United Nations CCPR/C/140/D/3245/2018

International Covenant on Civil and Political Rights

Distr.: General
23 May 2024

Original: English

Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3245/2018*, **, ***

Communication submitted by:	Tatiana Kisileva (represented by counsel, Kateryna Artiukhovych Petkovic)
Alleged victim:	The author
State party:	Sweden
Date of communication:	7 January 2018 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 28 September 2018 (not issued in document form)
Date of adoption of Views:	25 March 2024
Subject matter:	Family reunification
Procedural issues:	Another procedure of international investigation or settlement; exhaustion of domestic remedies; level of substantiation of claims; admissibility *ratione materiae*
Substantive issues:	Right to family life; discrimination on the ground of nationality
Articles of the Covenant:	2 (1), 17 and 26
Articles of the Optional Protocol:	2, 3 and 5 (2) (a) and (b)

1. The author of the communication is Tatiana Kisileva, a national of the Russian Federation born in 1945. She claims that the State party has violated her rights under articles 2 (1), 17 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is represented by counsel.

* Adopted by the Committee at its 140th session (4–28 March 2024).

** The following members of the Committee participated in the examination of the communication: Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Teraya Koji and Imeru Tamerat Yigezu.

*** Individual opinions by Committee members Rodrigo A. Carazo, Carlos Gómez Martínez and Marcia V.J. Kran (dissenting) are annexed to the present Views.

Facts as submitted by the author

2.1 In 2014, the author applied for a residence permit in the State party on the grounds of family reunification with her adult daughter. On 27 July 2015, the Migration Agency denied the application and that decision was upheld on appeal by the Migration Court, on 1 February 2016 and again, by the Migration Court of Appeal, on 6 April 2016. On 1 December 2016, the European Court of Human Rights rejected the author's application regarding the denial of her application for family reunification, finding that the application to the Court did not satisfy the admissibility criteria under articles 34 and 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

2.2 The author notes that she is 73 years old and has been living on her own since 2012, when her only daughter and granddaughter moved to Sweden to live with her daughter's partner, who is a Swedish national. Owing to her age and several chronic illnesses, the author has trouble taking care of herself and performing basic chores around the house. She has been able to visit her daughter a few times on a tourist visa, but given her age and limited mobility, she has difficulty travelling long distances. Since the departure of her daughter and granddaughter, she has also been diagnosed with depression. The author has regular phone and video calls with her family in Sweden, but states that this cannot replace normal family relations maintained in person.

2.3 On 2 October 2014, once her daughter had obtained permanent residency in the State party, the author applied for a residence permit in Sweden on the grounds of family reunification. The author provided documents to substantiate her economic dependency on her daughter, her emotional ties to her daughter and granddaughter and the fact that they had all lived together before the daughter's departure for Sweden, as well as her daughter's ability to support her financially and to provide her with accommodation in the State party. The author notes that under domestic law, close relatives may obtain a residence permit in the State party on the grounds of family reunification if they have previously lived in the same household in their country of origin and they have a level of dependency on one another, owing to having lived together in their country of origin. The author claims that she meets those criteria and that her application for family reunification was denied because the Migration Agency found that she had not established the existence of exceptional ties to her daughter.

2.4 The author claims that the migration authorities erred in their evaluation of her application and did not provide reasoning for deeming that she had not established the exceptional nature of her ties to her daughter. She notes that she provided the authorities with documents proving that she used to live with her daughter and granddaughter in the same house in the Russian Federation, but that the migration authorities did not take those documents into consideration. She claims that the migration authorities did not hear her, her daughter or her granddaughter in person, regardless of the fact that elements such as close emotional ties may be better established by testimony rather than by formal documents. She claims that by rejecting her application for a residence permit, when there are legal grounds for her reunification with her daughter and granddaughter, the State party has arbitrarily and unlawfully interfered with her right to family life.

2.5 The author claims that, when applying for residence and work permits, relatives of European Union citizens who reside in the State party have to show only that their relatives living in Sweden can provide them with financial support and make living arrangements for them. The author notes that relatives of non-European Union nationals residing in Sweden and relatives of Swedish nationals do not enjoy those same rights. In addition to establishing the existence of financial support provided by the State party resident, they have to meet the above-mentioned requirement to prove the existence of close family ties. The author alleges that such discrimination is politically motivated and discriminates against Swedish nationals and non-European Union citizens and their relatives, especially nationals of the Russian Federation.

