well-established family life in the State party. They note that they have no criminal convictions, that their children have never lived in India and have no knowledge of life in India. They argue that the State party authorities have not given due consideration to the right of the family to protection by society in assessing the family's situation.

[1] In its observations on the merits of the complaint, the State party noted that S.M. and S.S. were not removed at this time, as it had been agreed between the parties that they would not be removed until the end of the school year in December 2016. The Committee has received no further information on the whereabouts of the children since this information, nor has any information been received as to the situation of the authors since their return to India.

3.2 The authors further claim a violation of their and their children's rights under article 2 (3) of the Covenant. They note that under the Immigration Act 2009, the decision maker is not required to provide reasons for not cancelling a deportation order, which they argue amounts to a violation of their and their children's rights under article 2 (3).

State party's observations on admissibility and the merits

4.1 On 23 December 2016, the State party submitted its observations on the admissibility and merits of the communication. It submits that the communication should be found inadmissible for lack of sufficient substantiation of the authors' claims. Should the Committee find the communication to be admissible, the State party submits that it is without merit.

4.2 The State party notes that the authors arrived in New Zealand on 2 April 2004, travelling from the Philippines with their then 3-year-old-son on a two-week limited purpose visa to attend a short family reunion. The authors had applied for visitor visas but did not meet the standard requirements for such visas. Nonetheless, after considering the circumstances, as a matter of discretion and compassion, the family was offered limited purpose visas instead, under which they were immediately liable to removal if they remained unlawfully in the State party after the expiration of the visas. The State party also argues that the authors failed to be open and honest in their visa application by not disclosing that N.K. was eight months pregnant at the time of the visit. It notes that, had this fact been known to Immigration New Zealand, it is likely that her application for a limited purpose visa would have been declined.

4.3 The State party notes that the authors' limited purpose permits expired on 15 April 2004 but that the family remained in New Zealand. From that point on, they were unlawfully present in New Zealand and were under a legal obligation to leave the country. A week later, on 22 April 2004, N.K. gave birth to a daughter, A.K., who is a New Zealand citizen under the law in force at the time of her birth and hence is not liable for deportation. On the day their limited purpose permits expired, the authors applied for further limited purpose permits. The application for further limited purpose permits was declined. Immigration New Zealand advised the authors to leave New Zealand immediately and that failure to do so might result in removal action being taken.

4.4 On 16 June 2004, the authors applied for refugee status on the basis that K.S. feared persecution by the Philippines police because he was suspected of having links with Muslim terrorists and that he feared that on return to India he would be detained because of those suspected links. The application for refugee status was declined on 29 October 2004. The authors' subsequent appeal to the Refugee Status Appeals Authority was unsuccessful and was dismissed on 22 July 2005.

4.5 Following the dismissal of the authors' appeal to the Refugee Status Appeals Authority, Immigration New Zealand initiated removal action against the authors. It made inquiries, using its powers to obtain an address for the authors, but the responses received provided no clues as to their whereabouts. Further inquiries made in January and February 2007, March 2008, July 2009 and March 2012 were all unsuccessful. Immigration New Zealand was unable to locate the authors until 2013, despite making significant attempts to do so. The State party notes that it has been the policy of Immigration New Zealand not to approach schools in order to locate a family, in order to protect the child's or children's right to obtain an education. The Immigration Act 2009 provides that Immigration New Zealand cannot require a school providing compulsory education to provide an address. The State party further notes that between 2007 and 2013 the authors made no further attempts to gain residence status for themselves or their children in the State party. It notes that on 12 March 2013, the authors' renewed requests for work visas were declined. On 18 March 2013, the family's solicitor wrote to the Associate Minister of Immigration requesting that the family be granted temporary visas so that they could assist the brother of K.S. On 18 July 2013, a delegate responded, advising that he was not prepared to intervene in the family's case and noting that as unsuccessful refugee claimants the authors could not apply for or request further visas until they left New Zealand.

