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**International Covenant on
Civil and Political Rights**

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Views

Communication No. 1554/2007

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| <u>Submitted by:</u> | Mohamed El-Hichou (Represented by counsel Mr. Finn Roger Nielsen) |
| <u>Alleged victim:</u> | The author |
| <u>State Party:</u> | Denmark |
| <u>Date of communication:</u> | 18 April 2007 (Initial submission) |
| <u>Document references:</u> | Special Rapporteur's rule 97 decision, transmitted to the State party on 23 April 2007 (not issued in document form) |
| <u>Date of adoption of Views:</u> | 22 July 2010 |

* Made public by decision of the Human Rights Committee.

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| <i>Subject matter:</i> | arbitrary interference with family life/protection of the family/right of the child to protection/discrimination |
| <i>Substantive issues:</i> | Protection of family life, rights of the child |
| <i>Procedural issues:</i> | Degree of substantiation of claims |
| <i>Articles of the Covenant:</i> | 23, 24 |
| <i>Articles of the Optional Protocol:</i> | 2 |

On 22 July 2010 the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1554/2007.

[Annex]

Annex

**Views of the Human Rights Committee under article 5,
paragraph 4, of the Optional Protocol to the International
Covenant on Civil and Political rights (Ninety-ninth session)**

concerning

Communication No. 1554/2007*

Submitted by: Mohamed El-Hichou (Represented by counsel
Mr. Finn Roger Nielsen)

Alleged victim: The author

State Party: Denmark

Date of communication: 18 April 2007 (initial submission)

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

Meeting on 22 July 2010,

Having concluded its consideration of communication No. 1554/2007, submitted to the Human Rights Committee on behalf of Mr. Mohamed El-Hichou under 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, and the State party,

Adopts the following:

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

1.1 The author of the communication is Mohamed El-Hichou, a Moroccan national, born on 6 June 1990, currently residing in Denmark. He claims to be a victim of violations by Denmark of articles 23 and 24 of the International Covenant on Civil and Political Rights.¹ The author is represented by counsel, Mr. Finn Roger Nielsen.

1.2 On 18 April 2007, the author submitted his initial communication together with a request for interim measures following an order to leave the country by 3 January 2007. In accordance with Rule 97 of its Rules of Procedure, the Committee brought the complaint to the State party's attention on 23 April 2007. At the same time, the Committee, pursuant to Rule 92, of its Rules of Procedure, requested the State party not to execute the order for the author to leave the country while his complaint was being considered. On 1 May 2007, the

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlala Bhagwati, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms Iulia Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Mr. Fabian Omar Salvioli.

¹ The Covenant and the Optional Protocol entered into force for the State Party on 23 March 1976.

State party suspended the author's deadline to leave the country pending the outcome of the case before the Committee.

The facts as presented by the author

2.1 The parents of the author divorced before he was born. The author's mother obtained custody over him and he lived with his mother's parents in Morocco until their death in 2000. After the death of his maternal grand parents, the author's mother could not support him and he was placed with his paternal grand mother, who had difficulties taking care of him.

2.2 After the divorce, the author's father moved to Denmark, where he remarried and had two children. Since the birth of the author, his father supported him financially, regularly spent summer vacations with him and maintained regular contact through letters and phone calls. On 9 February 2002, the author applied to be reunited with his father in Denmark. On 27 February 2003, the Danish Immigration Service rejected his application, based on the fact that his father had no custody over him.

2.3 In 2003, the author's mother remarried and transferred the custody over the author to his father. On 2 March 2003, the author requested the State party to reopen his application for residence, a request which was refused on 10 March 2003. The transferral of the custody was approved by the Danish authorities on 10 June 2003, following a request from his father.

2.4 On 3 July 2003, the applicant again applied for a residence permit in order to be reunited with his father. On 17 November 2003, the Danish Immigration Service rejected the application of the author, stating that the applicant's father had not proved ability to maintain him.

