

HUMAN RIGHTS COMMITTEE

Dixit v. Australia

Communication No. 978/2001 *

28 March 2003

CCPR/C/77/D/978/2001

ADMISSIBILITY

Submitted by: Sunil Dixit

Alleged victim: Sonum Dixit (his daughter)

State party: Australia

Date of communication: 18 May 1998 (initial submission)

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

Meeting on 28 March 2003

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication, dated 18 May 1998, is Mr. Sunil Dixit, a resident of the United States at the time of submission of his communication. He claims that his daughter, Sonum Dixit, who was 7 years old at the time of submission, is a victim of a violation by Australia of articles 2, paragraph 3, article 14, paragraph 1, article 17, article 24 and article 26 the International Covenant on Civil and Political Rights (the Covenant). He is not represented by counsel.

The facts as submitted by the author

2.1 In the course of 1996, the author, a certified public accountant, applied from the United States, as primary applicant, for an Australian migrant visa covering himself, his wife Shivi and daughter Sonum. On 16 September 1997, the visas were denied to all three applicants by the Department of

Immigration and Multicultural Affairs (hereafter DIMA) under the Migration Act 1958. The grounds given were that Sonum, who had been born on 3 October 1991, suffered from a mild case of *spina bifida*, “a disease or condition that would be likely to result in significant cost to the Australian community in the areas of health care and community services”.

2.2 This conclusion was reached following an assessment by the Commonwealth Medical Officer of a specialist pediatrician’s report supplied by the author. The report concluded that the child’s *spina bifida*, “with several complications”, would result in “significant costs to the Australian community”, *inter alia*, through further orthopedic surgery, regular attendance at specialist clinics and likely long-term dependence upon income support.

2.3 Following the denial of the application, the author supplied further medical information, although there is no right to a formal review of the medical opinion underlying the decision to deny the applications. The Minister of Immigration responded that, upon analysis of the further information, even upon the most optimistic of predictions Sonum’s costs to the community would be significant (defined as Aus\$16,000 over the next 5 years or longer if foreseeable). This was based upon costs associated with close supervision by a multidisciplinary team, repeated investigations over her lifetime and foot surgery, as well as disability allowances of Aus\$1,950 a year until she reached 16 years of age. This assessment was made without regard as to whether the person would effectively use those services.

2.4 Thereafter, the author made a variety of professional complaints against the medical specialists involved, and made approaches to a variety of Ministers and officials, without success. Complaints made to the Ombudsman, the Human Rights & Equal Opportunity Commission (hereafter HREOC) (dismissed for want of jurisdiction), the Parliamentary Joint Standing Committee on Migration, the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (Human Rights Sub-Committee) were of no avail.

2.5 During the year 2000, the author and his family filed a new application for Australian Migrant Visa Sub-class 136, which is a different class of visa to the one for which the author’s family initially applied. This visa was granted on 18 May 2000 and the author’s family is since then entitled to lawful permanent residence of Australia. As a result, the author informed the Committee on 4 June 2001 that he was willing to withdraw his communication if the State party’s government confirmed that the commencement of their status as permanent residents is pre-dated to 1997 – when the first application for Migrant Visa was denied – instead of 2000 and waived the residency requirement for his family so that they can file applications for Australian citizenship.

The complaint

3.1 The author challenges the factual and evidential bases for the medical evaluations made, the author’s central complaint is that the decision to refuse the applications for visa violates the guarantee to equality before the law, stipulated in article 26 of the Covenant, in that the decision discriminated upon the grounds of disability. Essentially, the author attacks the specific health criteria contained in the Migration Act 1958 and associated regulations, which are stated as seeking to minimize risks to public health and community services, to limit public expenditure on health

and community services, and to maintain the access of Australian citizens and permanent residents to those services under which the decision to refuse the applications was made. The author points out that Section 52 of the Disability Discrimination Act 1952, which proscribes discrimination upon the basis of disability, specifically excludes that Act from applying to discriminatory provisions of the Migration Act 1958.