4.6 The State party notes that K.S. was finally located on 10 September 2013. Deportation liability notices and deportation orders were served on him and on S.M. and S.S. on the same date and on N.K. on 19 September 2013. K.S. was held in immigration detention under warrant until he was released on negotiated conditions in November 2014. As the deportation of the authors and their two non-citizen children raised issues relevant to the State party's international obligations, the immigration officer had to consider whether to exercise his discretion under section 177 of the Immigration Act 2009 to cancel the deportation orders. Section 177 of the Act provides that an immigration officer may, in his or her absolute discretion, cancel a deportation order. Under section 177 (2) of the Act the officer must consider cancelling the order if provided with information concerning personal circumstances and if the information is relevant to the State party's international obligations. The State party notes that during this procedure the authors and their children were interviewed in the presence of their lawyer. The immigration officer considered the authors' submissions and researched information relating to education and health in the Punjab region and other immigration options for A.K. On 14 October 2013, after considering all the information provided, the immigration officer decided not to cancel the deportation orders in relation to the authors and S.M. and S.S. The State party notes that under section 177 (4) of the Immigration Act an immigration officer is not obliged to give reasons for the decision on whether or not to cancel a deportation order. Following the filing of an application for judicial review, it was noted that the immigration officer had not made a separate record of decisions in respect of S.M. and S.S. He therefore agreed to reconsider the decisions. Because the policy of Immigration New Zealand is that deportation decisions should take into account the circumstances of the family as a whole, the decisions for all four non-citizen authors were reconsidered. On 28 January 2014, the immigration officer decided not to cancel the deportation orders.

4.7 The authors applied to the High Court for a judicial review of the decision not to cancel the deportation orders. That application was declined on 14 August 2014. The Court of Appeal also declined an appeal of the High Court decision on 8 December 2015. The Court of Appeal confirmed that the New Zealand statutory scheme required the immigration officer to undertake an evaluation exercise and to record a description of the applicable international obligations and the relevant personal circumstances. The Court held that in the authors' case the immigration officer had met this obligation and the decision to deport the authors was reasonably open to him on the basis of all the facts available and having regard to the State party's international obligations. The State party notes that all the authors' applications, including that to the Supreme Court were made with the assistance of legal counsel. While the application for a judicial review and subsequent appeals were outstanding, Immigration New Zealand did not take steps to deport the authors. Following the rejection of their application for a judicial review, and the subsequent appeals, K.S. was deported on 16 September 2016 and N.K. left New Zealand on 12 November 2016.

4.8 The State party submits that the authors' claims are inadmissible because they are insufficiently substantiated for the purposes of admissibility. It notes that the authors claim a violation of their and their children's rights under article 2 (3) of the Covenant owing to the lack of reasoning provided by the State party authorities in refusing to cancel the deportation orders against them. The State party notes that article 2 (3) is of an accessory character and cannot, in and of itself, give rise to a claim in a communication under the Optional Protocol. The State party submits that in any event, the authors clearly had the ability to challenge the decision to proceed with their deportation, as evidenced by the fact that they brought judicial review proceedings in the High Court in relation to that very decision and followed it with an appeal to the Court of Appeal.

4.9 The State party notes the authors' claim that A.K.'s rights to her nationality have been violated by the decision to remove the authors to India. It argues that the authors have not established any arguable breach of her right to acquire a nationality, noting that if she were to live with her family in India she would nonetheless retain her New Zealand citizenship. It further notes that A.K. is not required to travel to India and, at the time of its submission, was in fact living with her uncle in New Zealand.

4.10 The State party further notes the authors' claims that the removal of the family to India would amount to a violation of their and their children's rights under articles 17, 23 and 24

of the Covenant. It argues that the Covenant does not recognize the right of foreign citizens to enter a foreign State, that States must be given discretion to determine their own immigration laws and that only in very rare cases, where actions can be considered disproportionate or arbitrary, will there be a breach of the right to family life. The State party refers to the jurisprudence of the European Court of Human Rights in the case of *Jeunesse v. the Netherlands*,[2] in which the Court held that regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. In cases concerning immigration and family life, factors to be taken into account in that regard are the extent to which family life would effectively be ruptured, the extent of the ties in the contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the persons concerned and whether there are factors of immigration control or considerations of public order weighing in favour of exclusion. The State party further notes that the Court held that an important factor would be whether family life was created at a time when the family was aware that ongoing family life would be precarious from the outset owing to their immigration status and its finding that only in exceptional circumstances would the removal of a non-national family constitute a violation of the right to family life.

