

**SS.Communication No. 1792/2008, *Dauphin v. Canada*  
(Views adopted on 28 July 2009, Ninety-sixth session)\***

<i>Submitted by:</i>	John Michaël Dauphin (represented by counsel Alain Vallières)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	29 May 2008 (initial submission)
<i>Subject matter:</i>	Expulsion order against a Haitian national who has been a permanent resident since the age of 2, inadmissible to Canada on grounds of serious criminality
<i>Procedural issues:</i>	Failure to substantiate allegations; incompatibility <i>ratione materiae</i> with the provisions of the Covenant
<i>Substantive issues:</i>	Right to life; prohibition of torture; recognition as a person before the law; protection against arbitrary or unlawful interference with privacy; right to family life; principle of non-discrimination
<i>Articles of the Covenant:</i>	6; 7; 16; 17; 23; and 26
<i>Articles of the Optional Protocol:</i>	2 and 3

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

*Meeting* on 28 July 2009,

*Having concluded* its consideration of communication No. 1792/2008, submitted to the Human Rights Committee by John Michaël Dauphin under

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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, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

The texts of individual opinions signed by Committee members Mr. Krister Thelin and Ms. Ruth Wedgwood are appended to the present Views.

the Optional Protocol to the International Covenant on Civil and Political Rights,

*Having taken into account* all written information made available to it by the author of the communication, his counsel and the State party,

*Adopts* the following:

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

1.1 The author of the communication dated 29 May 2008 is John Michaël Dauphin, a Haitian citizen. He is currently residing in Canada and is due to be deported to Haiti, having been declared inadmissible to Canada after being sentenced to 33 months' imprisonment for robbery with violence. He claims that his deportation to Haiti would constitute a violation by Canada of articles 6, 7, 16, 23 and 26 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2 On 2 June 2008, in accordance with article 92 of the Committee's rules of procedure, the Special Rapporteur on New Communications and Interim Measures requested the State party not to deport the author while his case was under examination by the Committee. On 28 July 2008, 2 October 2008 and 17 March 2009, following requests made by the State party, the Special Rapporteur refused to lift the interim measures.

1.3 On 28 July 2008, the Special Rapporteur on New Communications and Interim Measures decided not to separate consideration of the admissibility and the merits of the communication.

1.4 On 22 October 2008, counsel for the author informed the Committee that, during proceedings to review the grounds for detaining the author, the State party had considered whether the interim measures ordered by the Committee should be observed. On 23 October 2008, this information was transmitted to the State party, with a reminder of its obligations under rule 97 of the rules of procedure.

#### **The facts as submitted by the author**

2.1 The author, born in 1987, is from Haiti and is the oldest in a family of four children. He lived in Haiti for the first two years of his life, then in Canada, where he was educated. Not long after turning 18 years of age, he was sentenced to 33 months' imprisonment for robbery with violence. While serving his sentence, he discovered that he was not a Canadian citizen, as his parents had never completed the process for obtaining citizenship in his case, although all the other members of his family had become Canadian citizens.

2.2 While he was in prison, the Canadian authorities initiated proceedings to deport him from Canada on the grounds of his criminal conviction, in

accordance with the Immigration and Refugee Protection Act.<sup>1</sup> On 5 November 2007, the Immigration Division of the Immigration and Refugee Board held an admissibility hearing. The author claims that he attempted, unsuccessfully, to prove to the Division that he had no links with Haiti and that, being Canadian citizens, his family were all in Canada. The Immigration Division allegedly refused to examine any information on that subject, as it deemed such information irrelevant in the light of the restrictions imposed under the Act.

2.3 The author appealed to the Immigration Appeal Division, which, on 18 March 2008, found that it did not have jurisdiction. The author applied for review of this decision and submitted an application for suspension of deportation to the Appeal Division of the Federal Court, which rejected his application on 10 June 2008. At the same time, the author appealed the Immigration Division's decision before the Federal Court, which rejected his application on 22 April 2008.

2.4 The State party then suggested that the author should apply for a pre-removal risk assessment (PRRA). On 9 May 2008, the Canadian authorities rejected his application on the ground that he faced no risk in the event of his return to Haiti. The author points out that this decision was taken within one month, whereas it is usually necessary to wait one year for such a decision. The author applied to the Federal Court to review the decision, but his application was rejected on 2 June 2008.

