HUMAN RIGHTS COMMITTEE

Rajan v. New Zealand

Communication No. 820/1998

6 August 2003

CCPR/C/78/DR/820/1998

ADMISSIBILITY

Submitted by: Mr. Keshva Rajan and Mrs. Sashi Kantra Rajan (represented by counsel, Mr. Sapt Shankar)

Alleged victims: The authors and their minor children, Vicky Rajan and Ashnita Rajan

State party: New Zealand

Date of communication: 11 June 1997 (initial submission)

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

Meeting on 6 August 2003

Adopts the following:

DECISION ON ADMISSIBILITY

1. The authors of the communication are Mr. Keshva Rajan, born in Fiji on 28 July 1965, Mrs. Sashi Kantra Rajan, born in Fiji on 6 June 1969, and their children Vicky Rajan, born in Australia on 2 February 1992, and Ashnita Rajan, born in New Zealand in March 1996, all residing in New Zealand at the time of the communication. They claim to be victims of violations by New Zealand of articles 9, paragraphs 1 and 4, 23, paragraph 1, and 24, paragraph 3, of the International Covenant on Civil and Political Rights. Without referring to specific articles, they also claim to be victims of discrimination and interference with their private lives and their children's rights to protection required by their status as minors. They are represented by counsel.

The facts as presented

2.1 Mr Rajan emigrated to Australia in 1988, where he was granted a residence permit on 19 February 1990, on the basis of his *de facto* relationship with an Australian woman. Subsequently, in 1994, the woman was convicted in Australia of making a false statement in Mr Rajan's application for residence). In 1990, Mr Rajan married Sashi Kantra Rajan in Fiji, who followed him to Australia in 1991, where she obtained a residence permit on her husband's residency status. In 1991, Australian authorities became aware that the claimed *de facto* relationship was fraudulent and started taking action against Mr and Mrs Rajan, as well as against Mr Rajan's brother (Bal) and sister who were believed to have obtained Australian residency under similarly false pretences. On 2 February 1992, son Vicky was born in Australia. On 22 April 1992, Mr Rajan's brother (Bal) was arrested on ground of false immigration, and Mr Rajan was advised of a pending interview by authorities.

2.2 The following day, Mr and Mrs Rajan migrated to New Zealand. They did not disclose events transpiring in Australia, and were granted New Zealand residence permits on the basis of their Australian permits. On 24 April 1992, Mr Rajan's brother (Bal) also left Australia for New Zealand. On 30 April 1992, the Australian authorities cancelled Mr and Mrs Rajan's Australian permits. On 5 June 1992, the New Zealand authorities were informed that Mr and Mrs Rajan were deemed to have absconded from Australia and were prohibited from re-entering Australia. On 3 July 1992, Mr Rajan admitted to New Zealand authorities that his original *de facto* relationship in Australia was not genuine. **(1)** Following investigations by the authorities, including interviews with Mr and Mrs Rajan, the Minister of Immigration, on 21 June 1994 revoked Mr and Mrs Rajan's residence permits on the basis that Mr Rajan had failed to disclose that the Australian documentation (upon which the New Zealand permits were founded) was dishonestly obtained.

2.3 Mrs. Rajan, not having disclosed these facts in an application for citizenship to the Ministry of Internal Affairs, was granted citizenship on 26 October 1994, whereby, under s.8 of the Citizenship Act 1977, her Fijian citizenship was automatically annulled. In early 1995, her son Vicky was also granted New Zealand citizenship. On 19 April 1995, the Minister of Internal Affairs issued notice of intention to revoke citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information or by mistake.

2.4 On 31 July 1995, the High Court dismissed an appeal against the revocation of residence permits and an application for judicial review of the Minister's decision to revoke, finding that they had been procured by fraud and false and misleading representation. The Court considered there was no threat to the family unit, as the child could live with the parents in Fiji and, if he so wished, return to New Zealand in his own right. The Court of Appeal dismissed their appeal. In March 1996, a second child, Ashnita, was born and automatically acquired New Zealand citizenship by birth.