4.11 The State party submits that in deciding to deport the authors, who are non-citizens of New Zealand, it has acted consistently with its international obligations. It argues that the deportation of the authors does not inevitably result in separation of the family or an irreparable severance of family ties, as nothing is preventing the authors and their children from living together as a family in India. The State party argues that the authors' claims to family life in New Zealand do not arise from a period of long-settled family life but from the failure to provide all relevant information, including N.K.'s advanced pregnancy, when applying for the limited purpose visas granted in 2004; the failure of the authors to leave New Zealand before the expiry of their limited purpose permits, which had been granted in special circumstances, and despite repeated reminders to do so; their continual pursuit of unsuccessful immigration and court applications; and their evasion of the immigration authorities. The State party argues that since the authors' entry into New Zealand, the State party authorities have either continued their attempts to deport the authors or agreed not to deport the authors until their legal challenges were determined. The deportation orders were served on the authors at the first available opportunity and the authors have always been aware of their obligation to leave the State party before the expiry of their limited purpose permits in 2004. They were specifically advised of that obligation twice before their departure to New Zealand and numerous times thereafter. The authors established their family life at a time when they knew from the outset that continuing family life in New Zealand would be precarious. A.K. was born a week after her parents' two-week visa had expired. S.S. was born in New Zealand at a time when his parents knew they were unlawfully present and under an obligation to leave New Zealand. Since that time, the authors have continually pursued appeals for a visa or evaded the authorities, in the knowledge that they could be deported at any time. They could have had no legitimate expectation of continuing family life in New Zealand because they were aware of their unlawful status and their ongoing liability for deportation. The State party argues that it has applied immigration law in a clear and predictable manner throughout the authors' stay in New Zealand.

4.12 The State party argues that even if the Committee considers there has been interference with long-settled family life, the interference is not arbitrary because the State party has appropriately weighed up its reasons for deportation with the likely hardship the family would experience on deportation. When considering cancellation of the deportation orders against the family, the immigration officer reviewed a significant amount of country information, including the likely conditions of family life in India, such as health, housing and educational opportunities.[3] The immigration officer considered all the relevant rights in

[2] European Court of Human Rights, *Jeunesse v. the Netherlands*, application no 12738/10 (November 2014).

[3] The State party notes that the information considered by the immigration officer included, among other documentation, the following: interviews with the authors and their children, country reports on access to education for children in India, country reports on access to health care in India and evaluation of the provisions of articles 17, 23, 24 (1), 24 (3) and 26 of the Covenant.

international law, including those which are the subject of the present claim. The State party argues that those circumstances were balanced against its right to maintain the integrity of its immigration system and that any interference cannot be characterized as arbitrary.

4.13 The State party notes the Committee's findings in the case of *Winata and Li v. Australia*, in which it found that in certain circumstances a State party is under an obligation to provide additional factors justifying deportation besides simple enforcement of its immigration laws.[4] The State party argues that this approach should not be followed, as the effect of finding that a deportation in such circumstances would constitute an arbitrary interference with family life would carry the following implications: if persons who are unlawfully in a State party's territory establish a family and manage to escape detection for a long enough period they in effect acquire a right to remain there; it would ignore prevailing standards of international law, which allow States to regulate the entry into and residence in their territory of aliens; it penalizes States parties that do not actively seek out unlawful immigrants so as to force them to leave, but prefer to rely on the responsibility of the immigrants themselves to comply with the law and the conditions of their entry permits; it also penalizes States parties which do not require all persons to carry identification documents and to prove their status every time they have any contact with a State authority; and the approach may provide an unfair advantage to persons who ignore the immigration requirements of a State party and prefer to remain unlawfully in its territory rather than following the procedure open to prospective immigrants under the State party's laws.

Authors' comments on the State party's observations

5.1 On 3 April 2017, the authors submitted their comments on the State party's observations. They maintain that the communication is admissible.

5.2 The authors refer to their initial submission of 20 May 2016 and reiterate their argument that the provisions of the Immigration Act 2009 are in contravention of article 2 (3) of the Covenant, as an immigration officer is not required to provide reasons for denying a visa application for persons who are considered to be residing illegally in the State party at the time of the application. The authors argue that this provision in the Immigration Act deprived them of the right to a remedy, as there was no real possibility to have the decision examined before a court and for the court to assess whether the decision was made in error of law or of fact, took into account relevant or irrelevant matters, or was made in breach of natural justice. The authors further note that their claims under article 2 (3) are not a separate claim but related to and intertwined with their claims under articles 23 and 24 of the Covenant.