### **The complaint**

3.1 The author claims that his deportation to Haiti would endanger his life and physical integrity, which would constitute a violation by Canada of articles 6<sup>2</sup> and 7 of the Covenant. He alleges that the Canadian authorities are aware of this risk, as there is a moratorium preventing people being deported to Haiti. He claims that any person there may be killed, kidnapped or ill-treated, and that the Haitian authorities would be unable to protect him. Furthermore, the author emphasizes that the protection of life and physical integrity are absolute rights which cannot be set aside, even for criminals.

3.2 The author argues that the State party would violate article 16 if he were deported, as he would be prevented from stating his case against his removal to Haiti. The author claims that the powers of the Immigration Division are limited by law, so that the official making the pre-removal risk assessment

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<sup>1</sup> Article 36 (1) (a) of the Immigration and Refugee Protection Act, S.C., 2001, c. 27, provides as follows: "A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed."

<sup>2</sup> See, for example, communications No. 469/1991, *Charles Chitat Ng v. Canada*, Views adopted on 5 November 1993, paragraph 15.6; and No. 470/1991, *Joseph Kindler v. Canada*, Views adopted on 30 July 1993, paragraph 14.6.

has a particularly important role. The author maintains that the assessment did not take into account his personal circumstances and that this amounts to a denial of his legal personality. The author adds that the failure to examine his personal circumstances prevents him from receiving a sentence proportional to his crime. The Canadian system allegedly does not take into account the relationship between the act and the punishment, as any person sentenced to two or more years in prison will be liable to deportation, without the possibility of defence and without any examination of his or her personal circumstances.

3.3 The author submits that his removal would prevent him from maintaining links with his family and would constitute a violation of article 23.<sup>3</sup> Prior to his arrest, he was living with his family in Canada and had no family links to Haiti, where he had spent no more than his first two years. In addition, he claims to have been, since 2001, in a stable relationship with his girlfriend, whom he met at school.

3.4 The author claims that there has been discrimination in his case, in violation of article 26. He belongs to a particular group of foreign nationals living in Canada to which the State party denies any possibility of a fair trial.<sup>4</sup> He claims that, if one of the aims of the Immigration and Refugee Protection Act is to protect Canadian residents, it is doubtful whether the automatic deportation of any person who has been sentenced to two years in prison achieves that aim. Dangerous criminals with the means to pay for talented lawyers may be sentenced to less than two years' imprisonment, whereas a person of modest income who has no lawyer may be sentenced to two years or more and deported. Furthermore, the author argues that, of all the foreign nationals living in Canada, only those sentenced to two years' imprisonment or more are denied access to judicial procedures for the assessment of their personal circumstances, subjected to double punishment with no possibility of review and removed from the country without having access to genuine judicial proceedings.<sup>5</sup>

### **State party's observations on admissibility and the merits**

4.1 On 18 July 2008, the State party transmitted its observations on the admissibility of the communication and a request for the Committee to lift the interim measures.

4.2 The State party submits that the communication is based on mere suppositions and fails to advance prima facie evidence of a violation of the Covenant. In particular, it notes that all of the author's allegations have been

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<sup>3</sup> See communication No. 1272/2004, *Fatima Benali v. Netherlands*, Views adopted on 23 July 2004, para. 6.3.

<sup>4</sup> The author cites the case law relative to article 15 of the Canadian Charter of Rights and Freedoms.

<sup>5</sup> The author compares the legal situation in Canada to six European countries: Belgium, Denmark, Germany, Italy, Portugal and the United Kingdom. He concludes that a criminal conviction can lead to a removal order being issued where the existence of a threat to public order has been established by examination of the specific case.

examined in depth by the national authorities, which concluded that they were unfounded. In the absence of proof of a manifest error, abuse of process, bad faith, obvious bias or serious irregularities in the process, the Committee should not substitute its own findings of fact for those of the Canadian authorities. It is for the courts of States parties to evaluate the facts and evidence in particular cases. The State party maintains that the communication should be found inadmissible under article 2 of the Optional Protocol for failure to substantiate claims. It adds that the communication is incompatible with the Covenant with regard to the alleged violation of articles 16, 23 and 26 and that these parts of the communication should therefore be found inadmissible *ratione materiae* under article 3 of the Optional Protocol.