2.5 In September 2004, due to the difficult living conditions he was experiencing in the home of his elderly grandmother, the author left Morocco and joined his father in Denmark. Meanwhile, the author appealed the refusal of the Immigration Service to the Ministry of Refugees, Immigration and Integration, which by decision of 1 February 2005, rejected the appeal and upheld the refusal to grant him residence permit. The decision of the Ministry was appealed to the Copenhagen City Court. In October 2005, the author's father admitted his son's illegal presence in the country and the author was requested to report to the Immigration Service. The author was allowed to remain temporarily in the country until the court proceedings were finalised.

2.6 On 18 May 2006, the City Court revoked the Immigration Service decision and obliged the Service to grant a residence permit to the author. The Immigration Service appealed the court decision to the Eastern Division of the High Court in Denmark. During the proceedings in that court, the author's father provided documentation evidencing that he was suffering from epilepsy and, as a result, he had been unemployed for a long time and was supporting his family on social benefits. On 29 November 2006, the High Court decided that the original refusal to issue residence permit of the Immigration Service should be upheld. On 12 December 2006, the Ministry for Refugees, Immigration and Integration issued a decision obliging the author to leave Denmark not later than 3 January 2007.

2.7 The author attempted to obtain a review of the Immigration Service's refusal on humanitarian grounds, presenting medical certificate that his father was suffering from epilepsy and could not work. The Ministry rejected the application by a letter dated 19 January 2007. The author also attempted to apply for further review of his case by the Supreme Court, but his application was rejected by the Appeals Permission Board on 20 March 2007. On 19 and 20 April 2007, the author was visited by the police, who informed him that he should leave the country within a week.

The complaint

3.1 The author contends that he has exhausted all available and effective domestic remedies. He claims that the refusal to grant him a residence permit in Denmark and the order to leave the country, if implemented, would constitute violations of his rights under articles 23 and 24 of the Covenant.

3.2 The author maintains that although the rights of the child, as specified in the Convention on the Rights of the Child, can not be considered as a direct legal instrument for a decision of the Human Rights Committee, nevertheless their content can contribute to the interpretation and understanding of what constitutes a violation under article 24 of the Covenant. According to article 5 of the Convention on the Rights of the Child, the ratifying states, which include the State party, should respect the rights and the duties a parent has. Despite the fact that the State party recognised in 2003 the transfer of custody concerning the author, it rejected the request for family reunification with his father, thus preventing the latter from supporting and raising him. The author alleges to have been discriminated, since any other child in the State party according to the law has the right to live with the parent who by judgement, agreement or administrative decision has been granted the custody.

3.3 The author maintains that according to article 9 of the Convention on the Rights of the Child, the State party must ensure that a child is not separated from his/her parents against their will, except when competent authorities, subject to judicial review, determine in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. The author alleges that the refusal of the State party to allow the author to remain with his father violates article 9 of the Convention on the Rights of the Child and, accordingly, article 24 of the Covenant, in particular since his mother is unable to look after him and her whereabouts are currently unknown.

3.4 The author maintains that, according to article 10 of the Convention on the Rights of the Child, applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner. The author claims that the State party violated this provision and accordingly article 24 of the Covenant, since his application for family reunification was pending for more than four years and was eventually rejected.

3.5 The author maintains that, according to article 18 of the Convention on the Rights of the Child, State parties must render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities. The author claims that the State party should support in particular the parent who has custody over the child, that in the instant case the State party failed to meet this obligation, despite recognizing the transfer of custody, and hence violated article 24 of the Covenant.

3.6 The author also alleges that the State party is not entitled to limit or obstruct his right to family life, since it can not be argued that separating him from his father and his half-siblings would serve his interests and well being. The author also alleges that ever since he was born and before he joined his father in Denmark, they maintained regular contact. Therefore, the State party can not argue that the contact between father and son has not been developed to such extent so that the author would not be in a position to refer to his rights under article 24 of the Covenant. The author submits that he has a family life in the State party and that the refusal to grant him residence constitutes disproportionate limitation of his and his father's family life and a violation of articles 23 and 24 of the Covenant.

