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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-second session
18 February – 7 March 2008

OPINION

Communication No. 39/2006

Submitted by:	D.F. (not represented by counsel)
Alleged victim:	The petitioner
State Party:	Australia
Date of the communication:	23 October 2006 (initial submission)
Date of the present decision	22 February 2008

[Annex]

* Made public by decision of the Committee on Elimination of Racial Discrimination.

ANNEX

OPINION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION UNDER ARTICLE 14 OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Seventy-second session

concerning

Communication No. 39/2006

Submitted by:	D.F. (not represented by counsel)
Alleged victim:	The petitioner
State Party:	Australia
Date of the communication:	23 October 2006 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 22 February 2008,

Having concluded its consideration of communication No. 39/2006, submitted to the Committee on the Elimination of Racial Discrimination by D.F.under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination.

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

Adopts the following:

OPINION

1. The petitioner is D.F., a New Zealand citizen now residing in Australia. He claims to be a victim of violations by Australia of article 2, paragraph 1(a), and article 5(e) (iv), of the International Convention on the Elimination of All Forms of Racial Discrimination. He is not represented.

The facts as presented by the petitioner

2.1 On 30 June 1970, at the age of 6, the petitioner and his family immigrated to Australia. As a New Zealand citizen, he was automatically deemed to be a permanent resident upon arrival and exempted from any visa requirements. In 1973, his status was that of an "exempt non-citizen" under the bilateral Trans-Tasman Travel Arrangement between Australia and New Zealand, which allows citizens of both countries to live in either country indefinitely. In 1994, the petitioner was automatically granted a Special Category Visa (SCV), which allowed him to remain indefinitely in Australia, as long as he remained a New Zealand citizen. In 1998, he was temporarily seconded overseas by his employer. He had then resided in Australia for 28 continuous years and had married an Australian. He regularly returned to Australia during his temporary absence and identifies himself as an Australian. He does not specify when he returned to Australia.

2.2 On 26 February 2001, the enactment of a bilateral social security agreement between Australia and New Zealand was announced. On the same day, the State party introduced national measures regarding social security benefits, amending the Social Security Act (1991) (SSA), and restricting access to the full range of social security payments to New Zealand citizens, unless they held permanent visas. This new act, known as the Family and Community Services Legislation Amendment (New Zealand Citizens) Act 2001, entered into force on 30 March 2001. According to the petitioner, this revised act was adopted unilaterally by the State party and not for the legitimate purpose of implementing the bilateral agreement.

2.3 The main amendment to the 1991 Act related to the meaning of the term "Australian resident", which defines eligibility for most social security benefits under the SSA. Prior to the amendment, the definition of "Australian resident" included Australian citizens, New Zealand citizens (SCV holders) and permanent visa holders. The amendment introduced a new class of non-citizen under social security law: the "protected" SCV holders, who retained their rights to social security, while all other SCV holders lost certain rights in this area. Those New Zealanders who were in Australia on 26 February 2001, and those absent from Australia on that day but who had been in Australia for a period totalling 12 months in the two years prior to that date and who subsequently returned to Australia, continued to be treated as Australian residents for the purposes of the Act, as they were now considered "protected" SCV holders. Other New Zealand citizens had to meet normal migration criteria to become an "Australian resident" for the purposes of the Act. The petitioner was not in Australia on the pertinent date and did not fulfil the transitional arrangements, as he was absent from the State party for more than 12 months in the 2 years immediately prior to and including 26 February 2001. He thus lost his status as an "Australian resident" for the purposes of the revised Act. In addition, and in conjunction with the revised Act, ministerial powers afforded under Subsection 5A(2) of the Citizenship Act 1948 were used to remove citizenship eligibility from New Zealand citizens who are not "protected" SCV holders and who do not have permanent resident status. According to the petitioner, the aim was to ensure that he was unable to regain his status as an "Australian resident" for the purpose of eligibility for social security by becoming an Australian citizen under Section 5A(2) of the Citizenship Act 1948 [1], which now deprives him of eligibility for Australian citizenship.

[1] Australian Citizenship Permanent Resident Status (New Zealand Citizens) Declaration 2001- See Attachment 2

2.4 Since the petitioner lost his status as an "Australian resident" for the purposes of social security benefits and citizenship, he is now required to apply for and obtain a permanent residence visa if he wishes to regain his previous rights. He would then be required to wait two additional years (waiting period for new arrivals regarding eligibility for social security), even though he has already resided in Australia for over thirty years. The petitioner has not yet attempted to apply for such a visa. He argues that the new legislation places him in a precarious situation, should he become sick, injured or unemployed. Although he admits that, prior to the passage of the bill, New Zealand citizens were given preferential treatment to citizens from other countries, he argues that the withdrawal of "the positive discrimination" towards New Zealand citizens for the purposes of creating equality between them and other non-citizens was never announced as an objective of the Act in question and did not in fact achieve that aim.