4.3 The State party recalls the facts as submitted by the author and emphasizes that, on 18 July 2006, the author was sentenced to four years' imprisonment, reduced to 33 months to take account of the time spent in detention, for robbery with violence or threatened violence against seven individuals, one of whom sustained serious injuries. On 12 December 2006, after having examined the author's case file, the Canada Border Services Agency recommended that he be deported from Canada.<sup>6</sup> This recommendation was confirmed on 27 April 2007 by a representative of the Minister of Citizenship and Immigration. On 5 November 2007, after having heard the author and his counsel, the Immigration Division of the Immigration and Refugee Board determined that all the conditions for "inadmissibility to Canada on grounds of serious criminality" had been met, i.e. that the author was not a Canadian citizen and had been sentenced to a prison term longer than six months.<sup>7</sup> At the hearing, the author stated that the official from the Canada Border Services Agency had not met him in person, that the Immigration Division was not an independent court and that the procedure for removal provided for in the Immigration and Refugee Protection Act was unconstitutional. On 12 March 2008, the author's appeal to the Immigration Appeal Division was rejected on the grounds of lack of jurisdiction under the Immigration and Refugee Protection Act, which provides that a person found inadmissible for serious criminality cannot lodge an appeal. On 21 April and 10 June 2008, the Federal Court rejected the two applications for judicial review of the Immigration Division and the Immigration Appeal Division decisions.

4.4 The author's application for pre-removal risk assessment was denied on 9 May 2008 on the grounds that he was not personally targeted or particularly at risk of kidnapping and that the risk in question was a general one which affects the entire Haitian population. On 2 June 2008, the Federal

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<sup>6</sup> Article 36 of the Immigration and Refugee Protection Act (note 1 above).

<sup>7</sup> The State party notes that the procedure for deporting foreign nationals for serious criminality has been challenged on a number of occasions and has always been upheld by the national courts. See, for example, *Powell v. Canada* [2005] FCA No. 929 (FCA); *Rammanan v. Canada* [2008] FCA No. 543 (FC).

Court rejected the application to stay his deportation. On 24 July 2008, the Federal Court rejected his application for leave and for judicial review of the rejection of his application for a pre-removal risk assessment.

4.5 With regard to the alleged violation of articles 6 and 7, the State party maintains that the risk alleged by the author is of a general nature and that he did not claim to belong to a category of persons particularly at risk of kidnapping or being personally targeted. The author has provided no evidence of his alleged risk of death, kidnapping or ill-treatment, or of the inability of the authorities to protect him. The State party points out that the stay of deportation to Haiti mentioned by the author and adopted by Canada in February 2004 for humanitarian reasons should not be interpreted as an admission by Canada of the alleged risks to the author. The stay is a voluntary measure that goes beyond international obligations under the Covenant. Under paragraph 230 (3) (c) of the Immigration and Refugee Protection Regulations, the stay does not apply to individuals who are inadmissible because they have committed criminal acts. The State party maintains that this part of the communication should be found inadmissible, as the author has not sufficiently substantiated his claims.

4.6 As to the alleged violation of article 16, the State party claims inadmissibility *ratione materiae*, since the Covenant does not guarantee the right to a hearing before a judge in immigration proceedings. It notes that article 16 protects the right to recognition as a person before the law and not the right to bring legal proceedings.<sup>8</sup> The State party maintains that this part is manifestly without merit.

4.7 With respect to article 23, the State party submits that the allegation is inadmissible *ratione materiae*, as article 23 does not guarantee the right to family. In the alternative, it submits that the author's mere claim that he has family in Canada and not in Haiti is not sufficient to substantiate admissibility and cannot prevent his deportation. Furthermore, the State party emphasizes that, even if the author has not invoked article 17, his deportation would not constitute unlawful or arbitrary interference with his privacy, his family or his home, since it was ordered in accordance with the law and the domestic remedies took into account relevant factors, including the fact that the author's family lives in Canada. Moreover, the State party submits that the communication in this case cannot be compared with the *Winata v. Australia* case,<sup>9</sup> or with the *Canepa v. Canada* case,<sup>10</sup> given that the author has neither a wife nor a child in Canada and there is no indication that his family is necessary to his rehabilitation. Furthermore, his deportation constitutes a reasonable measure in the circumstances, proportional to the gravity of the crimes that he has committed.