3.2 Also with respect to article 26 of the Covenant, the author alleges that all persons are not equal before the law, as he was not given a right to review or appeal the decision made by DIMA whereas there are categories of visa for which applicants have a full right of review or appeal.

3.3 The author alleges that article 26 of the Covenant was further violated in that his daughter suffered discrimination because the Medical Officer who made the health assessment did not have the appropriate medical specialization in *spina bifida*.

3.4 The author finally alleges a violation of article 26 in that he was unable to seek a possible waiver of the health requirements because he was unable to satisfy the apparently necessary statutory precondition of having a relative in Australia. The author contends that this requirement to have Australian relatives before a waiver can be considered breaches the equal protection of the law.

3.5 The author alleges a violation of article 2, paragraph 3 and article 14, paragraph 1 of the Covenant, as his right to access to judicial process for a determination of his rights are violated because in his case, in contrast to the situation under other types of migrant visas, there allegedly is no right to review or appeal of the refusing decision to the Immigration Review Tribunal or the Federal Court. The author however stated on 18 May 1998 that there was a form of appeal possible to the State party's Federal Court within four months of the decision, but that due to delays in obtaining the documents of his case the time limits had passed. In any event, the author contends that it is very difficult and weighted against a litigant for court action in Australia to be pursued from abroad.

3.6 The author further contends that his due process rights protected under article 14, paragraph 1, require an opportunity to be given to supply more medical information in such cases, to consult external specialists on the medical findings and to have the medical findings subject to review by an independent medical panel. In this regard, the author alleges that his complaint before the HREOC was a "suit at law" but that he "was not given opportunity to have [his] claim determined by a judicial body as guaranteed by" article 14, paragraph 1 of the Covenant.

3.7 The author finally alleges a violation of article 17 and 24 because his daughter has allegedly been falsely declared eligible for "Child Disability Allowance", which constitutes an unlawful attack on the reputation of a minor child and demonstrates that his daughter did not enjoy the protections guaranteed by article 24 of the Covenant. The State party's observations on the admissibility and merits of the communication

4.1 By submissions of 20 December 2001, the State party made its observations on the admissibility of the communication.

On admissibility

4.2 The State party first submits that the communication is inadmissible because, at the time when it was submitted to the Committee, the author, his wife and daughter, were neither on Australia's territory nor under its jurisdiction as required by article 2, paragraph 1, of the Covenant. Although the State party accepts that in some cases, a liberal interpretation should be given to the above mentioned provision, citing the jurisprudence of the Committee in *Lichtensztejn v. Uruguay* 1/ and *Vidal Martins v. Uruguay*, 2/ the author's communication may be distinguished from these cases since he and his family were nationals of another State applying to migrate to Australia. They had no previous connection with Australia and, referring to General Comment No. 15 of the Committee 3/ they had no right under international law to reside permanently in Australia. The State party stresses that, according to the *travaux préparatoires* of the Covenant, the insertion of the dual requirement that a person be both in the territory and subject to the jurisdiction of the State was quite deliberate and to suggest that the Covenant might apply to non-citizens, residing in another country, whose only connection with Australia is an application for a particular class of visa, is to extend the scope of the Covenant far beyond the intention of the drafters and would render the wording of article 2, paragraph 1, redundant.

4.3 The State party further submits that the author has not exhausted domestic remedies because, contrary to his allegation that he was not given a right to appeal the decision of the DIMA, there were two separate avenues of judicial review available to the author. The first was a right to seek a judicial review of the decision in front of the Federal Court according to Section 475 of the Migration Act then in force within 28 days of the notification of the decision, and the second was a right to seek a remedy in the High Court against a decision taken by Commonwealth officers according to Section 75 of the State party's Constitution. The State party argues that both courts could have given an impartial, timely, public and judicial hearing of the complainants' legal arguments. It is further submitted that both courts are readily accessible and that there are no undue delays for having a hearing before these courts. As the author had already obtained the assistance of a counsel in Australia, it would have been routine matter for the latter to ensure that such applications are made.