2.5 On 17 July 1996, the Deportation Review Tribunal rejected Mr and Mrs Rajan's further appeal against the decision to revoke the residence permits, finding no reason to quash the decision. It observed that parents not otherwise entitled to remain in New Zealand could not be entitled to

remain solely because they have children who are citizens. Mr and Mrs Rajan did not appeal the Tribunal's decision.
2.6 On 5 August 1996, the Minister of Internal Affairs issued a notice of intention to revoke Vicky Rajan's citizenship on the grounds that it was procured by fraud, false representation, wilful concealment of relevant information, or by mistake. On 5 November 1996, the High Court rejected an application by Mrs Rajan against the Minister's notice of intention to deprive her of citizenship, holding no error of law or administrative defect. The Court directed the Minister of Internal Affairs to consider the relevant provisions of international conventions before taking a final decision. On 28 January 1997, the Minister signed an order depriving Mrs Rajan of citizenship on the formal basis of a grant in error, in that the requisite period of time of residence had not been complied with. On 9 April 1997, the High Court dismissed an application for judicial review against the revocation decision. On 3 July 1998, the authors' communication was registered before the Committee.

2.7 On 15 April 1997, the Minister of Internal Affairs signed an order revoking Vicky Rajan's citizenship, leaving him with his Australian citizenship. The New Zealand authorities thereupon prepared removal warrants for service on Mr and Mrs Rajan, but their whereabouts could no longer be determined.

2.8 On 1 October 1999, the Immigration Act was substantially amended, including a provision that persons who were unlawfully in New Zealand following a confirmation of the Deportation Review Tribunal of the decision to revoke a residence permit could not further appeal to the Removal Review Authority. On 18 September 2000, the Government announced a "Transitional Policy". The policy permitted "well settled" overstayers, that is overstayers in New Zealand for five or more years with New Zealand-born dependent children, to be granted permits, subject to health and good character requirements. Mr and Mrs Rajan fell within the group requiring character waivers.

2.9 On 28 September 2000, the authors filed separate appeals with the Removal Review Authority. On 31 October 2000, the Minister of Immigration declined to intervene in the case. On 10 November 2000, the Authority declined jurisdiction to accept the appeals as a result of the Immigration Act amendments.

2.10 On 19 March 2001, the authors applied under the "Transitional Policy". A character waiver was sought on the basis of a conviction of Mr Rajan in Australia for tax evasion. The application was silent as to the fraudulent obtaining of residence. On 23 April 2001, the Minister of Immigration rejected the request for a character waiver. As a result, on 15 October 2001, the application under the "Transitional Policy" was declined. On 23 May 2002, the Fijian authorities confirmed that both Mr and Mrs Rajan continued to be Fijian citizens with valid passports. In December 2002, following submission of further information, the Associate Minister of Immigration confirmed the Minister's decision, specifically considering the children's position.

2.11 On 8 April 2003, Mrs Rajan's whereabouts were determined and she was served with a removal order. Mr Rajan could not be located. She was informed that it was expected that they would both leave by 22 April 2003. On 2 May 2003, the High Court declined an application for judicial review of the Minister's decision not to grant a character waiver, confirming that there was

"ample evidence" for the conclusion that fraud had been committed. The Court found Minister had properly and fully taken the children's rights into account, and there had been no failure to be fair, just or equitable.

The complaint

3.1 The authors specifically allege violations of articles 23, paragraph 1, 24, paragraph 3, and 9, paragraphs 1 and 4. They do not relate these articles to particular claims and the claims themselves are difficult to identify. The claims outlined below also appear to raise issues under articles 13, 17, 24, paragraph 1, and 26 of the Covenant.

3.2 Since their children cannot live on their own and would have to leave New Zealand with their parents, it is claimed that their human rights will be violated by a forced removal from New Zealand of their parents. The deportation of Mr. and Mrs. Rajan to Fiji would constitute arbitrary interference with the family's private life and would possibly lead to divorce and insecurity of income.