Complaint

3. The author claims a violation of her rights under articles 2 (1), 17 and 26 of the Covenant. She submits that her application for a residence permit based on family

reunification was arbitrarily denied by the domestic migration authorities and that the current migration system in the State party discriminates against non-European Union nationals, such as her, based on national origin.

State party's observations on admissibility and the merits

4.1 On 27 February 2020, the State party submitted its observations on the admissibility and merits of the communication. It submits that the communication should be found inadmissible: (a) as the same matter has been examined under another procedure of international investigation or settlement; (b) for failure to substantiate the claims for the purposes of admissibility; (c) as the claims under article 17 should be declared inadmissible *ratione materiae*; and (d) for failure to exhaust domestic remedies as concerns the author's claims under article 26 of the Covenant.

4.2 The State party notes that the author applied for a residence permit in Sweden on 2 October 2014. Her application was rejected by the Migration Agency on 27 July 2015 and subsequently upheld on appeal. The State party notes that, despite the decision of the migration authorities on the author's application, there is no limit to how many times an applicant can apply for a residence permit on the grounds of family ties in the State party. Thus, the author may apply anew for a residence permit at any time and have her application examined by the domestic migration authorities.

4.3 The State party provides information on applicable national legislation, noting that the author's application was assessed under the 2005 Aliens Act (2005:716), which entered into force on 31 March 2006. The legislative history of certain amendments to the 2005 Aliens Act contains a description of what the right to family life entails under the Act, as well as under article 8 of the European Convention on Human Rights. Under the Act, a family is primarily considered to include married couples and their minor children. However, protection is not limited to this family unit only. Relationships of non-marital cohabitation are also protected, and the protection can, to some extent, be applied to relationships outside the nuclear family such as members of the same household, elderly parents or adult children.

4.4 The State party notes that under chapter 5, section 3a, first paragraph, point 2, of the Aliens Act, a residence permit may be granted to an applicant who is a close relative of someone who is resident in or who has been granted a residence permit to settle in the State party, if he or she has been a member of the same household as that person and there exists a special relationship of dependence between the relatives that already existed in the country of origin. This provision may apply to unmarried children over the age of 18 who still reside at home, or a parent who was cared for by their child in their country of origin. A common feature of relatives who might be eligible for a residence permit as a member of a previously joint household must furthermore be that there is a special relationship of dependence between them which makes it difficult for the relatives to live apart. This means that it is a requirement that the relatives belonged to the same household immediately before the sponsor moved to Sweden and that the application for family reunification is made relatively soon after the sponsor settles in the State party. Other factors such as biological kinship, the applicant's marital status and the applicant's age can also be taken into consideration in the assessment of whether a special relationship of dependence exists. Moreover, under chapter 5, section 3a, third paragraph, point 3, of the Aliens Act, a residence permit may also be granted to an applicant when there are exceptional grounds and the applicant has some other special tie to Sweden. In accordance with domestic jurisprudence, this provision may be applied as a safety net when a residence permit cannot be granted on any other ground. The exceptional grounds prerequisite further confirms that the provision is of an exceptional nature and indicates that the situation must be unusual and distressing for a residence permit to be granted.

4.5 The State party notes the author's argument that she is being discriminated against as a non-European Union citizen compared to relatives of European Union citizens residing in the State party. It notes that a fundamental principle of the European Union and its regulatory system regarding the free movement of persons is that European Union citizens should be able to move freely between member States in much the same way as when member States' own citizens move within their own countries. Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the

member States applies to all European Union citizens who move to or reside in a member State other than that of which they are a national, and to their family members who accompany or join them. The Directive was implemented in Sweden on 30 April 2006, mainly through amendments to the Aliens Act and to the Aliens Ordinance (2006:97). The amendments meant, inter alia, that the former requirement for European Union citizens and their relatives to obtain residence permits was abolished. Instead, the right of residence was introduced. The right of residence, under chapter 3a, section 1, of the Aliens Act, means a right for European Union citizens and their family members to stay in Sweden for more than three months without a residence permit and without prior examination by the Swedish authorities. The State party notes, however, that the "right of residence" is not the same as a residence permit.