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<sup>8</sup> Nowak, Manfred, *UN Covenant on Civil and Political Rights*, second edition, Kehl am Rhein: Strasbourg, 2005, pp. 370–371: “Article 16 is limited exclusively to the capacity to be a person before the law and does not cover the capacity to act.”

<sup>9</sup> Communication No. 930/2000, *Winata v. Australia*, Views adopted on 11 May 2000, para. 7.3.

<sup>10</sup> Communication No. 558/1993, *Giosue Canepa v. Canada*, Views adopted on 3 April 1997.

4.8 With respect to article 26 of the Covenant, the State party submits that the author did not sufficiently substantiate, for the purposes of admissibility, his claim that the Immigration and Refugee Protection Act was discriminatory and had produced an unfair or inequitable outcome in his case. In these circumstances, the State party maintains that it could not be expected to speculate on the purport of the author's allegations, much less to refute any possible interpretations. The State party maintains that this part of the communication is incompatible with the Covenant and is therefore inadmissible *ratione materiae*.

4.9 Moreover, the State party submits that differential treatment of persons who have committed serious criminal acts is not prohibited under article 26. It is a universally recognized practice in respect of immigration, and foreign nationals who have committed serious crimes can legitimately be denied certain privileges that are afforded to other foreign nationals. Moreover, this criterion for differential treatment is both objective and reasonable, given that the author himself is responsible for his inclusion in the category of inadmissible persons.

4.10 On 1 October 2008, the State party gave its opinion on the merits of the communication and reiterated its request that interim measures be lifted, citing inter alia a statement by the Senior Protection Officer at the Office of the United Nations High Commissioner for Refugees (UNHCR) in Haiti to the effect that there is no apparent reason to continue to call for the non-refoulement of Haitian nationals. Furthermore, the State party submits that deportation would not cause irreparable damage under rule 92 of the Committee's rules of procedure because it could be reversed: the author could be granted leave to return if the Committee concluded that articles 17 and/or 23 had been violated.

4.11 The State party submits, as a subsidiary argument to its observations on admissibility and on the same grounds, that the communication should be found inadmissible on the merits as it fails to demonstrate any violation of articles 6, 7, 16, 23 or 26.

5. On 2 October 2008 and 9 February, 17 March and 19 May 2009, the Committee asked the author to submit comments on the State party's observations on admissibility and the merits, but has received no response.

#### **State party's additional observations**

6. On 30 January 2009, the State party submitted additional observations on admissibility and the merits, clarifying its observations on article 23. It recalls that, in the Committee's jurisprudence, deporting a person with family on the State party's territory does not of itself constitute arbitrary interference with his or her family.<sup>11</sup> It points out that the author has neither

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<sup>11</sup> See, for example, communications No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004; No. 893/1999, *Sahid v. New Zealand*, Views adopted on 28 March 2003, paragraph 8.2; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004.

children nor a wife in Canada, that he has no dependants and is himself not dependent on his family's help. The State party notes that the author lived for the most part in youth centres and foster homes from the age of 13 and received no help from his family when he turned to a life of crime and drug abuse; there was no indication that his family was necessary to his rehabilitation, nor was there any evidence of the existence of close links between the author and his family. The State party points out that the fact that the author has spent most of his life in Canada is not in itself an exceptional circumstance from the standpoint of article 17 or article 23. The State party argues that, even if the author's deportation constituted interference with his family, it would be reasonable in the circumstances and proportional to the seriousness of his crimes.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with article 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 The Committee notes that it is not disputed that the author has exhausted all available domestic remedies and that the conditions laid down in article 5, paragraph 2 (b), of the Optional Protocol have therefore been met.