3.3 It is stated that neither Mr. nor Mrs. Rajan were cross-examined by the appellate instances in New Zealand on the question of the alleged fraud, which Mr. Rajan always denied. With regard to Mrs. Rajan, it is contended that she was deprived of her Australian residence permit without being given the opportunity to be heard, even though she had done no wrong. As a result of the loss of her New Zealand citizenship, she is now stateless.

3.4 The authors claim that Vicky Rajan's rights were violated because his citizenship was revoked. According to the authors, this should not have occurred as he received it on the grounds of his own Australian citizenship and residency in New Zealand for three years, and not as the courts established, by virtue of his dependence on his mother. Therefore, it is argued, his citizenship cannot be revoked in connection with the withdrawal of his mother's citizenship.

3.5 It is intimated that the authors have been discriminated against with the suggestion that New Zealand law "applies more harshly against non-Europeans".

3.6 The authors refer to a decision of the New Zealand Court of Appeal **(2)**concerning a similar case, in which the authors contend it was ruled that international obligations, such as the Covenant on Civil and Political Rights and the Convention on the Rights of the Child, require New Zealand to accept its responsibility for children who are New Zealand citizens, and that children are not to be held responsible for the behaviour of their parents. It is alleged that the Minister of Internal Affairs, as a result of the judgment, had granted permits for parents in similar cases, including the cases of Mr. Rajan's sister and brother. That the decision was not followed in this case is said to constitute a case of discrimination against the authors.

The State party's submissions on admissibility and merits

4.1 By *note verbale* of 3 February 1999, the State party contested both the admissibility and merits

of the communication. As to admissibility, it submits that the communication should be rejected for failure to exhaust domestic remedies, for failure to substantiate the claims and for incompatibility with the provisions of the Covenant.

4.2 With respect to the non-exhaustion of domestic remedies, the State party notes that Mr. and Mrs. Rajan are currently avoiding legal process, but are subject to a Removal Order being served on them when they are found. Such a removal order must be endorsed by a District Court judge before execution. Once a removal order is served on Mr. and Mrs. Rajan, they could appeal to the Removal Review Authority within 42 days of the date on which the removal order was served, arguing *inter alia* humanitarian and family circumstances. An appeal would then lie against the decision to the High Court and Court of Appeal on points of law. Alternatively, they could apply to the High Court, and in turn the Court of Appeal, for judicial review of the Removal Review Authority's decision. Finally, they could apply directly to the Minister of Immigration, especially if there is any new information, for a special direction for a residence permit.

4.3 In addition and particularly with respect to the alleged violations of articles 9 and 13, the State party contends that any such breaches of process would violate the New Zealand Bill of Rights Act 1990 and constitute grounds for review. Moreover, the State party points out that the authors did not appeal the decision against them of the Deportation Review Tribunal, as provided for by law, though the deadline for this has now lapsed.

4.4 The State party also submits that the authors have failed to substantiate their claims. They have not provided *prima facie* evidence of violations of provisions of the Covenant. Nor have they adduced evidence to establish any breach of process to suggest that the State party has acted arbitrarily or unlawfully or that the protection of the law was not available to them, or that it had not protected the family as envisaged under the Covenant. The family has the right to return to Fiji under Fijian law and would be provided with relevant travel documents by the New Zealand Government. There is no suggestion that the family will be separated. The children's independent rights to remain in New Zealand or Australia means that they may be sent for education or other forms of upbringing to other members of the extended family, in the same way as thousands of Pacific Islanders do. But this, the State party argues, would be the choice of the parents in relation to the welfare of their children and would not constitute grounds for a breach of the Covenant. In addition, the State party refers to the vague statements concerning possible harassment by the family members which might threaten the family and possibly lead to divorce in Fiji, and insecurity of income, buts notes that no evidence is provided to support such allegations. Neither is there any evidence that the family will not be able to re-tie its support networks in Fiji.