4.4 The State party also submits that the alleged victim of the case is not a victim in the sense of article 1 of the Optional Protocol, because the author, his wife and daughter were granted an Australian permanent entry visa on 18 May 2000, although on a different class of visa, noting that the author's daughter was cleared by the Health Assessment Services on 9 May 2000 on the basis of a further assessment of her condition and further medical documentation. The State party holds that a person who has substantially obtained the benefit claimed can no longer be a victim in the sense of article 1 of the Optional Protocol. Referring to the jurisprudence of the Committee and that of the European human rights institutions in this respect and the reasons lying behind the principle of exhaustion of domestic remedies, it is submitted that the provision of a remedy by the State party constitutes an obstacle to the international claim given the subsidiary role of the international mechanism. The State party considers that standing provisions should be interpreted strictly and recalls that the Committee stated previously that it was not intended to be a vehicle for

debate on public policy. 4/ The State party is also of the opinion that the implied threat contained in the author's submission of 4 June 2001 raises doubt about the sincerity of and motivation for his claim.

4.5 Finally, the State party argues that the author has failed to substantiate his claims under the Covenant in order to make a *prima facie* case. The arguments supporting this ground of inadmissibility are developed together with the observations by the State party on the merits of each of the claims.

4.6 For the above reasons, the State party considers that the communication should be declared inadmissible.

On the merits

4.7 With respect to the alleged violation of article 2, paragraph 3, of the Covenant in that the State party failed to provide a local remedy in accordance with article 2 (3) of the Covenant, the State party underlines that the rights referred to in article 2 of the Covenant are accessory in nature and linked to the other rights set forth in the Covenant and, referring to a number of decisions taken previously by the Committee, that a violation of this provision can only be found once a violation of another right has been established. Therefore, if, as the State party submits, there is no violation of another provision of the Covenant, the claim under article 2, paragraph 3 should be considered as unsubstantiated.

4.8 With respect to the alleged violation of article 14 of the Covenant, the State party first contends that a complaint made to the HREOC is not a "suit at law" as the HREOC is not a judicial body. Moreover, the author could have taken legal proceedings if he was not satisfied with the HREOC decision. The State party further argues that if the author's claim is that the substance of the complaint to HREOC is a "suit at law" therefore alleging a violation of article 14 because of the lack of judicial review from the decision not to grant a visa, article 14 paragraph 1 does not provide for a right to review *per se*, similarly to the right contained in article 14, paragraph 5, that relates only to criminal conviction and sentence. The State party considers therefore that the author has not raised an issue under the Covenant and that this claim should be declared inadmissible.

4.9 With respect to the alleged violation of article 17 of the Covenant, the State party submits that a violation of the said provision implies an "attack", which must be of a certain intensity, its "unlawful" character, that is in violation of a domestic legal provision, and must be made with the intention to impair a person's honour and reputation. In relation to the admissibility of this claim, it is submitted that the author has not substantiated the existence of these three elements. In relation to the merits of this claim, the State party contends that the statement made on the health of the author's daughter was entirely reasonable and based on the specialist medical reports on which the author himself relies. The comment is not unlawful as it was neither gratuitous nor extreme and therefore could not constitute an attack in the sense of article 17. The statement made on the basis of three concurring medical report that the author's daughter was eligible for Child Disability Allowance is fair and thus not aimed at intentionally injuring the person's reputation or honour.

4.10 With respect to the alleged violation of article 24 of the Covenant, the State party submits that

the author failed to demonstrate the existence of any measures of protection that could have been taken by Australia and that it failed to fulfill. An interpretation of article 24, paragraph 1 of the Covenant according to which a State party would be prohibited from assessing children according to visa criteria and drawing conclusions in appropriate cases that those children would be eligible for an allowance would be absurd.