7.4 With respect to the alleged violation of articles 6 and 7 of the Covenant, the Committee must ascertain whether the conditions laid down in articles 2 and 3 of the Optional Protocol have been met. With respect to articles 6 and 7, on the basis of the information before it, the Committee cannot find that the author has substantiated, for the purposes of admissibility, his claim that his deportation to Haiti and separation from his family in Canada would place his life in danger (art. 6) or amount to cruel, inhuman or degrading treatment within the meaning of article 7. The Committee recalls that, in accordance with its practice,<sup>12</sup> the author must show that deportation to a third country would pose a personal, real and imminent threat of violation of articles 6 and 7. In his communication, the author simply states that "any person there [in Haiti] may be killed, kidnapped or ill-treated [...] and that the Haitian authorities are not able to protect individuals, who are left to fend for themselves". The Committee notes the statement by the State party,

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<sup>12</sup> See, for example, communications No. 706/1996, *G.T. v. Australia*, paragraphs 8.4–8.6; No. 692/1996, *A.R.J. v. Australia*, paragraph 6.14; and general comment No. 31 (2004), *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. I, annex III, paragraph 12.

citing the UNHCR office in Haiti, which contains the view that it is no longer necessary to extend the moratorium of February 2004 on the removal of Haitian nationals, which does not cover persons inadmissible for having committed crimes. The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>13</sup> This jurisprudence has also been applied to expulsion procedures.<sup>14</sup> The Committee does not believe that the material before it shows that the proceedings before the authorities in the State party suffered from any such defects. The Committee accordingly considers that the author has failed to substantiate his claims under articles 6 and 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.<sup>15</sup>

7.5 With regard to article 16, the Committee notes that the right to a hearing before a judge in a deportation case is not provided for by article 16, which covers only the right to recognition as a person before the law and is not applicable to the right to institute legal proceedings. The Committee therefore considers that this part of the communication is inadmissible under article 3 of the Optional Protocol and incompatible with the provisions of the Covenant.

7.6 With regard to the alleged violation of article 26, the Committee notes the author's argument that there has been discrimination in this case insofar as he belongs to the category of foreign offenders and has consequently been denied access to a judicial procedure for the assessment of his personal circumstances. The Committee recalls that differential treatment based on reasonable and objective criteria does not amount to discrimination as prohibited under article 26. In this case, the author has failed to substantiate, for the purposes of admissibility, his claim of discrimination and the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.7 As to articles 17 and 23, the Committee notes the State party's arguments on article 17 and considers it appropriate to examine the communication in the light of this article as well. The Committee notes that the author spent only two years of his life in Haiti and the rest in Canada where his family still lives. It takes note of the State party's observation that the author has neither a wife nor children in Canada and that he is not financially dependent on his family. The Committee nevertheless recalls that, a priori, there is no indication that the author's situation is not covered

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<sup>13</sup> See, for example, communication No. 541/1993, *Errol Simms v. Jamaica*, decision adopted on 3 April 1995, paragraph 6.2.

<sup>14</sup> See communication No. 1234/2003, *P.K. v. Canada*, decision adopted on 20 March 2007.

<sup>15</sup> See, for example, communication No. 1315/2004, *Daljit Singh v. Canada*, inadmissibility decision adopted on 30 March 2006, paragraph 6.2.

by article 17 and article 23, paragraph 1, and thus concludes that the matter should be considered on the merits.

7.8 The Committee declares the communication admissible insofar as it appears to raise issues under articles 17 and 23, paragraph 1, of the Covenant, and proceeds to a consideration of the merits.

*Consideration of the merits*

8.1 As to the alleged violation under articles 17 and 23, paragraph 1, the Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of a family to remain in its territory would involve interference in that person's family life. However, the mere fact that certain members of the family are entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.<sup>16</sup>

8.2 In this instance, the author has lived in the State party's territory since the age of two and was educated there. His parents and three brothers and sisters live in Canada and have Canadian nationality. The author is to be deported after having been sentenced to 33 months' imprisonment for robbery with violence. The Committee notes the author's claim that his entire family is in Canada, that he lived with his family before his arrest and that he has no family in Haiti. The Committee also notes the State party's arguments referring to a rather casual link between the author and his family, since he had lived mainly in youth centres and foster homes and received no help from his family when he turned to a life of crime and drug abuse.