4.5 With regard to an alleged violation of article 26, the State party submits that the authors have failed to substantiate the vague allegations of racial discrimination. It is contended that any evidence of racial discrimination may still be raised by the authors in further proceedings prior to the removal of Mr. and Mrs. Rajan to Fiji. It also submits that the allegation of different treatment in relation to Mr. Rajan's sister and brother does not of itself constitute *prima facie* evidence of a breach of the obligation to ensure equal protection of the law under article 26 and no details have been provided.

4.6 As to Mrs Rajan's claim of deprivation of citizenship so as to make her stateless, the State party contends that this claim does not involve a right protected by the Covenant and is thus inadmissible *ratione materiae* as incompatible with the Covenant. The State party observes that Mrs. Rajan has a right to return to Fiji under section 16 of the Fijian Constitution, and that she may in time reapply for her Fijian citizenship under section 12(6) and (7) of the 1997 Fijian Constitution.

4.7 As to the merits, the State party refers in detail to the decisions of the domestic authorities. In considering the revocation of the Rajans' permits, the State party observes that the High Court was satisfied that Mr. Rajan had procured his residence permit by "fraud and by the false and misleading representation that he was living in a *de facto* relationship". Mrs. Rajan's derivative permit was, as a result, also fraudulently procured. The Court considered the possibility of a threat to the family unit and the protection of the children prior to dismissing the application. The Court of Appeal upheld this decision. The Deportation Review Tribunal considered the *Tavita* case, but held that having regard to the interests of the children did "not entitle the parents not otherwise able to remain in New Zealand to stay solely because they have children who are citizens". Having considered the family circumstances as a whole, the Tribunal found no grounds on which to quash the revocation of the residency permits.

4.8 The State party submits that Mr. and Mrs. Rajan are facing the consequences of Mr. Rajan's fraudulent actions to obtain residency in New Zealand. All the actions taken since were taken in accordance with the law, and have been tested several times by independent authorities and cannot therefore be characterised as arbitrary or unfair. It submits that the circumstances of the family, and particularly the welfare of the children, were considered at multiple levels in the process. The State party also refers to international jurisprudence in support of the Deportation Review Tribunal's decision that a child's citizenship, without more, cannot entitle parents to residence in that State. **(3)** What is required, according to the State party, is a balancing of the undoubted rights of the children and family as a whole, against all other factors.

4.9 The State party reiterates that there is no evidence provided to support any allegation of racial discrimination. On the allegation of unequal treatment as other persons in similar circumstances, in particular Mr Rajan's sister and brother, appear to have been treated differently, the State party argues that such decisions are made on the circumstances of a particular case and the time and resources involved. Differentiation on this basis is reasonable and objective. It argues that it is the reality of decision-making in government that not all offenders will be prosecuted at once, where resources for prosecution are always less than the demand. It employs an analogy that merely because one person is caught speeding and prosecuted, whilst other people speed and are not prosecuted, does not mean that the former is discriminated against or denied equal protection of the law.

The author's comments on the State party's submissions

5.1 By letter of 30 June 1999, the authors contest that the communication is inadmissible and argue that the remedies referred to by the State party are stated in general terms. They contend that a challenge by judicial review and/or appeal to the High Court would have no prospect of success, adding that as they did not succeed in previous appeals they would be unlikely to succeed in

subsequent applications for review. They argue that an application for judicial review may be made to challenge a point of "fact or law" only and that otherwise there is no prospect of reviewing the merits of their case. In this connection, they state that there are no grounds on which judicial review could be sought effectively and, therefore, such an application would be ineffective.

5.2 The authors also note that the remedies referred to by the State party are not available to them as they do not qualify for legal aid, and that they are not allowed now to work in New Zealand. Moreover, they claim that any representations made to the Removal Review Authority "fall into the class of remedy which we submit are properly classified as extraordinary remedies. They make a discretionary decision available but do not vindicate a right, hence they are or do not constitute effective remedies". To the authors, such remedies are akin to the right to make representations to an advisory panel against a deportation order which, they claim, the Committee has previously held could not be seen as an effective remedy.