4.6 The State party submits that the communication should be found inadmissible under article 5 (2) (a) of the Optional Protocol. It notes that it made a declaration upon ratification of the Optional Protocol indicating that it ratified the Optional Protocol on the understanding that the provisions of article 5 (2) (a) of the Optional Protocol signify that the Committee shall not consider any communication from an individual unless it has ascertained that the same matter is not being examined or has not been examined under another procedure of international investigation or settlement. The State party notes that the author submitted an application to the European Court of Human Rights concerning the same matter in 2016 and that the Court declared the application inadmissible. It submits that the complaint should therefore be declared inadmissible in accordance with article 5 (2) (a) of the Optional Protocol.

4.7 Regarding the author's claims under article 17 of the Covenant, the State party notes that it does not contest that all available domestic remedies have been exhausted. It does submit, however, that the author has not exhausted domestic remedies with regard to her claims under article 26 of the Covenant. It notes that the author only very summarily stated in her appeal to the Migration Court of Appeal that she felt discriminated against since she cannot live with her daughter, while European Union citizens are allowed to do so if they wish. It submits that this claim should consequently be declared inadmissible for failure to exhaust all available domestic remedies. In any event, the State party submits that the author has not sufficiently substantiated the claim for the purposes of admissibility, as she has failed to show a difference in treatment from that of other persons under the State party's jurisdiction in a similar situation and based on any of the grounds listed in article 26 of the Covenant.

4.8 Furthermore, the State party submits that the author's claims under article 17 of the Covenant should be declared inadmissible *ratione materiae* since article 17 is not applicable and, in any event, there has been no interference with the rights enshrined in that article. It also submits that the author's claims under article 17 of the Covenant fail to attain the basic level of substantiation required for the purposes of admissibility. Concerning the author's claims under article 2 of the Covenant, the State party refers to the Committee's jurisprudence and notes that this provision cannot be invoked in isolation under the Optional Protocol and should thus be declared inadmissible.

4.9 Regarding the merits of the complaint, the State party notes the author's claims that she was not given the opportunity to give an oral account of her family ties to her daughter and her claims that the domestic decisions were subjective and arbitrary and did not take into account her circumstances and the evidence she had provided. The State party argues that it is evident from the case files that the domestic migration authorities based their assessment on the written information and evidence submitted by the author. The Migration Agency and the Migration Court did not question the strong bond between the author and her daughter, or that the author's daughter provided the author with financial support after the daughter moved to Sweden. However, the domestic authorities considered the relationship between the author and her daughter not to be such that a residence permit could be granted on the grounds of family ties or other special ties to Sweden. The State party argues that the author has not accounted for what probative value an oral hearing could have added to the investigation. Moreover, she has not explained in what way the domestic authorities' decision-making appeared subjective and biased. The State party therefore submits that the author has failed to demonstrate that the domestic migration authorities failed to take into

account relevant facts or aspects in its assessments and has not shown that the authorities' assessments were arbitrary or amounted to a manifest error or a denial of justice.

4.10 Regarding the author's claims under article 17 of the Covenant, the State party notes that, according to the European Convention on Human Rights, married couples and their minor children are primarily included in a family unit. Article 8 of the Convention can to some extent also be applied to relatives outside the nuclear family. In cases where older parents or adult children share a household with a nuclear family member, their right to family life may be protected under article 8.[1] Nevertheless, it also notes the jurisprudence of the European Court of Human Rights according to which the Court recognizes that States are entitled, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens in their territory.[2] It further notes that the European Court of Human Rights has consistently held that the Convention includes no right, as such, to establish one's family life in a particular country of the individual's own choosing.[3] It notes the Court's findings that there is no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence.[4]

4.11 In the present case, the State party notes that the domestic migration authorities found that it was not a question of a family reunification of a nuclear family under the Aliens Act, since the author's daughter was an adult. However, it was undisputed that the author and her daughter had been members of the same household in their country of origin before the daughter moved to Sweden together with the author's granddaughter in August 2012. Furthermore, the domestic authorities did not question the existence of a strong bond between the author and her daughter. Moreover, they took into account the fact that the author was in need of support from her daughter since she lacked other relatives in her country of origin and also was in need of financial support. However, the domestic migration authorities considered that the author had not demonstrated that, above and beyond the natural bonds that exist between close relatives, there were such additional elements of dependence between her and her daughter that made it difficult for them to live apart. The domestic authorities further held that there were no obstacles for the author and her daughter to maintain close contact with each other using Skype, the telephone and by visiting each other. The State party therefore submits that the relationship between the author and her daughter and granddaughter does not amount to family life within the meaning of article 17 of the Covenant and that article 17 of the Covenant is consequently not applicable in the present communication.