8.3 The Committee recalls its general comments Nos. 16 (1988) and 19 (1990),<sup>17</sup> whereby the concept of the family is to be interpreted broadly. In this case, it is not disputed that the author has no family in Haiti and that all his family live in the territory of the State party. Given that this is a young man who has not yet started a family of his own, the Committee considers that his parents, brothers and sisters constitute his family under the Covenant. It finds that the State party's decision to deport the author, who has spent all his life since his earliest years in the State party's territory, was unaware that he was not a Canadian national and has no family ties whatsoever in Haiti, constitutes interference in the author's family life. The Committee notes that it is not disputed that this interference had a legitimate purpose, namely the prevention of criminal offences. It must therefore

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<sup>16</sup> See, for example, communications No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, paragraph 7.1; No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, paragraph 9.7; and No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, paragraph 11.5.

<sup>17</sup> *Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40)*, annex VI para. 5; and *Ibid.*, *Forty-fifth Session, Supplement No. 40 (A/45/40)*, vol. I, annex VI, sect. B, paragraph 2.

determine whether this interference was arbitrary and a violation of articles 17 and 23, paragraph 1, of the Covenant.

8.4 The Committee notes that the author considered himself to be a Canadian citizen and it was only on his arrest that he discovered that he did not have Canadian nationality. He has lived all his conscious life in the territory of the State party and all his close relatives and his girlfriend live there, and he has no ties to his country of origin and no family there. The Committee also notes that the author has only a single previous conviction, incurred just after he turned 18. The Committee finds that the interference, with drastic effects for the author given his very close ties to Canada and the fact that he appears to have no link with Haiti other than his nationality, is disproportionate to the legitimate aims pursued by the State party. The author's deportation therefore constitutes a violation by the State party of articles 17 and 23, paragraph 1, of the Covenant.

9. 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 information before it discloses a violation of articles 17 and 23, paragraph 1, of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by refraining from deporting him to Haiti. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not, and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

## Appendix

### **Individual opinion of Committee Member Mr. Krister Thelin (dissenting)**

The majority has found a violation of articles 17 and 23, paragraph 1, of the Covenant.

I respectfully disagree.

The author, born 1987, is a citizen of Haiti. He has been sentenced to 33 month's imprisonment for robbery with violence in Canada and has for this reason been subject to a lawful decision of deportation to Haiti by the Canadian authorities.

While the author's wish to avoid being expelled to his country of citizenship, where he has no family and the general conditions are less favourable than in Canada, is understandable, the issue before the Committee is whether an execution of the legitimate deportation order would be a disproportionate interference with the author's family life. Considering that he lacks family of his own in Canada, although his parents, brothers and sisters are there, and the seriousness of the crimes for which he has been convicted, an expulsion to Haiti would in my view not amount to a violation of articles 17 and 23, paragraph 1, of the Covenant.

*(Signed)* Mr. Krister **Thelin**

[Done in French, English and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

### **Individual opinion of Committee member Ms. Ruth Wedgwood (dissenting)**

Even in a globalized world, the regulation of immigration is a matter of importance to nation States. It includes not only the right to set conditions for obtaining citizenship, but also for long-term residence. The Committee has never purported to suggest that the Covenant contains a detailed code for how States can regulate both matters. In a limited number of cases, however, the Committee has found that articles 17 and 23 set some outer boundary, in particular, where the deportation of a non-citizen parent would leave a citizen child without full parental care.<sup>18</sup> In

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<sup>18</sup> See communications No. 930/200, *Winata v. Australia*, Views adopted on 29 July 2001 (deportation of authors would deprive 13-year-old juvenile of parental care); No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004 (deportation

the *Sahid v. New Zealand* case, the Committee set out the test that limiting a State's enforcement of its immigration law on grounds of a right to family life would require the demonstration of "extraordinary circumstances".

In the current case, the Committee has not applied this jurisprudence with consistency. The author in the instant case did not plead article 17 of the Covenant in his communication to the Committee, even though he was assisted by legal counsel. But even within the standards of article 17 combined with article 23, it is hard to see how any violation can be well-founded.