3.7 The author maintains that the State party is not entitled to set as a condition for the family reunification that the father of the author should work, since no such condition exists regarding parents or children who are nationals of the State party or foreign nationals with residence permit. The author notes that he had been living in the country since September

2004 and has been supported by his father, which proves that the latter is in a position to raise him despite his limited means.

State party's observations

4.1 On 25 June 2007, the State party submitted its observations contesting the admissibility of the author's communication.

4.2 The State party submits that on 14 July 2006, the Danish Immigration Service refused to grant the author asylum, declaring his application manifestly unfounded. On 18 May 2006, the Copenhagen City Court quashed the Ministry's decision of 1 February 2005 with the motivation that the case did not present such substantial considerations that the author's father had to prove his ability to maintain the author. By order of 29 November 2006, the High Court of Eastern Denmark reversed the order of the City Court, restating the argumentation of the Ministry and that further appeals were refused by the Appeals Permission Board. The Ministry of Refugees, Immigration and Integration ordered the author to leave the country by 3 January 2007. On 2 January 2007, the author filed an application for reopening of the Ministry's decision, which the latter refused on 19 January 2007.

4.3 The State party notes that the author stayed illegally in the country from September 2004 till 12 October 2005; that he was granted a residence permit while his asylum claim was being processed between 12 October 2005 and 24 July 2006; that he resided again illegally from 24 July till 20 September 2006; that he was granted temporary permission until 3 January 2007, pending legal proceedings; and that he remained illegally in the country between 3 January 2007 and 1 May 2007, when he was granted procedural extension based on the Human Rights Committee's request for interim measures.

4.4 The State party states that according to the latest information submitted by the author on 18 April 2007, his mother's address was unknown. The State party further includes information about other family members residing in Morocco- the author's paternal grand mother, and three siblings of his father.

4.5 The State party quotes the relevant domestic legislation, namely article 9 of the Aliens Act of 1 July 1998. According to paragraph 1 (ii) of that article, a residence permit may be issued, upon application, to a minor child of a person permanently residing in the State party, provided that the child lives with the person having custody of it. Pursuant to paragraph 10 of the same article, since 1 June 2002, if "essential considerations" make it appropriate, before issuing such residence permit, evidence may be required that the resident can maintain the child. The State party submits that the above provision is applied in accordance with the State party's international obligations, including in particular article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the current practice, as "essential consideration" the immigration authorities consider the length of the period from the time the applicant first had the opportunity to apply for a residence permit until the time when an application is submitted. An "essential consideration" would also be if a residence application is submitted after an applicant has spent a substantial part of his childhood in his/her country of origin. Other "essential consideration" is whether the parent living in the State party chose to exercise his/her family life through short stays in the country of origin, for example during annual holidays and how often the parent and the child have been in contact before the application. Finally, it is also assessed whether there seem to be any substantial bars to the continued exercise of the family life in the same manner in the country of origin. If there are such bars, the authorities would refrain from making maintenance conditions.

4.6 The State party further explains that if an application for asylum is declared manifestly unfounded, a consultation with the Danish Refugee Council (a private

humanitarian organization) takes place. If the latter disagrees with the immigration authorities' assessment, the case is forwarded to the Refugee Appeals Board for a review and final decision.

4.7 The State party maintains that the author failed to advance any submission as to the alleged violation of article 23 of the Covenant. It objects to the author's complaint related to his expulsion/deportation since it maintains that no such proceedings were ever initiated, but rather that he was ordered on several occasions to leave the country before a fixed deadline. Had the author not voluntarily left the country by the fixed deadline, and had his deadline not been extended upon the request of the Committee, deportation proceedings ultimately would have been initiated by the authorities. Such proceedings would not be contrary to articles 23 and 24 of the Covenant, as the same principles apply in cases concerning family reunification and cases concerning deportation of aliens who have a close family member in the country. The State party maintains that the author's claims are insufficiently substantiated and therefore the communication should be declared inadmissible.²

4.8 The State party acknowledges that the relationship between the author and his father amounts to "family life" within the meaning of the Covenant, even though they had never lived permanently together prior to the author's illegal entry into the country in September 2004. However, the State party does not find that it is obliged under the Covenant to permit the author and his father to enjoy their family life in its territory.

