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HUMAN RIGHTS COMMITTEE
Sixty-ninth session
10 - 28 July 2000

DECISIONS

Communication No. 772/1997

Submitted by:	Mr. Colin McDonald and Mr. Nicholas Poynder, on behalf of Mr. Y. (Name deleted)
Alleged victim:	Mr. Y.
State party:	Australia
Date of communication:	25 October 1996
Prior decisions:	Special Rapporteur's rule 91 decision, transmitted to the State party on 9 October 1997 (not issued in document form)
Date of present decision:	17 July 2000

[ANNEX]

*Made public by decision of the Human Rights Committee.

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
- Sixty-ninth session -
concerning
Communication No. 772/1997*

Submitted by:	Mr. Colin Mc Donald and Mr. Nicholas Poynder on behalf of Mr. Y (Name deleted).
Alleged victim:	Mr. Y
State party:	Australia
Date of the communication:	25 October 1996

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

Meeting on 17 July 2000

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Colin McDonald, legal counsel. He presents the communication on behalf of Mr. Y, ethnic Chinese and born in 1951 in Vietnam. Counsel claims that Mr. Y is a victim of violations by Australia of articles 10, paragraph 1, as well as articles 9, paragraph 3, and 14, paragraphs 3(a), (b), and (d), in conjunction with article 2(1) of the Covenant. As of 7 September 1998, the conduct of the case was taken over by another counsel, Mr. Nicholas Poynder.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, and Mr. Abdallah Zakhia. Pursuant to rule 85 of the Committee's rules of procedure, Ms. Elizabeth Evatt did not participate in the examination of the case.

The facts as submitted by counsel

2.1 Counsel explains that Mr. Y is ethnic Chinese and that he was resettled from Vietnam, where he was born, to China in 1979. In China he had no work and no housing. In October 1994, he left China as captain of a boat codenamed the Albatross, together with 117 other Sino-Vietnamese. On 12 November 1994, the ship was intercepted in Australian waters and taken to Darwin. Upon arrival in Darwin, on 13 November 1994, the passengers were taken into custody under section 189(2) of the Migration Act 1958. On 15 November 1994, they were transferred to the Port Hedland Detention Centre in Western Australia.

2.2 From 15 November to 11 December 1994, Mr. Y and the other passengers of the Albatross were detained in a quarantine block that was separated from the rest and were thus isolated from all other detainees. From 15 to 19 November 1994, each of the detainees was interviewed by immigration officials. During this time, they were not informed that they had a right to legal counsel, nor were they provided with any legal counsel. On 11 December 1994, Mr. Y and his co-passengers were moved to an open block within the detention centre.

2.3 On 6 January 1995, some of the Albatross detainees requested access to a lawyer. There is no indication, however, that Mr. Y requested such access.

2.4 On 13 February 1995, Port Hedland's manager informed Mr. Y and other detainees that, following a Memorandum of Understanding between Australia and China on 25 January 1995, Parliament had designated China a 'safe country' for purpose of all Vietnamese nationals who had resettled in China.[1] The provision had retro-active effect as of 30 December 1994. According to sections 91A to 91F of the Migration Act persons from designated safe countries are not allowed to apply for refugee status in Australia.

2.5 Mr. Y first saw a legal adviser on 17 February 1995. Counsel points out that by that time he was unable to apply for refugee status, as a consequence of the amendment which had been passed by Parliament. On 22 February 1995, Mr. Y and others filed an application in the Federal Court of Australia against the Minister for Immigration and the Commonwealth of Australia. They alleged that they had been denied procedural fairness in so far as they had not been advised of their right to request access to a legal adviser, and thus had lost their opportunity to apply for refugee status.

2.6 On 27 July 1995, the application was dismissed on the ground that there is no statutory obligation under Australian law for an Immigration Officer to inform non-citizens who enter Australia illegally of their rights to legal advice. On the facts, the Court found that there was no evidence that any of the Albatross people had indicated that they were seeking asylum in

[1]The text of the Memorandum of Understanding reads inter alia: “Both parties agreed that for the recent and possible future unauthorised arrivals in Australia of Vietnamese refugees settled in China they will, ... , engage in friendly consultations and seek proper settlement of the issue through agreed procedures. To this end, Vietnamese refugees settled in China returned under agreed verification arrangements, will continue to receive the protection of the Government of China”.

Australia or that they had otherwise invoked Australia's protection obligations, either during the boarding of their ship by immigration officers or during the interviews conducted at Port Hedland detention centre between 15 and 19 November 1994. The Court further found that there was no evidence that any of the Albatross people had requested to see a lawyer before 30 December 1994.

2.7 On 16 August 1995, Mr. Y and others filed a notice of appeal with the Full Federal Court of Australia, and on 28 February 1996 the Court, by majority, dismissed the appeal. Other than the first instance Court, the majority of the Full Federal Court found that factors such as the circumstances of their arrival, their having previously been refugees from Vietnam, their concern to travel on rather than return to China if denied entry, the claims of no employment or housing in China showed by implication that the Albatross people sought to claim Australia's protection obligations in a Convention sense. However, the presence of an implied claim could not lead to a finding in their favour, because the law requires the completion of a specific application and it could not be said that a constructive application had been made. The Full Federal Court confirmed the High Court's finding that there was no statutory obligation to facilitate obtaining legal advice without the applicants asking for it. Mr. Y's application with the High Court of Australia for special leave to appeal was dismissed on 16 April 1996.

2.8 On 11 May 1996, Mr. Y was deported from Australia to China.

The complaint

3.1 Counsel makes claims relating to the period in which Mr. Y was placed in quarantine detention and to the failure of the State party to inform Mr. Y of his right to seek legal advice.

