



**International covenant
on civil and political
rights**

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HUMAN RIGHTS COMMITTEE
Ninety-third session
7 to 25 July 2008

DECISION

Communication No. 1513/2006

<u>Submitted by:</u>	Vital Maria Fernandes et al. (represented by counsel, Mr. Bjorn van Dijk)
<u>Alleged victim:</u>	The authors and their children
<u>State party:</u>	The Netherlands
<u>Date of submission:</u>	12 January 2005
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 November 2006 (not issued in document form)
<u>Date of adoption of Decision:</u>	22 July 2008

*Made public by decision of the Human Rights Committee.

Subject matter: Deportation of family members; separation of children from their parents

Procedural issues: Sufficient substantiation, for purposes of admissibility

Substantive issues: Right to privacy; protection of the family

Article of the Optional Protocol: 2

Articles of the Covenant: 17(1), 23

[ANNEX]

ANNEX**DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS**

Ninety-third session

concerning

Communication No. 1513/2006*

<u>Submitted by:</u>	Vital Maria Fernandes et al (represented by counsel, Mr. Bjorn van Dijk)
<u>Alleged victim:</u>	The authors and their children
<u>State party:</u>	The Netherlands
<u>Date of submission:</u>	12 January 2005

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

Meeting on 22 July 2008,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Vital Maria Fernandes, a Cape Verdean national, submitting the communication on his own behalf and on behalf of his three children, all of Dutch nationality; his wife Maria Jose Pereira Monteiro Fernandes, a Cape Verdean national; and Walter Hugo Monteiro Semedo, son of the latter and also a Cape Verdean national. They claim to be victims of a violation by the Netherlands¹ of article 17, paragraph 1 and article 23 of the

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

¹ The Covenant and the Optional Protocol thereto entered into force for the State party on 11 March 1979.

International Covenant on Civil and Political Rights. The authors are represented by counsel, Mr. Bjorn van Dijk.

The facts as presented by the authors

2.1 Mr. Fernandes worked on Dutch commercial vessels since the late 1980s. Pursuant to the Dutch Aliens Act, individuals are eligible for a residence permit if they, *inter alia*, have worked on Dutch ships for seven years. Mr. Fernandes stopped working before completing this 7-year term, due to back problems. He received benefits in accordance with the Disablement Benefits Act (WAO) and has not worked since that time.

2.2 Mr. Fernandes resides in the Netherlands with his wife, Ms. Monteiro Fernandes, whom he married in 1995 in the Netherlands, and their four children. Three of the children are minors and Dutch nationals. They all lived in the Netherlands since their birth. Mr. Monteiro Semedo, born on 5 October 1985, is the son of Ms. Monteiro Fernandes from a previous marriage.

2.3 On 13 November 1995, Mr. Fernandes submitted an application for a residence permit to the Commissioner of the Groningen District Police, in order to be able to obtain employment on board a Dutch vessel and spending his leave in the Netherlands. This application was rejected on 16 July 1996. His administrative appeal against this decision was declared inadmissible by decision of 9 October 1996. A further appeal was filed in The Hague District Court (Zwolle branch) on 6 November 1996. The appeal was dismissed on 2 May 1997.

2.4 On 6 May 1997, Mr. Fernandes submitted a new application for a residence permit ‘without restrictions’ to the Commissioner of the Groningen District Police. This was rejected on 7 May 1999. On 1 June 1999, the complainant filed an objection and requested an interlocutory decision on 29 June 1999. The Hague District Court (Zwolle branch) denied the request on 31 August 2000, and declared the objection of 1 June 1999 unfounded. A new application for a residence permit was then submitted to the Commissioner of the Groningen District Police on 10 July 2000. This request was focused on enabling Mr. Fernandes to stay with his children. The request was not accepted. An objection was filed on 7 August 2000 and declared well-founded on 8 January 2001.

2.5 On 12 September 2000, the Groningen District Police Commissioner proposed that Mr. Fernandes be declared an “undesirable person”, as he had committed criminal offences and had been sentenced on at least three occasions in 1996, 1999 and 2000 for violations to the Opium Act and the Road Traffic Act. On 20 February 2003, the application of 10 July 2000 was rejected by the Minister for Aliens Affairs and Integration and Mr. Fernandes was declared “an undesirable person”.² The decision explicitly stated that the refusal to grant the author a residence permit did not constitute a violation of his right to respect for his family life, as defined by article 8 of the

² Ms. Monteiro Fernandes and Mr. Monteiro Semedo submitted applications for temporary residence permits on 10 July 2000 for the purpose of “staying with her children” and “family reunification with parents” respectively. The Minister for Alien Affairs and Integration rejected both applications by decisions dated 20 February 2003.