4.9 The State party submits that "families" are given wide implicit and explicit recognition in its legal system, in accordance with article 23 of the Covenant. Furthermore, article 24 of the Covenant does not define what protective measures are required by a child's status as a minor; instead, the States are granted a broad discretion with regard to the manner in which they implement their positive obligation. The State party submits that its legal system allows family members of persons residing in the country to apply for family reunification and/or short term visits and that in all such cases the authorities examine whether the applications should be granted in light of, *inter alia*, its obligation pursuant to the international law. Articles 23 and 24 of the Covenant do not entail a general obligation for a State to respect immigrant's choice of the country of their residence or to authorize family reunification in its territory, as both provisions must be read in the light of the State party's right to control the entry, residence and expulsion of aliens.

4.10 The State party disputes the claim that the refusal to grant the author a residence permit constitutes an "interference" with the family life between the applicant and his father, given that their present family life has lasted short of three years, it was established and developed during the applicant's mainly illegal stay in the country and they had never lived permanently together prior to the author's arrival in Denmark. The present case should be considered as one concerning the extent of the State's potential positive obligation under articles 23 and 24 of the Covenant, i.e. whether or not the author should be allowed to reside with his father in the country.

4.11 The State party is aware that the Committee normally considers a State's refusal to allow one member of a family to remain in its territory as a potential interference in that person's family life, but draws attention to the fact that in the majority of the cases involving family reunification considered by the Committee, the authors had spent much longer periods of time in the territory of the state concerned than the author in the present

² The State party refers to: *Gangadin v. the Netherlands*, paras. 4.1-4.3, Communication 1451/2006, *Rajan v. New Zealand*, paras. 7.3-7.4, Communication 820/1998 and "*O.J.*" v. *Finland*, para 3.2, Communication 419/1990.

case (11 years in *Sahid v. New Zealand*, 15 years in *Maddafferi v. Australia* and 14 years in *Winata v. Australia*).

4.12 The present case does not fall within the scope of articles 23 and 24 of the Covenant and therefore the State party must enjoy a wide margin of appreciation to decide whether to authorize a family reunification. It maintains that the margin of appreciation should be particularly wide in the present case, considering that it had been tried in debt in two instances of administrative proceedings and in two court instances, all of which have specifically considered the case in light of Denmark's obligations according to the international law. The State party recalls that in *Winata v. Australia* the Committee explicitly stated that "there is significant scope for State parties to enforce their immigration policy and to require departure of unlawfully present persons".

4.13 The State party deduces from the Committee's practice that, in order not to be contrary to the articles 23 and 24 of the Covenant, a refusal of family reunification must be lawful and non-arbitrary. In the instant case the refusal was lawful, since it was made in accordance with the Aliens Act and its lawfulness is not disputed by the author. As for the concept of arbitrariness, it implies that the impugned measure must be proportionate to the legitimate aim pursued and quotes paragraph 7.3 of *Winata v. Australia* in support. Unlike in *Winata v. Australia*, in the present case there are no exceptional circumstances that would deem the removal of the author arbitrary.

4.14 The most important factor in the present case is the fact that the separation of the author and his father from the author's birth until September 2004 was caused entirely by the choice of the father to live abroad together with his new family. Nothing prevented the author's father from applying for family reunification at a much earlier stage, but he did not do so until 9 February 2002, eleven and a half years after the birth of the author. No legitimate explanation exists as to why the authors' father waited that long. At no time during their more than 14 years of separation did the author's father apply for a short term visa for the applicant to visit him and his new family in Denmark.

4.15 The State party refers to the established case law of the European Court of Human Rights (European Court) on article 8 of ECHR and family reunification of children. In cases where the separation of the family is a result of the parents' conscious decision to settle in a Contracting State and leave their children behind in their country of origin, the European Court adopts a strict approach, which is even stricter if the parents do not display a clear intention to be united with their children, e.g. because they wait several years before filing an application.