4.12 In addition, the State party notes that the author is resident in the Russian Federation, which was also the case at the time when her daughter decided to move to Sweden. It submits that the present complaint does not therefore concern whether the domestic migration authorities' decision has wrongfully interfered with the author's family life. It submits that, considering that the author's daughter and granddaughter caused the family separation by voluntarily moving from the Russian Federation, the migration authorities' decision not to grant the author a residence permit does not amount to interference with her family life within the meaning of article 17 of the Covenant.[5]

4.13 The State party argues that, if the Committee were to consider that the decision not to grant the author a residence permit in Sweden constituted interference with her family life

[1] The State party refers to European Court of Human Rights, *Bronda v. Italy*, Application No. 40/1997/824/1030, Judgment, 9 June 1998, para. 51; and *Mitovi v. former Yugoslav Republic of Macedonia*, Application No. 53565/13, Judgment, 16 April 2015, paras. 58 and 59.

[2] The State party refers to European Court of Human Rights, *Mugenzi v. France*, Application No. 52701/09, Judgment, 10 July 2014, para. 43; *Nunez v. Norway*, Application No. 55597/09, Judgment, 28 June 2011, para. 66; and *Jeunesse v. Netherlands*, Application No. 12738/10, Judgment, 3 October 2014, para. 100.

[3] The State party refers to European Court of Human Rights, *Senchishak v. Finland*, Application No. 5049/12, Judgment, 18 November 2014, para. 54.

[4] The State party refers to European Court of Human Rights, *Khan v. Germany*, Application No. 38030/12, Judgment, 23 April 2015, para. 38; and *Senchishak v. Finland*, para. 55.

[5] The State party refers to European Court of Human Rights, *Gül v. Switzerland*, Application No. 23218/94, Judgment, 19 February 1996, paras. 41 and 42.

within the meaning of article 17 of the Covenant, the interference is neither arbitrary nor unlawful. It argues that the rejection of the author's application for a residence permit was based in domestic law, which complies with the State party's international obligations, including under the Covenant. Furthermore, the general purpose of the domestic law is to regulate immigration and to control public expenditure, thus serving a legitimate aim. The State party reiterates its argument that there is nothing in the present case to suggest that the domestic proceedings were arbitrary. It argues that any interference was necessary and proportionate as the author has no ties to Sweden, besides her daughter and granddaughter. She has never lived in Sweden and does not speak Swedish. The author has lived apart from her daughter and granddaughter since 2012, when the daughter decided to move to Sweden. The author was already a widow at that time and was left to care for herself. By her own account, the author's health issues arose after her daughter moved to Sweden and consequently, prior to moving to Sweden, the daughter did not provide the author with care for her health issues. In addition, the author has been receiving medical treatment on a regular basis and has been able to take care of herself during the time she has been apart from her daughter and granddaughter, even though her financial status might have been strained. She has housing and a pension in her country of origin, and she also receives financial support from her daughter, who can continue to contribute in the future. Moreover, nothing has emerged in the case that indicates that there are obstacles to the author and her daughter maintaining close contact with each other using the telephone or the Internet, as well as through visits. Regarding the author's granddaughter, to whom she also claims to have a strong bond, the State party notes that the granddaughter is now an adult and can visit her grandmother on her own. In addition, there are no legal or insurmountable obstacles to the author's daughter and granddaughter resettling in the Russian Federation. The State party therefore submits that any interference with the author's right to family life is lawful, necessary and proportionate.

4.14 The State party notes the author's claims that the difference in treatment regarding the right to family reunification of a relative of a Swedish citizen, like her, and a relative of a non-Swedish European Union citizen residing in Sweden constitutes discrimination contrary to article 26 of the Covenant. The State party notes that the right of residence is derived from Directive 2004/38/EC and is a right for non-Swedish European Union citizens and their family members to reside in Sweden for more than three months without a residence permit in accordance with the Aliens Act. It notes that the author's daughter is a Swedish citizen residing in Sweden. Neither the daughter, nor the granddaughter, are European Union citizens living in a member State within the European Union other than Sweden. The author's daughter thus lacks the possibility to claim her rights based on the free movement of persons, as long as she still resides in Sweden. The State party therefore submits that relatives of Swedish citizens living in Sweden and relatives of European Union citizens with the right of residence in Sweden are in no way comparable. It argues that the author has thus not explained how she has been treated differently from others in a similar situation, let alone shown that she has been discriminated against compared to others in a similar situation. It submits that she has failed to establish this initial requirement and that, in any event, the complaint does not show that any difference in treatment has occurred which is not compatible with the provisions of the Covenant and that is not based on objective and reasonable grounds. It reiterates its argument that the author's claims were properly assessed by the domestic authorities and that there is nothing to indicate that the regulation in the Aliens Act has been applied in a discriminatory manner in relation to the author's nationality or on any other grounds.