4.11 With respect to the alleged violation of article 26 of the Covenant, in that the process of the Independent Visa Sub-class 126, for which the author applied initially is discriminatory vis-à-vis the other visa processes because of its requirement of health assessment and its lack of right of review, the State party, referring to the jurisprudence of the Committee, 5/ submits that, for the purposes of the Covenant, differentiation based on reasonable and objective criteria and whose aim is a legitimate purpose under the Covenant do not constitute discrimination. In relation to the admissibility of this claim, it is submitted that the author has not made general submissions on the difference in visa classes or on the public interest *criterion* of the health assessment, has not demonstrated that the different conditions related to visa classes are based on disability and has not indicated that such difference is unreasonable. In relation to the merits of this claim, the State party, explains that the Independent Visa Sub-class 126 is aimed at allowing immigration of people whose particular skills and qualifications are likely to bring a net economic benefit to Australia and that, for such a purpose, it is a reasonable requirement for applicants to ensure that they are not likely to impose significant health care cost upon the Australian community, an assessment that is made on a case-by-case basis by competent medical officers.

4.12 With regard to the alleged violation of article 26 of the Covenant, in that the Independent Visa Sub-class 126 is discriminatory because it is exempt from the requirements of the Disability Discrimination Act, the State party emphasizes that all visa subclasses contain the same exemption and may be reviewed by either the Federal Court or the High Court, remedies that the author failed to apply for. Moreover, it is submitted that even in the absence of a possibility of judicial review there would still be no grounds for discrimination as the latter means treating like groups or individuals differently for no objective reasons whereas applicants of the different visa subclasses are not like groups. The existence of different types of visa subclasses does not constitute discrimination because it is legitimate and reasonable and based on objective criteria.

4.13 With respect to the alleged violation of the same article 26 of the Covenant, in that the discrimination suffered by the author's daughter party arose from the fact that the officer making the health assessment did not have the appropriate medical specialization, the State party, analyzing the three medical reports upon some of which the author also relied, submits that the officer's opinion paraphrases the specialist reports and does not differ in its conclusions.

Comments of the author

5.1 By submission of 14 and 15 March 2002, the author gave his comments on the State party's submissions.

On admissibility

5.2 With respect to the allegation that the conditions of article 2, paragraph 1 of the Covenant are not fulfilled, the author states that the victim does not have to be physically within the territory of the State party in order to be subject to its jurisdiction. In the present case, the author and his daughter were subject to the jurisdiction of the State party by the operation of the Australian Migration Act. In some cases, the State party's laws operate with extra-territorial effect as for example in matters concerning travel to and entry into Australia, a State party's legislation subjecting people to its jurisdiction even though they may not be citizens or residents. In order to demonstrate the extent to which he and his daughter are subject to the Australian jurisdiction for the purpose of the visa, the author gives an extensive description of the visa system in Australia and especially of the Independent Visa Sub-class 126, which he describes as a complex legal framework. Thus where a person's rights and duties are subject to the State party's legislation, even if not physically present on its territory, he or she is subject to the jurisdiction of this State for the purpose of having those rights and duties determined. Any person trying to enter Australia must comply with the relevant State party's legislation. The author and his daughter were thus subject to the State party's jurisdiction because their application for visas was determined pursuant to the State party's legislation. The decision is made according to the State party's legislation and, as it is suggested by the State party, there are remedies under the State party's legislation. The author submits that this is sufficient to demonstrate that the author and his daughter were indeed subject to the jurisdiction of the State party at the relevant time.