4.16 The State party notes that, at the time of the submission, the author was 17 years old and capable of looking after himself; he did not have the same need for his parents as a small child; the author has lived his entire childhood and his first teenage years without his father; his mother and a number of close relatives live in his hometown and consequently he has strong family, cultural and linguistic ties with Morocco. He has not substantiated his claim that the whereabouts of his mother are unknown, and he had repeatedly provided contradictory statement as to whether he lived with her from the year 2000 onwards.

4.17 The State party notes that at no time during his stay in its territory has the author been given an assurance or a legitimate expectation that he will be granted a right of residence, that in fact he was refused residence permit twice, and that both the author and his father were well aware that the family life they were developing will remain precarious until the latter complied with the minimum income requirement. The State party further refers to the case-law of the European Court according to which not even a very long

illegal/precarious stay of an applicant child can improve the child's legal position in relation to article 8 of ECHR.³

4.18 The State party's refusal to grant a residence permit to the author does not prevent him and his father from maintaining the degree of family life that they had prior to the applicant's illegal arrival in the country. The State party does not find it established that the author's mother or his other relatives would not be able to provide for his care, with financial assistance from his father. The fact that the author's father's wife and their two children live in Denmark cannot be considered decisive as the author's father waited eleven and a half years before he applied for reunification and during that time he did not demonstrate any intention or desire of including the applicant in his new family. Consequently the State party maintains that the degree of hardship the author and his father will encounter as a result of the refusal of family reunification can not be compared in any way with the hardship facing the families in the *Madafferi*⁴ and *Winata*⁵ cases.

4.19 The State party agrees that the provisions of the Convention on the Rights of the Child can be taken into consideration for the interpretation of article 24 of the Covenant, but notes that the Covenant is the legal basis to be considered and that the Committee does not have competence to decide whether a State has violated the Convention on the Rights of the Child. Furthermore, there is no legal basis to assert that the Convention on the Rights of the Child provides the author with additional and/or more favorable protection than articles 23 and 24 of the Covenant in the area of family reunification. Only article 9 of the Convention directly concerns family reunification and the requirements of that article have been met in the present case.

4.20 In all cases, in which application for family reunification is filed, the parties involved have to meet all the conditions set in the Aliens Act. The author has not been treated any differently and therefore he has not been subjected to discrimination by the authorities. The maintenance requirement is imposed in all cases, including on its citizens, where a long period of time has elapsed from when the parent was able to apply for family reunification until such application is actually submitted. The State party disagrees with the author that article 24 of the Covenant, read in the light of article 10 of the Convention on the Rights of the Child, imposes an obligation on it to facilitate family reunification between a parent residing legally in Denmark and his/her child in all cases where the parent holds custody.

4.21 The State party finds it entirely reasonable to require the person residing in the country to demonstrate that he/she can provide for the basic costs of subsistence of his/her family members with whom reunion is sought. The State party maintains that such condition is in line with the jurisprudence of the European Court and refers to two cases where no violation was found as it had not been substantiated that the applicants had made any serious attempts at complying with the minimum income requirement and/or sustained their inability to do so.⁶

4.22 The State party quotes the applicant's submission regarding his father's health (medical records establishing that the latter has been suffering from epilepsy since 1986 and

³ The State party refers to: *Mensah v. the Netherlands*, admissibility decision of 9 October 2001; *I.M. v. the Netherlands*, admissibility decision of 25 March 2003; *Benamar v. the Netherlands*, admissibility decision of 5 April 2005; *Chandra v. the Netherlands*, admissibility decision of 13 May 2003.

⁴ *Madafferi v. Australia*, Communication No. 1011/2001, Views of 26 August 2004.

⁵ *Winata and Li v. Australia*, Communication No. 930/2000, Views of 26 July 2001.