Author's comments on the State party's observations on admissibility and the merits

5. On 30 March 2020, the author submitted her comments on the State party's observations. She maintains that the communication is admissible and that the complaint reveals a violation of her rights under articles 2 (1), 17 and 26 of the Covenant.

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.

6.2 The Committee notes the State party's submission that the communication should be found inadmissible under article 5 (2) (a) of the Optional Protocol, as it has already been examined under another procedure of international investigation or settlement, in accordance with the State party's declaration upon ratification of the Optional Protocol. The Committee notes that in 2016, the author submitted an application to the European Court of Human Rights concerning the rejection of her application for family reunification. On 1 December 2016, she was notified that her application had been found inadmissible in a single-judge decision with no reasons specified, stating only that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights had not been met. The Committee recalls its jurisprudence that, when the European Court of Human Rights bases a declaration of inadmissibility not solely on procedural grounds, but also on grounds based to some extent on a consideration of the merits of the case, then the same matter should be deemed to have been "examined" within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.[6] Nevertheless, the Committee recalls its jurisprudence that when the brevity of the reasoning set out by the Court does not put forward any argument or clarification regarding the grounds for the decision on inadmissibility, it cannot conclude that a consideration on the merits has been made by the Court.[7] In the present case, the Committee notes that the letter from the Court to the author does not put forward any such argument or clarification regarding the grounds for inadmissibility in the author's case, and the Committee thus concludes that it is not precluded from examining the communication in the light of the State party's declaration under article 5 (2) (a) of the Optional Protocol.

6.3 The Committee also notes the State party's submission that the author has not exhausted domestic remedies concerning her claims under article 26 of the Covenant and that those claims should therefore be declared inadmissible. It notes that the author has not provided any information or argumentation refuting the State party's argument in this regard. The Committee therefore finds the author's claims under article 26 of the Covenant inadmissible in accordance with article 5 (2) (b) of the Optional Protocol for failure to exhaust domestic remedies.

6.4 The Committee notes the author's claim of a violation of her rights under article 2 (1) of the Covenant. It recalls its constant jurisprudence, according to which the provisions of article 2 of the Covenant lay down general obligations for States parties and cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.[8] The Committee therefore considers that the author's claims under article 2 (1) of the Covenant are inadmissible under article 3 of the Optional Protocol.

6.5 The Committee notes the author's claims that her rights under article 17 of the Covenant have been violated as she claims that her application for a residence permit based on family reunification was arbitrarily denied by the domestic migration authorities. The Committee considers that the author has sufficiently substantiated this claim for the purpose of admissibility. Accordingly, the Committee declares the communication admissible as

[6] For example, *Mahabir v. Austria* (CCPR/C/82/D/944/2000), para. 8.3; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; and Human Rights Committee, *A.M. v. Denmark*, communication No. 121/1982, para. 6.

[7] For example, *X v. Norway* (CCPR/C/115/D/2474/2014), para. 6.2; and *Rosenberg and Jacquart v. France* (CCPR/C/130/D/2584/2015), para. 7.4.

[8] For example, *Ch.H.O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.4; *Rodríguez Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8; *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5; *Peirano Basso v. Uruguay* (CCPR/C/100/D/1887/2009), para. 9.4; and *H.E.A.K. v. Denmark* (CCPR/C/114/D/2343/2014), para. 7.4.

concerns the author's claims under article 17 of the Covenant and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

7.2 The Committee notes the author's claims that her rights under article 17 of the Covenant have been violated as she claims that her application for a residence permit based on family reunification was arbitrarily denied by the domestic migration authorities. In this connection, the Committee notes her claims that the migration authorities erred in their evaluation of her application and did not provide reasoning for deeming that she had not established the exceptional nature of her family ties with her daughter and her claims that she was not afforded the opportunity of an oral hearing in order to establish her claims. The Committee also notes the State party's submission that the migration authorities examined all of the author's claims but found that the relationship between the author and her daughter did not meet the criteria for granting a residence permit based on family ties or other special ties to the State party. The Committee further notes the State party's argument that the author has not accounted for what specific information of probative value an oral hearing could have added to the examination of her claims, as well as its argument that the author has not explained in what way the domestic authorities' decision-making appeared subjective or biased.