2.5 In May 2006, the petitioner lodged a complaint with the Human Rights and Equal Opportunities Commission (HREOC), regarding the withdrawal of benefits and rights to social security and citizenship under the revised legislation. On 21 June 2006, his complaint was rejected, on the grounds that: it could not proceed with any complaint under the ICERD; discrimination on the ground of a person's citizenship or visa status was not a ground covered under the Racial Discrimination Act (1975), and the HREOC Act does not cover complaints where the events complained of are the result of the direct operation of legislation.

The Complaint

3. The petitioner claims that he has exhausted domestic remedies by virtue of his complaint to the HREOC. He claims that the Family and Community Services Legislation Amendment (New Zealand Citizens) Act 2001, which amended the Social Security Act (1991) (SSA), discriminated against him on the basis of his New Zealand nationality, by withdrawing entitlements to social security and citizenship, in violation of article 5 (e)(iv) of the Convention. By so doing, the State party also committed an act of racial discrimination against a group of persons, of which he is a member, in violation of article 2(1)(a), of the Convention.

The State party's submission on admissibility and merits

4.1 On 1 May 2007, the State party submits that the communication is inadmissible, as the petitioner is unable to demonstrate that he is a victim of a violation of either article 2, paragraph 1 (a), or article 5 (e)(iv), of the Convention. It denies that the Family and Community Services Legislation Amendment (New Zealand Citizens) Act 2001, discriminates against New Zealand citizens living in Australia on the basis of their national origin. It submits that the Act amends legislation which previously allowed New Zealand citizens living in Australia as holders of "Special Category Visas" to receive certain social security payments without having to apply for permanent residence in Australia or Australian citizenship. Subject to transitional arrangements, New Zealand citizens arriving in the State party must now meet the definition of "Australian resident" that applies to all entrants to Australia before being eligible for certain Australian Government funded social security payments. These changes do not affect the ability of New Zealand nationals residing in Australia to have automatic access to other benefits such as employment services, health care, public housing and primary and secondary education.

4.2 According to the State party, under the terms of the new legislative amendments, no distinction is applied with respect to access to social security between New Zealand citizens and people of other nationalities who live in Australia. The limitation on the petitioner's ability to access certain social security benefits is not based on his national origin but on the fact that he is neither a permanent resident nor an Australian citizen. Previously New Zealand citizens received preferential treatment; the subsequent withdrawal of such advantages does not constitute discrimination, as it merely places New Zealand citizens on an equal footing with people of other nationalities who are neither permanent residents nor Australian citizens. It is open to the petitioner, as with all migrants to Australia, to apply for a permanent residence visa. Persons who have held a permanent residence visa for two years are eligible to receive certain social security payments, such as unemployment benefits.

4.3 The State party dismisses as misleading the allegation that New Zealand citizens who had been residing in the State party but were temporarily absent at the time the amendments came into force, i.e. 26 February 2001, "lost their rights", unlike New Zealand citizens who were present in the State party at that time and could avail themselves of the transitional arrangements in the legislative amendments. It submits that extensive transitional arrangements were put in place for New Zealand citizens temporarily absent from Australia on 26 February 2001. These arrangements provided a regime for many New Zealand citizens to continue to receive the benefits available under the pre-February 2001 arrangements. In particular, the changes did not apply to New Zealand citizens who were temporarily absent from the State party if they had been in Australia for a period, or periods, of 12 months in the previous 2 years immediately before 26 February 2001. For those New Zealand citizens who were intending to reside in Australia at the time of the changes, a 3-month period of grace applied from 26 February 2001 (i.e. 3 months to commence or recommence residing in Australia). A 6-month period of grace applied to those New Zealand citizens temporarily absent from Australia on 26 February 2001, and who were in receipt of social security payments. A 12-month period of grace applied to those New Zealand citizens, resident in Australia but temporarily absent, who were unable to return to Australia in the 3 month period and were not in receipt of a social security payment.

4.4 On the merits, the State party submits that the petitioner has failed to substantiate his claims of racial discrimination and that the communication is thus without merit. It notes that the legislative amendments do not affect the petitioner's access to employment services, health care, public housing and primary and secondary education or family tax benefits nor do they affect the petitioner's right to obtain gainful employment in Australia. New Zealand citizens are still permitted to travel, live and work indefinitely under the terms of the Trans-Tasman Travel Arrangement. In this respect, they continue to access a significant relative advantage over citizens of other countries under the Trans-Tasman Travel arrangements.

Petitioner's comments on State party submission

5.1 The petitioner notes that the State party does not contest the admissibility of the complaint as far as it concerns exhaustion of domestic remedies. He argues that although the State party admits that, as a New Zealand citizen he can remain "indefinitely" within the State party, he is not a "permanent resident" for the purposes of the amended legislation. In his view, any distinction based on whether a person holds a SCV (as in his case) or a permanent residence visa is a distinction based upon "legal formalism" – as it ignores the fact that both visas afford indefinite/permanent residence. He argues that rather than comparing

his situation to that of a minority group of non-citizens (those who do not have permission to indefinitely reside in Australia and thus never had the same rights to social security as the petitioner), his situation should be compared to that of the majority who are also indefinitely residing in Australia, i.e. Australian citizens.