⁶ *Konstantinov v. the Netherlands*, Judgment of 26 April 2007, para 50 and *Haydarie v. the Netherlands*, admissibility decision of 20 October 2005.

has been hospitalized on two occasions in 2003 and in 2006) and notes that the above does not prevent him from maintaining the same degree of family life as they had before the author's arrival in the country.

4.23 The State party finally notes that the applicant has not referred to article 17 (1) of the Covenant, which prohibits the States from interfering with family life in an arbitrary or unlawful manner. Should the author refer to this provision at a later time the State party submits that the interference with the author's family life is both non-arbitrary and proportionate to the pursued legitimate aim.

4.24 The State party concludes that the communication should be declared inadmissible for lack of substantiation and the interim measures request withdrawn.

Author's comments

5.1 On 14 January 2008, the author reiterates his complaint. He notes that he has learned to speak, read and write in Danish, despite the fact that he was denied access to school by the authorities. Despite his illness, his father has been employed for varying periods of time and, contrary to the State party's submission, he did not sustain the family's needs only on social assistance since 2003. In that respect the author provides copies of short-term employment contracts of his father dated 12 December 2005, 23 May 2006 and 14 November 2006.

5.2 With regard to his mother, the author clarifies that after his maternal grand-parents' death in 2000, his mother was forced to live with her siblings, she could no longer support him and for that reason the author was relocated to live with his paternal grand-mother and was supported financially by his father. The last address he has for his mother is the one she put on the documents transferring his custody to his father; subsequently she moved with her new husband and he is currently unaware of her whereabouts. The author strongly rejects the attempts of the State party to indicate that the information he provided regarding the whereabouts of his mother is not reliable and refers to a report of the Immigration Police, dated 18 October 2005 and the Decision of the City Court of Copenhagen, dated 18 May 2006, which documents that he did not deliver contradictory statements on that subject. The author also states that, according to the Moroccan law, only when a child reaches the age of 12, his/her father has a reasonable possibility to claim custody, which is why his father did not attempt to do that earlier. He also states that according to Muslim tradition the children of women who remarry can not live with the new family, unless the new husband allows that and that in general men in Morocco do not take up responsibility to support children of their wives from previous marriages.

5.3 The author resubmits that the State party's obligations under article 24 of the Covenant are determined by the content of articles 5, 9 and 10 of the Convention on the Rights of the Child. He submits that since the State party has ratified the Convention on the Rights of the Child, it has positive obligations and in particular the obligation to ensure that the well-being of the child is not jeopardized by decisions of its authorities.

5.4 The author notes that his case is different from the *Winata* and *Sahid* cases, where the children had residence permits and their parent's right to remain in the country was at stake. When a strong relationship has been established between a child and a parent, it is incumbent of the State party to demonstrate additional factors beyond enforcement of immigration policy justifying the deportation of the child, in order to avoid its decision to be characterized as arbitrary.

5.5 The author also submits that the decision of the Ministry of Refugees, Immigration and Integration is not in accordance with section 9 (10) and section 9 (1)(ii) of the Aliens Act and therefore it is not lawful, since those provision do not entitle the authorities to set as a condition for issuing a permit that the father of the author should have a regular

employment. The author disputes the Ministry's interpretation of the *travaux préparatoires* for the above provisions and submits that the latter lead to the conclusion that a parent can be required to prove that he/she can maintain the child only if there has been no contact between the parent and the child for a long period prior to the application for family reunification. The author stresses that his father has visited him for one month every year and that he has continuously, since his birth, maintained his alimony obligations and hence has proved that he can support him. The author also notes that according to the Copenhagen City Court the author's father did not have to prove his ability to maintain him.

5.6 The author also submits that the decision of the State party not to grant him a residence permit is not in accordance with article 8 of the ECHR or the jurisprudence of the European Court. The author recognizes that the jurisprudence the State party relies on refers to the fact that parents who decided to live abroad opted consciously for a family life under those circumstances and that State parties are allowed a wide margin of discretion to implement immigration policy. However the author points out that in the present case his father has two children who have spent their whole life in the State party and their interests in their country of residence must also be given consideration. The author draws the Committee's attention to the case *Sen v. the Netherlands*,⁷ paras 38-41, in which a violation of article 8 was found since a reasonable balance was not made between the government's interests in maintaining its immigration policy and the interest of the children.