7.3 The Committee recalls that regarding the term "family", the objectives of the Covenant require that for the purposes of article 17, this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned.[9] The Committee notes that there may be cases in which a State party's refusal to allow one member of a family to remain on its territory would involve interference with that person's family life. The Committee recalls that a State party, pursuant to its immigration rules, may deny the right of entry or impose other restrictions in pursuit of a legitimate aim. That discretion is not, however, unlimited.[10] In particular, the Committee recalls that in order to be permissible under article 17, any interference with the family must meet all the conditions set out in paragraph 1 of that article. Therefore, even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances of the case.[11]

7.4 The Committee recalls its jurisprudence according to which it is for the organs of States parties to evaluate the facts and the evidence or the application of domestic legislation in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[12]

7.5 In the present case, the Committee considers that the decision of the State party to reject the author's application for family reunification constitutes interference with family life within the meaning of article 17 of the Covenant. The issue thus arises as to whether this interference is contrary to article 17 Covenant. The Committee observes that the domestic legislation pursued a legitimate objective, which is the enforcement of the State party's immigration laws. Nevertheless, the Committee notes that in addition to pursuing a legitimate aim, it is also necessary to consider whether the assessment of the author's application for family reunification carried out by the State party authorities was also in accordance with the

[9] Human Rights Committee, general comment No. 16 (1988) on the right to privacy, para. 5.

[10] *Ilyasov v. Kazakhstan* (CCPR/C/111/D/2009/2010), para. 7.2. See also European Court of Human Rights, *M.A. v. Denmark*, Application No. 6697/18, Judgment, 9 July 2021, paras. 134 and ff.

[11] Human Rights Committee, general comment No. 16 (1988), para. 4.

[12] For example, *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6; *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.10; and *Aden and Hassan v. Denmark* (CCPR/C/126/D/2531/2015 and CCPR/C/126/D/2531/2015/Corr.1), para. 10.5. See also Human Rights Committee, general comment No. 32 (2007), para. 26.

provisions, aims and objectives of the Covenant and reasonable in the circumstances of the particular case.

7.6 The Committee considers that the immigration authorities, in the assessment of whether the author and her daughter met the requirement of exceptional family ties under the State party's domestic legislation, failed to adequately take into consideration a number of circumstances relevant to article 17. These include the author's advanced age, which would foreseeably prevent her from travelling in order to visit her daughter and granddaughter, thus reducing the family's ability to maintain their close relationship, the author's health status and limited mobility, the fact that the family lived together in their country of origin as a family unit, the fact that the author is economically dependent on her daughter, and the fact the author's daughter had the means to financially support the author in the State party and to provide her with accommodation. In view of the foregoing, the Committee considers that the domestic authorities did not adequately assess the author's individual circumstances, in particular regarding the reasonableness of the domestic decisions in the light of the aims and objectives of the Covenant, as required by article 17.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is thus of the view that the facts before it disclose a violation by the State party of article 17 of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to provide the author with an effective re-evaluation of her application for family reunification, taking into account the Committee's findings in the present case. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future.

10. 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 and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, 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. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

Annex I

[Original: Spanish]

Individual opinion of Committee member Carlos Gómez Martínez (dissenting)

1. At first glance, in a positive sense (which it is), a decision is "arbitrary" when it is based on the whim of the person who issues it, when it is the result of pure voluntarism and, in the field of law, when it is not based on law or an objective and fixed criterion.

2. In the negative sense (which it is not), a decision is not arbitrary if it is in accordance with the law unless the law itself is arbitrary, in other words, if it is the product of the whim of legislators and, from the Committee's standpoint, in total disregard of their obligations under the Covenant.

3. In such cases where decisions are in line with the law and yet arbitrary, the Committee must provide stronger reasoning for its assessment of arbitrariness. It must explain the reasons for concluding that it was faced with the delicate situation where a law in full effect in the State party is contrary to the Covenant and that the decision of the national authority under discussion, being based on this law, is "arbitrary".

4. When, as in the present case, the national law has not been expressly found to be arbitrary, the Committee must be doubly cautious in assessing whether it is faced with a case of arbitrariness, bearing in mind that simply disagreeing with a decision taken at the national level does not signify arbitrariness.