3.2 He claims violations of article 9, paragraph 3, article 10, paragraph 1 and article 14, paragraphs 1 and 3 (a), (b) and (d).

State party's observations

4.1 By submission of 30 September 1998, the State party explains that Mr. Y was classified on arrival as an 'unlawful non-citizen' for the purposes of the Migration Act 1958 and taken into immigration detention under section 189(2) of the Act. Under the Act, no obligation exists to advise those detained under section 189(2) that they may apply for a visa of any type, to provide any opportunity to apply for a visa or to allow access to advice in connection with an application for a visa. However, under section 156 of the Act, the Department of Immigration is under an obligation to facilitate access to legal advice whenever a person detained under section 189(2) so requests. Publicly funded legal assistance is provided where the Department considers that a person, prima facie, may engage the protection obligations of Australia under the Refugees Convention.

4.2 The State party explains that on 15 November 1994, new provisions of the Migration Act came into operation, providing that certain persons from designated 'safe third countries' are

excluded from making an application for a Protection Visa under the Act. On 25 January 1995, the Australian Government entered into a Memorandum of Understanding with the Government of China. The Memorandum provides that, subject to verification procedures, Vietnamese refugees settled in China who subsequently arrive in Australia without authorisation will be returned to China and continue to receive the protection of the Government of China. On 17 January 1995, the migration regulations were amended to designate China as a safe third country for Vietnamese nationals who had resettled in China as refugees. On 17 February 1995, the Migration Legislation Amendment Act (No.2) 1995 rendered invalid any visa applications made by Sino-Vietnamese between 30 December 1994 and 27 January 1995. In this context, the State party notes that Mr. Y is of Sino-Vietnamese origin and had not made an application for a Protection Visa before 30 December 1994 and was precluded from doing so after that date pursuant to the operation of the above mentioned statutory amendments.

4.3 While in accordance with the Committee's rules of procedure the State party has addressed counsel's arguments on the merits, the State party raises a preliminary argument regarding the admissibility of the communication. The State party argues that, in the absence of a written power of attorney, the communication is inadmissible ratione personae, since counsel has no standing to act on Mr. Y's behalf. In this connection, the State party refers to rule 90 of the Committee's rules of procedure and argues that a representative should be duly authorized. The State party notes that there is no evidence that Mr. McDonald received instructions from Mr. Y to act on his behalf or that Mr. Y expressly authorized him to do so. Moreover, the State party notes that counsel himself acknowledges that he is not aware of Mr. Y's current address. The State party submits that counsel cannot act on Mr. Y's behalf when he has no means of contacting him or receiving instructions from him. The State party further argues that there is no evidence of a sufficiently close relationship between counsel and Mr. Y to justify counsel acting without express authorization. The State party therefore requests the Committee to declare the communication inadmissible under article 1 of the Optional Protocol.

Counsel's comments

5.1 By submission of 4 January 1999, counsel comments on the State party's submission on the issue of admissibility. As to the question of standing, counsel attaches a statutory declaration, dated 4 January 1999, by himself in which he declares having met Mr. Y in June 1995 when attending the Federal Court hearings in Perth as an observer. Afer that, he received at least one telephone call from Mr. Y, during which his proceedings were discussed. On 17 April 1996, after the High Court dismissed the application for special leave to appeal, counsel initiated a telephone conversation with Mr. Y through an interpreter, of which he attaches the transcript. From the transcript, it appears that he requested Mr. Y's permission to present his case to the United Nations, to which Mr. Y replied that he had no objection. The same day, counsel confirmed the contents of the telephone conversation in a letter to Mr. Y With the letter, he included a written authority to be signed by Mr. Y According to counsel, Mr. Y did in fact sign the written authority and returned it to counsel,

who subsequently misplaced it and it now appears to be lost. On 8 May 1996, counsel spoke to Mr. Y again and asked his permission to have Mr. Colin McDonald work on his case.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has challenged the admissibility of the communication on the grounds that it was not submitted by the victim of the alleged violations of the Covenant. The Committee notes that the lawyer who submitted the communication did not represent Mr. Y in the proceedings before the domestic courts nor has he produced a power of attorney in writing to act on Mr. Y's behalf. As to the telephone conversation between counsel and Mr. Y (a transcript of which has been provided to the Committee), it transpires that counsel told Mr. Y that he wished to address a question of principle to the Human Rights Committee (whether the State party has an obligation to inform unlawful entrants into Australia of their right to consult a lawyer) and asked whether Mr. Y would agree to counsel submitting a communication in Mr. Y's name in order to test this question. According to the transcript, counsel made it clear that the said communication would not affect Mr. Y himself (for the good or bad) and all Mr. Y said was that he had no objection to counsel submitting such a communication. Although 24 days elapsed between the said telephone conversation and Mr. Y's deportation counsel never received instructions from Mr. Y as to the subject matter of the communication. Counsel has lost contact with Mr. Y since the latter's deportation from Australia.

6.3 The Committee has always taken a wide view of the right of alleged victims to be represented by counsel in submitting communications under the Optional Protocol. However, counsel acting on behalf of victims of alleged violations must show that they have real authorization from the victims (or their immediate family) to act on their behalf, that there were circumstances which prevented counsel from receiving such authorization, or that given the close relationship in the past between counsel and the alleged victim it is fair to assume that the victim did indeed authorize counsel to proceed with a communication to the Human Rights Committee. The Committee is of the opinion that in the present case counsel has failed to show that any of these conditions apply. The Committee is therefore of the opinion that counsel has not shown that he may act on behalf of Mr. Y in submitting this communication. The communication does not meet the requirement of article 1 of the Optional Protocol that a communication be submitted by a victim of an alleged violation. The Committee therefore holds it to be inadmissible.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

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

[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.]