5.3 With respect to the alleged failure to exhaust domestic remedies, the author submits that the remedies to which the State party is referring are remote, expensive, ineffective and likely to fail. The author also draws the attention of the Committee on the actions he has taken in relation to his visa application before lodging this communication, writing an important number of letters, requesting information and seeking assistance of various bodies, complaining to the HREOC, the Ombudsman and the Medical Board. Moreover, despite his extensive correspondence with DIMA and the Minister, the author was never advised of the existence of the remedies referred to by the State party. The author further submits that it has taken more than 3 years to be in possession of all the elements to understand why the visa had been rejected and that when he contacted lawyers in Australia, they were unable to help him as that information were unavailable. The author asked a counsel, Goldsmith Lawyers, to request copy of his file from DIMA but by the time he received the file, he realized that there was not enough information to make a determination of specific aspects of health assessment which led to denial of the visa. He thus requested the help of a Senator to find the facts, and it was not until 1999 that he was able to take action, outside the time limitation for bringing an action before the Federal Court. The author considers that this delay in obtaining the appropriate information cannot be attributed to him. Further, the author contends that he is not obliged to pursue a domestic remedy that does not offer a reasonable prospect of success. Having regard to the nature of the decision on visa application, the fact that he was residing in the United States, that did not receive the reasons for the negative decision, that he was not eligible for legal aid in Australia, it would have been practically impossible to pursue legal proceedings in Australia before either the Federal Court or the High Court. The author also argues that judicial review is not intended to assess whether there has been a violation of human rights but whether there was a legal error and does not include a review of the substantive issue, which is what the author was concerned with. Those remedies would thus not have provided the author with any relief for the

substantive issues. Finally, the author contends that there is no precedent where an off-shore non citizen has made an appeal before the High Court in relation to the refusal of a visa on health grounds and that the High Court, being mainly a court of last instance, does not encourage litigants to commence claims at this stage. The author is therefore of the opinion that he has exhausted all reasonable available domestic remedies.

5.4 With respect to the alleged absence of quality of victim, the author, referring to the jurisprudence of the Committee, 6/ notes that the alleged victim of a communication does not have to remain a victim throughout the entire period of the procedure before the Committee. Moreover, the issuance of a visa to the author and his family in 2000 does not mean that they are no longer a victim in the sense of the Covenant as they continue to suffer the effects of the State party's violations of the Covenant. The fact that the visa was granted 3 years later than expected had some consequences on the situation of the family, including with regard to their application for Australian citizenship. The author further argues in this respect that had he and his family been granted a visa in 1997, their situation would have been much more favourable. In support of this allegation, the author makes a comparison between currency rates and explains the evolution of the market during the period 1997-2000. The author also submits that while it would have been easy for his daughter to move to Australia in 1997 when she started her education, it will now be much less easy for her to adapt herself to a new country because she started her education in a different system since 3 years. The author also firmly rejects the State party's contention that his letter of 4 June 2001 is an implied threat that raises doubts about the sincerity of and motivations for his claims.

5.5 With respect to the State party's argument that the claims developed in the communication are unsubstantiated, the author submits that he has provided a detail account of the circumstances giving rise to the communication as well as the basis for the communication and the provision allegedly violated.

On the merits

5.6 With respect to the allegation that article 2, paragraph 3, of the Covenant provides no independent right that could make the object of a communication and that a violation of article 2 can only be found whenever the violation of another right of the Covenant has been established, the author submits that the existence of a remedy is critical to the effectiveness of the Covenant as the true enjoyments of the Covenant's rights ultimately depends on securing the existence of an effective remedy. Acknowledging that earlier Views of the Committee support the State party's opinion, the author emphasizes that this has not been always an unanimous view of the Committee members and that some members of the Committee have made clear that the Committee's jurisprudence may be reversed or modified and cannot be invoked as a ground per se for declaring a case inadmissible.

5.7 With respect to the alleged violation of article 14 of the Covenant, the author reiterates that there are no remedies under the State party's legislation to challenge the application of criteria excluding a person with a disability for being granted a visa and, in this case, to present evidence as to why his daughter would not have been a burden for the Australian health care system.

5.8 With respect to the alleged violation of article 17, the author maintains that the failure of the State party authorities to have considered all relevant aspects of his daughter's condition constitute an unreasonable process that undermined her honour and reputation.

5.9 With respect to the alleged violation of article 24, the author contends that his daughter is entitled to be considered for a visa without discrimination on the basis of her disability.