5. According to the Committee's jurisprudence, "due weight must be given to the assessment conducted by the State party, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice ... and that it is generally for organs of States parties to the Covenant to review or evaluate facts and evidence."[1]

6. Furthermore, the burden of claiming, proving and substantiating arbitrariness rests with the author of the communication, as the Committee has made clear that it is also for the author to explain why the decision taken at the national level is manifestly unreasonable or arbitrary or amounts to a denial of justice.[2]

7. It should be recalled that, in order to overturn a decision issued by a national authority, the Committee not only requires that the decision be "arbitrary", but often adds the adverb "clearly" or "manifestly",[3] which clearly shows that it applies a restrictive criterion to such situations.

8. Under Swedish national law, two requirements must be met in order to authorize family reunification when it involves persons who are not members of a nuclear family, that is, where the relationship exceeds that between parents and children: (a) that the reunited persons lived together as a family unit in their country of origin, and (b) that the petitioners have a special relationship of dependency with their family abroad. There is no evidence that this legislation is unreasonable, nor does the author allege that it is.

9. The State party does not dispute that the first of the above requirements is met. As for the second, it considers that the special dependence of the author, a resident of the Russian Federation, on her daughter, a resident of Sweden, has not been established.

[1] *E.P. and F.P. v. Denmark* (CCPR/C/115/D/2344/2014), para. 8.4.

[2] *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.4; *Baharuddin v. Hungary* (CCPR/C/125/D/2923/2016), para. 10.8; and *Ryzhova v. Belarus* (CCPR/C/138/D/3074/2017), para. 6.5.

[3] See, for example, *Riedl-Riedenstein et al. v. Germany* (CCPR/C/82/D/1188/2003), para. 7.3; and *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.10.

10. The decision of the competent authority of the State party to deny family reunification was based on an assessment of the circumstances of the case and the ensuing conclusion that there is no special relationship of dependency.

11. When, as in the present case, applying the law requires conducting such an assessment, it is because there is a conflict between two principles pulling in opposite directions – in this case, a person's right to live with her non-nuclear family and the State's right to regulate immigration. Conflicts between principles are not resolved by exclusion but by weighting, which means that one principle prevails over the other but the latter remains underlying, not totally discarded or excluded, and therefore the result always entails a certain degree of dissatisfaction.

12. In such cases, the Committee must be particularly cautious when determining whether it is faced with a case of arbitrariness, as there is a high risk of simply substituting one factor for another, of altering the weight given to one principle or another at the domestic level.

13. In the present case, the Swedish authorities took into account the same elements that, paradoxically, the Committee enumerates in paragraph 7.5 of its Views to explain the arbitrariness of the decision ultimately taken by the Migration Court of Appeal but without mentioning the omission of any relevant element or explaining the nature of the arbitrariness in this particular case beyond its disagreement with the assessment carried out by the national authorities.

14. In the light of the foregoing, the Committee should have rejected, on the grounds of non-substantiation, the claim of a violation of the right to family life under article 17 (1) of the Covenant, in accordance with article 2 of the Optional Protocol.

Annex II

[Original: Spanish]

Individual opinion of Committee member Rodrigo A. Carazo (dissenting)

1. I fully agree with the reasons and considerations laid out in the individual opinion of Committee member Mr. Gómez Martínez, up to and including paragraph 13. In short, the State party's actions are not reprehensible, nor can the Committee find arbitrariness where it does not exist, since there was no arbitrariness in the interpretation or weighting of the laws invoked.

2. The State party may, in the light of the particular case and at the author's request, re-evaluate the rejected application by considering not only the criteria for family reunification but, more importantly, how the circumstances enable it to meet the author's vital need and thus ensure her full enjoyment of the right to family reunification with her daughter and granddaughter. Human rights are not static – they evolve, expand and adapt.

Annex III

Individual opinion of Committee member Marcia V.J. Kran (dissenting)

1. I have come to a conclusion that differs from that of the majority of the Committee, which decided that the State party's denial of the author's application for a residence permit constitutes a violation of the author's rights under article 17 of the Covenant.