5.2 In the petitioner's view, the argument of "equality through deprivation" is illogical, as it can be used to claim that any group is "advantaged" over a more deprived group. He notes that the State party has used this argument on several recent occasions years to justify the progressive limitation of the right to social security for non-citizens, including, the extension of a two-year waiting period to New Zealand citizens before they became eligible to receive most social security benefits, to ensure that they too are now "equal" to permanent visa holders. As to the suggestion that he may apply for a "permanent visa", he argues that the possibility of changing his immigration status to one that is less discriminatory does not address the claim that he is discriminated against because of his current status as the holder of a Special Category Visa – particularly given that his current visa pertains directly to his nationality. In addition, there is no guarantee that he will be granted one[2].

5.3 The petitioner affirms that New Zealand citizens retain other advantages under the terms of the Trans-Tasman Travel Arrangement, but, in his view, this does not absolve the State party from discriminating against New Zealand citizens under the new amended legislation. As to the arguments on the transitional arrangements, he submits that the fact that he was potentially eligible for a limited period to apply to regain his rights does not negate the fact that he lost them in the first place. In any event, he argues that the deadline to regain his rights was inadequate, as was the method of informing those who were absent from the State party at the date of the legislative amendments. He notes that the State party failed to offer any observations pertaining to the deprivation of his eligibility for Australian citizenship based upon his nationality.

Issues and proceedings before the Committee

6. 1 Before considering any claim contained in a communication, the Committee on the Elimination of all Forms of Racial Discrimination must decide, pursuant to article 14, paragraph 7(a), of the Convention, whether or not the current communication is admissible.

[2] He refers to the Committee's concluding observations on Australia (Sixty-sixth session, 21 February-11 March 2005), in which it raised a concern with respect to the limited public services offered to refugees and stated that **"**differential treatment based on citizenship or immigration status would constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of that aim. He also refers to General comment no.3 on article 9 of the Covenant on Economic, Social and Cultural Rights ('ICESCR'), which states that "……any deliberately retrogressive measures […] would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

6.2 The Committee notes that the State party has not disputed the petitioner's argument that he has exhausted domestic remedies and thus considers that he has done so, for purposes of admissibility.

6.3 The Committee notes the State party's argument that the petitioner has not demonstrated that he is a "victim" within the meaning of the Convention, as his lack of entitlement to social security benefits was not based on his national origin but rather on the fact that he is neither a permanent visa-holder nor an Australia citizen. The Committee notes, however, that the petitioner was affected by the amendments to the Act in question and thus could be considered a "victim" within the meaning of article 14, paragraph 1, of the Convention. The question of whether the petitioner was discriminated against on the basis of his national origin and the State party's arguments in that regard relate to the substance of the petition and, for this reason, should be considered on the merits. The Committee finds no other reason to consider the petition inadmissible and therefore moves to its consideration on the merits.

7. 1 The Committee notes that the State party contests the petitioner's claim that he is discriminated against on the basis of his national origin with respect to the distribution of social security benefits. It observes that prior to the entry into force of the Family and Community Services Legislation Amendment (New Zealand Citizens) Act of 2001, New Zealand citizens residing in Australia had the same rights to social security benefits as Australian citizens. These benefits were granted to New Zealand citizens on the basis of their nationality. Pursuant to the Act of 2001, these benefits were withdrawn from the petitioner and all other New Zealand citizens who were not entitled to, or in possession of, "protected" Special Category Visas or permanent resident visas. Thus, the distinction which had been made in favour of New Zealand citizens no longer applied. The provisions of the Act of 2001 did not result in the operation of a distinction, but rather in the removal of such a distinction, which had placed the petitioner and all New Zealand citizens in a more favourable position compared to other non-citizens.

7.2 The provisions of the 2001 Act put New Zealand citizens on a more equal footing with other non-citizens, and they can apply on the same terms for a permanent resident's visa or Australian citizenship, the receipt of either of which would bring them within the definition of "Australian resident" for the purposes of receiving the benefits in question. In this context, the Committee notes that the petitioner has neither argued nor demonstrated that the implementation of the Act of 2001 itself results in distinctions based on national origin. He has failed to show that his national origin would be an impediment to receiving a permanent resident's visa or Australian citizenship, that the majority of visa holders are non-citizens of national origins different to himself, or indeed that he has been refused such a visa on the grounds of his national origin. For these reasons, the Committee concludes that the Act in question does not make any distinctions based on national origin and thus finds no violation of either article 5 (e)(iv) or 2(1)(a) of the Convention.

8. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of any of the provisions of the Convention.

[Adopted in English, French, Spanish and Russian, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]