5.3 The authors reiterate their argument that they have a well-settled family life in the State party, where all the children have grown up. The children are integrated in the community and culture of the State party and have no knowledge of Punjab or India and they have close bonds and attachments to their wider family in the State party. The authors submit that the decision to deport the members of the family who are not citizens of the State party amounts to an arbitrary interference in their family life in violation of articles 17 (1), 23 (1) and 24 (1) of the Covenant. The authors argue that they were reasonably active in applying for visas, which were rejected. They argue that the State party took no steps to enforce compliance with its immigration laws, resulting in a settled family life for the authors and their children in the State party. They also argue that they were required to remain in the State party to ensure that A.K. had access to her rights to health and education and to remain in the State party. The authors argue that the State party has not provided any argumentation as to why their family life should be disrupted by deportation, other than compliance with its immigration laws. They argue that the family's removal to India is not in the best interests of their children. They refer to the Committee's jurisprudence in *Winata and Li v. Australia* and argue that in line with that jurisprudence and considering their settled family life in the State party, the State party is under an obligation to demonstrate additional factors justifying their removal that go beyond a simple enforcement of its immigration laws in order to avoid a characterization of arbitrariness. The authors argue that the State party has presented no such additional factors.

[4] *Winata and Li v. Australia* (CCPR/C/72/D/930/2000), para. 7.3.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the authors' claim that they have exhausted all effective domestic remedies available to them. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee notes the State party's submission that the authors have failed to substantiate their claims for the purposes of admissibility. It notes the authors' claims that the decision to deport them, and their two children who are not citizens of the State party, would amount to an arbitrary interference with their well-settled family life in the State party, in violation of their and their children's rights under articles 17 (1), 23 (1) and 24 (1), read alone and in conjunction with article 2 (3) of the Covenant. It also notes their arguments that the State party has not demonstrated that its interest in enforcing its immigration laws is proportionate to, or greater than, the family's right to maintain their well-established family life in the State party and that the immigration authorities failed to provide reasons for not cancelling the deportation orders against them. The Committee further notes the State party's argument that the authors' claims to family life in the State party do not arise from a period of legal residence in the State party, but from the failure of the authors to comply with their visa conditions and leave the State party before the expiry of those permits, as well as their evasion of the immigration authorities thereafter. It also notes the State party's argument that the authors established their family life at a time when they knew from the outset that continuing family life in New Zealand would be precarious and that they therefore could have had no legitimate expectation of it continuing, as they were aware of their ongoing liability to deportation. The Committee also notes the State party's argument that the family can enjoy family life together in India and its argument that the interference in the authors' family life is not arbitrary, as the State party authorities appropriately weighed up the reasons for deportation with the likely hardship the family would experience upon return, taking into account both the available information on India, including the likely conditions of family life, such as health, housing and educational opportunities, and its international obligations.

6.5 The Committee notes that the authors disagree with the decision of the State party authorities not to cancel the deportation order against them and their argument that the best interests of their children were not taken into account as a primary consideration in the decision. The Committee, however, notes that the decision of the immigration authorities was reviewed by the High Court, which found that the decision not to cancel the deportation orders had been based on the factual material before the authorities, including material on the education and health systems in India. The Committee further notes that the Court of Appeal held that the decision to deport the authors was reasonably open to the decision-maker on the basis of the facts and having regard to the State party's international obligations. The Committee further notes that the authors have not identified any specific and personal instance of hardship or irreparable harm that they or the children would face if removed to India, apart from their unsubstantiated claim that the children would be exposed to lower living and educational standards in India, which even if properly established would not necessarily imply living conditions incompatible with the standards set out by the Covenant. It also notes that the authors have not provided any specific argument as to why they would be unable to enjoy family life together in India. The Committee therefore finds that the authors have failed to substantiate, for purposes of admissibility, their claims under articles 17 (1), 23 (1) and 24 (1), read alone and in conjunction with article 2 (3) of the Covenant and declares the claims inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the decision shall be communicated to the State party and to the authors.