2. In my view, the decision should have followed the Committee's well-established jurisprudence that considerable weight should be given to the assessment conducted by the State party and that it is generally for the organs of the State parties to the Covenant to review and evaluate facts and evidence, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[1] This deferential approach takes into account the Committee's general practice of considering communications solely on the basis of the written information provided by the author and the State party.[2] The high threshold reinforces the long-held position that the Committee is not a fourth instance review mechanism that re-evaluates findings of fact or the application of domestic legislation.[3] If the State party's decision was made under law in furtherance of a legitimate State interest and due consideration was given to the author's application, the domestic decision is not considered to be unlawful or arbitrary.[4] It is incumbent upon the author to identify specific circumstances demonstrating that the proceedings in the State party, or the decision itself, were arbitrary, manifestly erroneous, or amounted to a denial of justice.[5]

3. In this case, the State party's migration authorities based their assessment on the written information and evidence submitted by the author and considered that the author did not account for the probative value an oral hearing could have added to the investigation (para. 4.9 of the Committee's Views). In assessing the author's application, the State party's Migration Agency and Migration Court considered that the relationship between the author and her daughter was not such that a residence permit could be granted on the grounds of family ties or other special ties to Sweden. In particular, the State party considered: (a) the strong bond between the author and her daughter; (b) the author's need for health, social and financial support; (c) the author and her daughter's ability to maintain close contact using Skype, the telephone and by visiting each other; and (d) the author's ties to the State party. The State party concluded that the author had not demonstrated that, above and beyond the natural bonds that exist between close relatives, there were such additional elements of

[1] *C.C.N. v. Sweden* (CCPR/C/136/D/3701/2020), para. 6.7; *J.S. v. Australia* (CCPR/C/135/D/2804/2016), para. 7.5; *Z.H. v. Denmark* (CCPR/C/119/D/2602/2015), para. 7.4; *A.S.M and R.A.H. v. Denmark* (CCPR/C/117/D/2378/2014), para. 8.3; *M.M. v. Denmark* (CCPR/C/125/D/2345/2014), para. 8.4; *K v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.4; *Elezaj v. Denmark* (CCPR/C/137/D/2858/2016), annex, para. 5; *Z v. Denmark* (CCPR/C/137/D/2795/2016), para. 6.8; *Murne et al. v. Sweden* (CCPR/C/137/D/2813/2016), para. 10.5, and annex I, paras. 15 and 16; *S v. Australia* (CCPR/C/137/D/2999/2017), annex, para. 4; *Rudurura v. Sweden* (CCPR/C/136/D/3706/2020), paras. 8.2 and 8.7; *P. et al. v. Sweden* (CCPR/C/134/D/2632/2015), annex, para. 3; and *Isley v. Australia* (CCPR/C/138/D/3208/2018), annex, para. 5.

[2] Office of the United Nations High Commissioner for Human Rights, *Individual Complaint Procedures under the United Nations Human Rights Treaties*, Fact Sheet No. 7, Rev. 2 (United Nations, New York and Geneva, 2013), p. 10. See also *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 4.15; *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3; and *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), para. 11.2.

[3] *A.G. v. Netherlands* (CCPR/C/130/D/3052/2017), para. 10.4; *F and G v. Denmark* (CCPR/C/119/D/2530/2015), annex, para. 2; and *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.

[4] *Gnaneswaran v. Australia* (CCPR/C/133/D/3212/2018), para. 9.3; *Stewart v. Canada* (CCPR/C/58/D/538/1993), para. 12.10; *Canepa v. Canada* (CCPR/C/59/D/558/1993), para. 11.4; and *Budlakoti v. Canada* (CCPR/C/122/D/2264/2013), para. 9.6.

[5] *J.I. v. Sweden*, para. 7.7; and *M.R. v. Denmark* (CCPR/C/133/D/2510/2014), para. 7.9.

dependence between her and her daughter that made it difficult for them to live apart (paras. 4.11 and 4.13).

4. At issue in the present communication is whether the author has demonstrated that the assessment made by the State party of her situation was clearly arbitrary or amounted to a manifest error or a denial of justice. The State party's decision was reached by competent national authorities after a thorough and individualized assessment of the author's case. The author has not explained in what way the State party's decision-making contributed to a degree of arbitrariness, or was manifestly erroneous, or amounted to a denial of justice (para. 4.9).

5. Based on the above findings, I conclude that the author's article 17 rights have not been violated. The State party evaluated the facts and evidence of this application in a manner that was neither arbitrary nor did it amount to a manifest error or a denial of justice. Therefore, I concur with the conclusion set out in the individual opinions (dissenting) of Committee members Rodrigo A. Carazo and Carlos Gómez Martínez.