At the age of 18, the author was convicted and sentenced to jail for a term of four years for a serious crime of violence, namely, "robbery with violence or threatened violence against seven individuals, one of whom sustained serious injuries".<sup>19</sup> He is now 22 years old. He is not married and has no child, though he avers to have had a "stable relationship with his girlfriend" since 2001.<sup>20</sup>

The Committee does not suggest any ground for barring the author's deportation from Canada, upon his release from jail, except the claimed right to family life under the Covenant.<sup>21</sup> Yet the author's distance from his family is the only reason given in the record to explain why, unlike his siblings, the author did not become a naturalized citizen. He states that "his parents had never completed the process of obtaining citizenship in his case".<sup>22</sup> Prior to committing the violent robbery, he "lived for the most part in youth centres and foster homes from the age of 13" and "received no help from his family when he turned to a life of crime and drug use".<sup>23</sup>

Any person of humane feeling would wish that the author's life had a better outcome. But the State party also has a legitimate right to consider a pattern of criminal behavior in refusing to permit continued residency by a non-citizen. Canada initiated deportation proceedings against the author under article 36(1) (a) of the Immigration and Refugee Protection Act, which mandates that a permanent resident or foreign national becomes

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of husband would deprive citizen wife and four minor children of his support); and No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004 (deportation of husband would de facto compel citizen wife and four minor children also to leave). Compare with communication No. 893/1999, *Sahid v. New Zealand*, Views adopted on 28 March 2003 (no violation in deportation of non-citizen maternal grandfather, where children still cared for by citizen parents).

<sup>19</sup> See Views of the Committee (above), paragraph 4.3.

<sup>20</sup> *Ibid.*, paras. 3.3 and 4.7.

<sup>21</sup> *Ibid.*, para. 8.3.

<sup>22</sup> *Ibid.*, para. 2.1.

<sup>23</sup> *Ibid.*, para. 6.

inadmissible “on grounds of serious criminality” for conviction of an offense where a “term of imprisonment of more than six months has been imposed”.

The jurisprudence of the European Court of Human Rights, including its dissenting opinions, at times seems to be a source of inspiration to the Committee – albeit those cases arise under a different convention and have no direct authority in our construction of the Covenant. One might also wish that the travaux préparatoire of the Covenant — including the deliberations and negotiations of its drafters — were as readily available and as often consulted.

But regardless, it is interesting to note that just as the Human Rights Committee has limited the reach of articles 17 and 23, so too, the European Court of Human Rights has deferred to State decisions on residence and naturalization in the face of serious criminal conduct by a resident.

One may note the pertinent case of *Bouchelkia v. France*.<sup>24</sup> There, the non-citizen applicant was convicted for the crime of “aggravated rape” as a minor and was deported to Algeria. He returned to France to reunite with his companion, had a child, and married. Because of the situation in Algeria, his wife and child could not accompany him to Algeria. In addition, he had a “particularly close” relationship with his mother “even during his imprisonment”. Nonetheless, the European Court concluded that in light of the “seriousness and gravity” of his prior crime, there was no basis to interfere with the State’s decision to deport him for a second time. The Court concluded that “[t]he authorities could legitimately consider that the applicant’s [initial] deportation was ... necessary for the prevention of disorder and crime” and that the balance had not changed.<sup>25</sup>

Judge Elizabeth Palm, later to join the Human Rights Committee as our colleague, dissented in the *Bouchelkia case* and concluded that “As a rule, second-generation migrants ought to be treated in the same way as nationals. Only in exceptional circumstances should a deportation of these non-nationals be accepted.” Despite profound respect for Judge Palm’s learning and experience, this minority view of the European Court of Human Rights has not been the rule of the Human Rights Committee under the Covenant.

So, too, in the case of *Boujlifa v. France*, No. 122/1996/741/1940 (21 October 1997), the European Court of

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<sup>24</sup> Council of Europe, European Court of Human Rights, *Reports of Judgments and Decisions, 1997, Bouchelkia v. France*, 29 January 1997, No. 112/1995/618/708.

<sup>25</sup> *Ibid.*, paras. 51–53.

Human Rights found no unlawful violation of family life in the deportation of an applicant after his conviction for armed robbery. He had resided in France since the age of 5, “seem[ed] to have remained in touch” with his parents and eight siblings who were lawful residents, and had “cohabited with a French national”. Nonetheless, by a vote of 6–3, the European Court held that states could “maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens convicted of criminal offences”.

This is an area where the Committee should tread cautiously. Rules can have unexpected consequences. And if the reference to family life is used as a method of creating a de facto ban on the consideration of criminal conduct in decisions on residence (and even, perhaps, on citizenship), States may react by rebuilding the borders that made emigration far more difficult for persons who wished to seek new economic or social opportunity.

*(Signed)* Ms. Ruth **Wedgwood**

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the present report.]