5.3 The authors note that, with respect to the State party's claim that no *prima facie* case has been made by the authors in relation to alleged violations of articles 9 and 13, it is not explained how an action could be taken alleging a violation of the New Zealand Bill of Rights Act 1990. With respect to alleged racial discrimination, the authors reiterate that they are discriminated against as they are of Fijian Indian descent and "do not fit within the Anglo-Saxon preference". As to the State party's claim that the deprivation of citizenship of Mrs. Rajan, which makes her stateless, does not involve a right protected under the Covenant, the authors state that if these rights are not specifically protected under the Covenant "they are [so] in conjunction with the primary rights protected by the Covenant".

5.4 On the merits, the authors argue that their statements on the adverse effects of their removal to Fiji are sufficiently substantiated, and refer to the domestic proceedings at which these issues were raised. They provide information and a comparison on the treatment of another Fijian family who were granted New Zealand citizenship under the same procedures to support their submission that they have not been dealt with reasonably and objectively. They reiterate that such a difference in treatment, when the circumstances of the cases are similar, is discriminatory.

Supplementary submissions of the parties

6.1 On 15 February 2001, the authors of the communication requested the Committee to suspend examination of their communication, pending consideration of their application under the "Transitional Policy". By letters of 22 October 2001, 14 March 2002 and 23 December 2002, the authors described the sequence of subsequent events and argued, on the rejection of the request for a character waiver, that it was unfair to use Mr Rajan's alleged fraud as a reason not to grant him a waiver, as he was neither charged nor found guilty of fraud and to implicate his wife in her husband's alleged wrongdoing was also unjust. They argue that, as their children are now 6 and 11 years old, it would be improper to suggest that they can stay in New Zealand without their parents. In addition, the authors claimed that having lodged recent appeals with the Removal Review Authority (which were rejected) and having made an application under the "Translational Policy", they had exhausted domestic remedies.

6.2 By supplementary submissions of 14 May 2003, the State party observes that the authors had indicated an intention to appeal to the Court of Appeal against the High Court's decision of 2 May 2003. These issues have been litigated for 10 years, and seemingly will continue. Thus, in the interests of seeking finality, the State party explicitly foregoes any challenge in this case to the admissibility of the communication based on the need to exhaust domestic remedies. The State party observes that the extended period the whole matter has taken — more than ten years — is due primarily to repeated unsuccessful legal challenges by Mr and Mrs Rajan. As the High Court observed, every consideration that might have been given to them has been. On the merits, the State party point out that the "Transitional Policy" is a sympathetic approach to the question of overstayer families, including their children. However the inability of the Rajans to come within it is a consequence of their past improper immigration conduct. The State party emphasises this improper conduct is not just overstaying *per se*, but adopting positive acts to deceive both New Zealand and Australian immigration officials.

6.3 By letter of 5 June 2003, the authors advised that the Court of Appeal hearing had been set down for 23 June 2003. The State party had allegedly indicated that it would deport Mr and Mrs Rajan in the event of an adverse judgment of the Court of Appeal, though Mr Rajan had not yet been located. Accordingly, given the imminent hearing of the case at the Committee's 78th session in July-August 2003, the authors sought the Committee's action pursuant to Rule 86 of its Rules of Procedure to request the State party not to deport them until the Committee had made a determination in the case.

6.4 On 23 June 2003, the Committee, through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party not to remove any of the alleged victims from its jurisdiction, while the case was before the Committee.

Issues and proceedings before the Committee

7.1 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.