European Convention of Human Rights. Although the matter involved respect for the family life of the complainants, the refusal to grant Mr. Fernandes a residence permit in the Netherlands was not aimed at depriving him of any entitlement to temporary residence, enabling him to live with his family in the Netherlands. The decision indicates that Mr. Fernandes and his wife were illegal residents when they started their family life in the Netherlands, and that they knew or should have known of the risks their choices entailed. The decision stipulated that the minor children with Dutch nationality could opt for Cape Verdean nationality, under Cape Verdean law. Thus, no objective obstacles existed that would prevent the complainants from leading a family life outside the Netherlands. An objection was lodged with the Minister for Aliens Affairs, as well as a request for a provisional ruling from the Hague District Court (Aliens Chamber). The request and the following objection were dismissed on 3 February 2004. The Hague Court decision was not subject to appeal.

2.6 On 30 March 2004 a complaint was filed with the European Court of Human Rights. On 7 September 2004 the European Court of Human Rights declared the authors' application inadmissible because it did not comply with the requirements set out in articles 34 and 35 of the European Convention on Human Rights.³

The complaint

3. The authors claim that the Netherlands violates article 17, paragraph 1, and article 23 of the Covenant, by refusing the complainants residence permits, since three of their children are Dutch nationals. Being Dutch citizens, they cannot be deported. The three children were born and raised in the Netherlands and they do not have any connection with Cape Verde. The complainants are being forced to make an unacceptable choice of either to remain in the Netherlands, without legal residence status, or to return to Cape Verde with their children, who are fully integrated into Dutch society.⁴

State party's submissions on admissibility and merits

4.1 On 21 February 2007, the State party made its submission on the admissibility of the communication. On 16 April 2007, the State party confirmed that its admissibility submission also pertained to the merits of the communication.

4.2 The State party considers that the authors have insufficiently substantiated their claim. They failed to provide specific information and arguments in support of their claim that provisions of the Covenant have indeed been violated. The only substantiation provided is a mere assertion that the three minor children are integrated into Dutch society and that their return to Cape Verde would cause them problems.

³ ECHR, Application No. 11347/04, Fernandes and others v. The Netherlands.

⁴ Authors refer to the Committee's views in communication No.1011/2001, Madafferi v. Australia, Views adopted on 26 July 2004.

4.3. The State party indicates that Mr. and Mrs. Fernandes established a family in the Netherlands without being legal residents in that country. They knew, or at the very least should have known, that the question of whether they would be able to continue their family life in the Netherlands would depend on whether they received a residence permit. The State party points out to Mr. Fernandes' criminal record, which resulted in him being declared an "undesirable alien". It notes that, as the children are eligible for Cape Verdean nationality, nothing would prevent them from living with their parents in Cape Verde.

Author's comments on the State party's submissions

5. On 28 November 2007, the authors reiterate that their communication is admissible and that their three Dutch children cannot be asked to relocate to a country to which they do not belong. They indicate that an attempt to move to Cape Verde in October 2006, where the children spent four months, not in the company of their father, failed because their links to the Netherlands proved to be too strong and they were not able to adjust to life in Cape Verde.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee notes that this matter was already considered and decided by the European Court of Human Rights on 7 September 2004. However, it recalls its jurisprudence⁵ that it is only where the same matter is being examined under another procedure of international investigation or settlement that the Committee has no competence to deal with a communication under article 5, paragraph 2(a), of the Optional Protocol. Thus, article 5, paragraph 2(a), does not prevent the Committee from considering the present communication.

6.3 In relation to the alleged violation of article 17, paragraph 1, and article 23 of the Covenant, the Committee notes that other than statements on the alleged hardship that the children, who were born and raised in the Netherlands, would suffer if they follow their parents to their country of origin, the authors have provided no arguments on how their rights under these provisions would allegedly be violated.⁶ In addition, the authors have not demonstrated why, in these particular circumstances, their deportation to Cape Verde would constitute an unlawful or arbitrary

⁵ See Communication No. 824/1998, Nicolov v. Bulgaria, inadmissibility decision adopted on 24 March 2000.

⁶ See Communication No. 820/1998, Rajan v. New Zealand, inadmissibility decision adopted on 6 August 2003.

interference with their family relations.⁷ Consequently, the Committee is of the view that the authors have failed to sufficiently substantiate their claim for purposes of admissibility, that they or their children are victims of violations of article 17, paragraph 1, and article 23 of the Covenant. It thus finds that the communication is inadmissible under article 2 of the Optional Protocol. The Committee notes that its conclusion takes account of the paucity of information provided by the authors, despite its requests for additional information on the status of the children as well as on the difficulties they would face if relocated to Cape Verde.

7. The Committee therefore decides:

- (a) That the communication is inadmissible under article 2 of the Optional Protocol;
- (b) That this decision shall be communicated to the author and to the State party.

[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.]

⁷ See Communication 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, paragraph 11.7; Communication No. 1011/2001, *Madafferri v. Australia*, Views adopted on 26 July 2004, paragraphs 9.7 and 9.8; Communication No. 538/1993, *Stewart v. Canada*, Views adopted on 1 November 1996, paragraph 12.10