5.10 With respect to the alleged violation of article 26, the author argues that, on matters relating to the consideration of a visa, people with a disability are, according to the Migration Act, not treated on an equal basis with people without the disability. Referring to the Committee's General Comment No. 18, and although he agrees that not every differentiation is discriminatory if the differentiation is based on objective and reasonable criteria and is aimed at pursuing a legitimate purpose under the Covenant, the author considers that the differentiation made on the basis of the health criteria is not reasonable and objective and that it does not constitute a legitimate aim under the Covenant.

Additional comments by the State party

6.1 By submission of 19 September 2002, the State party made additional observations on the author's comments.

6.2 Regarding the issue of jurisdiction, the State party argues that the term "jurisdiction" means that the State has rights "to control or interfere with a particular person or object", that the issuing or refusal of a visa does not fall into that category and that the Australian migration law does therefore not confer any sovereign authority to the State party over the author.

6.3 Regarding the exhaustion of domestic remedies, the State party argues that the remedies to which it was earlier referring are not expensive as the fee for such applications could have been waived, that the presence of the author before the Federal Court or the High Court would not have been required, that the High Court could have allowed an application made outside the usual time limit if it was in the interests of justice, that it would not be appropriate for a Commonwealth Department such a DIMA to advise individuals of possible rights of judicial review, that, under the two remedies, the decision to refuse the visa could have been quashed and directed to be remade and that over 100 immigration cases have made the object of an application to the High Court, including by off-shore non-citizen.

6.4 Regarding the quality of victim, the State party draws the attention of the Committee on the fact that, despite the issuing of a visa for the author's family in 2000, the author did not move to Australia for financial reasons.

6.5 Finally, the State party notes, on the basis of the author's last submission, that the author's salary in the United States of America over the last year exceeds by 200 percent the equivalent Australian salaries and that, for that reason, it appears that the author's family has decided to stay in the United States of America.

Author's additional comments

7. By submission of 8 October 2002, the author made additional comments on the State party's observations and reiterated that the processing of his visa's family was done under Australian laws and with physical boundaries of the Australian Diplomatic post. He also emphasized that the way the State party was admitting immigrants had to be in compliance with the Covenant. The author finally underlines that he had never been informed of the legal avenues that were open to him and does not believe that the High Court can effectively be used for initiating legal proceedings emerging from an allegedly fraudulent medical assessment.

Issues and proceedings

8.1 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 the communication is admissible under the Optional Protocol to the Covenant.

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

8.3 The Committee observes that the author appears to accept that there was, in principle, a remedy available to his daughter in the State party's Federal Court. Although formal time limits now have expired, the Committee considers that the author has not demonstrated any effort to engage the State party's judicial remedies. Furthermore and in respect of the present time, the Committee observes that the author has not shown that an application for leave to appeal out of time would be unavailable and also observes that a later visa application has meanwhile proven successful. The communication is accordingly inadmissible under article 5, paragraph 2(b).

9. The Committee therefore decides

(a) that the communication is inadmissible under article 5, paragraph 2 (b) of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author.

[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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr.

Nigel Rodley, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood, Mr. Roman Wieruszewski and Mr. Maxwell Yalden..CCPR/C/77/D/978/2001

Notes

1/ See Case No 77/1980, Views adopted on 31 March 1983.

2/ See case No. 57/1979, Views adopted on 23 March 1982.

3/ The State party quotes the first sentence of paragraph 5 of General Comment No. 15: “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory”.

4/ See *E.W. et al v. Netherlands*, Case No. 429/1990, Decision adopted on 8 April 1993.

5/ See *P.P.C. v. Netherlands*, Case No. 212/1986, inadmissibility decision adopted on 24 March 1988 and *A.P.L. v. d. M. v. Netherlands*, Case No. 478/1991, inadmissibility decision adopted on 26 July 1993.

6/ See *A. v. Australia*, Case No. 560/1993, Views adopted on 3 April 1997.