7.2 As to the exhaustion of domestic remedies, the Committee observes that the State party has explicitly waived any challenge to the admissibility of the communication on these grounds (see paragraph 6.2, *supra*). In such circumstances, the Committee need not decide what obstacle, if any, the current proceedings in the Court of Appeal would present to the admissibility of the communication. **(4)**

7.3 With respect to the authors' claim that the removal of Mr. and Mrs. Rajan would violate their rights under article 23, paragraph 1, and their children's right to protection under article 24, paragraph 1, the Committee notes that other than a statement that because of the children's youth they would also have to leave New Zealand if their parents were removed, the authors have provided insufficient argument on how their rights in this regard would be violated. It is clear from the decisions of the domestic authorities, that the protection of the family and, more particularly, the protection of the children were considered at each stage in the process including the High Court,

the Court of Appeal, the Deportation Removal Tribunal and most recently by the Minister considering the author's application under the "Transitional Policy". The Committee observes that from an early point, and several years prior to the birth of Ashnita, the State party's authorities moved to remove the authors once fraudulent action became apparent, and that the subsequent time in New Zealand has, in large measure, been spent either in pursuing available remedies or in hiding. In addition, any contention that Mrs Rajan, in the event that she was uninvolved in the fraud of Mr Rajan, may have had a separate reliance interest arising from the passage of time is diminished by the State party moving with reasonable dispatch to enforce its immigration laws against criminal conduct. Consequently, the Committee is of the view that the authors have failed to substantiate their claim that they or their children are victims of violations of articles 17, 23 paragraph 1 and 24, paragraph 1, of the Covenant. These claims are, therefore, unsubstantiated and inadmissible under article 2 of the Optional Protocol.

7.4 The Committee notes the authors' contention that they and their children are victims of racial discrimination as they are not Anglo-Saxon and their contention that they have been treated differently and, therefore, unequally to others in similar cases, including the cases of Mr. Rajan's sister and brother. The Committee recalls that equality in enjoyment of rights and freedoms does not mean identical treatment in every instance and that differences in treatment do not constitute discrimination, when they are based on objective and reasonable criteria. The Committee observes that the national courts can only examine cases on the facts presented, and such facts differ from case to case. The authors have not presented the facts of any comparable cases either to the Committee or to the domestic courts; the Committee therefore considers that the arguments advanced by the authors do not substantiate, for the purposes of admissibility, the authors' claim that they are victims of discrimination or unequal treatment. Consequently, the Committee finds that this claim is inadmissible under article 2 of the Optional Protocol.

7.5 The Committee notes the claim that Vicky Rajan will be rendered stateless, as a result of the revocation of his New Zealand citizenship, thereby violating article 24, paragraph 3, of the Covenant. It appears, however, from the materials before the Committee, that Vicky Rajan still retains his Australian citizenship and, therefore, no issue under 24, paragraph 3, of the Covenant arises. Similarly, as to the claim that the deprivation of Mrs. Rajan's New Zealand citizenship rendered her stateless and violates the Covenant, the Fijian authorities have confirmed that her Fijian passport remains valid. These claims under the communication are therefore inadmissible *ratione materiae* under article 3 of the Optional Protocol. Taking into account that the Fijian authorities have confirmed that Mrs Rajan's Fijian passport remains valid and that she continues to be a Fijian citizen, the same conclusion applies to any claim concerning revocation of Mrs Rajan's New Zealand citizenship.

7.6 With regard to the alleged violations of article 9, paragraphs 1 and 4, and article 13, the Committee considers that these allegations have not been substantiated by the authors for the purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides that:

(a) The communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) This decision be communicated to the authors and to the State party.

[Done 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. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Franco Depasquale, Mr. Maurice Glèèlèè Ahanhanzo, Mr. Walter Käälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Hipóólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Notes

1/ This admission was apparently later retracted. It is unclear exactly when this occurred.

2/ *Tavita v Minister of Immigration* [1994] 2 NZLR 257.

3/ *Jaramillo v United Kingdom* (ECHR Appl. 24865/94) and *Fajujonu v Minister of Justice & Attorney-General* [1990] 2 IR 151 (High Court of Republic of Ireland).

4/ See also *Joslin et al. v New Zealand*, Case No 902/1999, Views adopted on 17 July 2002, at para 7.3.