5.7 With regard to the author's age and connections with Morocco, the author restates that he was eleven years old when he applied for reunification with his father for the first time, fourteen when he joined his father. The fact that the consideration of the case by the State party's authorities took several years should not affect the assessment of the facts. Furthermore, the fact that his father has three siblings in Morocco is less relevant in a case where he seeks reunification with the parent who has a legal custody over him.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee has ascertained, in accordance with article 5, paragraph (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee observes that all available and effective domestic remedies have been exhausted.

6.3 The Committee takes note of the author's claim that the State party's refusal to grant him a residence permit constitutes discrimination against him under article 24, read in conjunction with article 2 of the Covenant. However, the Committee finds that the author failed to substantiate this allegation and therefore declares the communication inadmissible in that part.

6.4 The Committee notes the State party's submission that the author did not substantiate his claims of violations of his rights under articles 23 and 24 of the Covenant. However, the Committee is of the opinion that the arguments before it raise substantive issues which should be dealt with at the merits stage. The Committee therefore declares the communication admissible and proceeds to the examination of the merits.

⁷ *Sen v. the Netherlands*, 31465/96, Judgment of 21 December 2001.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee must decide whether the refusal of the State party to grant residence permit to the author for the purposes of family reunification with his father and the order to leave the country constitute a violation of his rights to family life protection under articles 23 and 24 of the Covenant.

7.3 In the present case, it is not disputed by the State party that the author and his father have a family life, both before he joined his father in the State party's territory and afterwards. The fact that the author has remained illegally in the territory of the State party does not influence the fact that he developed family ties not only with his father, but with his half-siblings and their mother. It is also undisputed that the author learned the local language and developed certain ties with the local culture and society. The Committee notes the State party's submission that if the author was returned to his country of origin there was nothing to prevent him and his father from maintaining the same degree of family life they had before the author came to the State party. The Committee observes, however, that two important circumstances have changed. Firstly, already in the year 2000, the author's maternal grand-parents, who were his *de facto* caregivers during the first ten years of his life, were deceased. Second, in 2003 the author's mother transferred his custody to his father, a transfer recognised by the State party's authorities, and the primary responsibility for his support and upbringing after that lie with his father. Considering the above circumstances, the Committee is not convinced that it would have been in the best interest of the author, when he originally requested to be allowed to reunite with his father, to continue to maintain a family life with his father limited to annual visits and financial support.

7.4 The Committee takes note of the State party's argument that the initial separation of the author and his father were caused entirely by the decision of the latter to move to the State party and leave his son in his country of origin and that he made no attempts to reunite the author with his new family until he was eleven and a half years old. The Committee observes that the author's parents were divorced, his mother obtained the custody of him after his birth and that for the first ten years of his life the author was adequately cared for by his grand parents. The Committee also observes that when those circumstances changed, the author's father started to make attempts to reunite with him in order to assume the role of a primary caregiver. The Committee also observes that at stake in the present case are the author's rights as a minor to maintain a family life with his father and his half-siblings and to receive protection measures as required by his status as a minor. The Committee notes that the author can not be held responsible for any decisions taken by his parents in relation to his custody, upbringing and residence.

7.5 In these very specific circumstances, the Committee considers that the decisions not to allow the reunification of the author and his father in the State party's territory and the order to leave the State party, if implemented, would constitute interference with the family contrary to article 23 and a violation of article 24, paragraph 1 of the Covenant, due to a failure to provide the author with the necessary measures of protection as a minor.

8 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 decisions not to allow the reunification of the author and his father in the State party's territory and the order to leave the State party would, if implemented, entail a violation of articles 23 and 24 of the Covenant.

9 In accordance with the Covenant, the State party is under an obligation to take appropriate action to protect the right of the author to effective reunification with his father, and to avoid similar situation in the future.

10 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views.

[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.]