



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-eighth session
16 October – 3 November 2006

VIEWS

Communication No. 1291/2004

<u>Submitted by:</u>	Mrs. Olga Dranichnikov (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Australia
<u>Date of communication:</u>	1 June 2004 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 June 2004 (not issued in document form).
<u>Date of adoption of Views:</u>	20 October 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Independence of Refugee Review Tribunal; discrimination on the basis of sex and marital status

Procedural issues: Actio popularis; moot claims; exhaustion of domestic remedies

Articles of the Covenant: 6, 7, 9, 14(1), 23, 26

Articles of the Optional Protocol: 1, 2, 5(2)(b)

On 20 October 2006, 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. 1291/2004.

[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

Eighty-eighth session

concerning

Communication No. 1291/2004*

<u>Submitted by:</u>	Mrs. Olga Dranichnikov (not represented by counsel)
<u>Alleged victim:</u>	The author
<u>State party:</u>	Australia
<u>Date of communication:</u>	1 June 2004 (initial submission)

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

Meeting on 20 October 2006,

Having concluded its consideration of communication No. 1291/2004, submitted to the Human Rights Committee by Mrs. Olga Dranichnikov 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:

* 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. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Ivan Shearer did not participate in adoption of the Committee's decision.

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

1. The author of the communication, dated 1 June 2004, is Olga Dranichnikov, a Russian national born on 8 January 1963. She claims to be a victim of a violation by Australia of articles 2, 6, 7, 9, 14, 23 and 26 of the International Covenant on Civil and Political Rights. She is not represented by counsel. The Optional Protocol entered into force for Australia on 25 December 1991.

Factual background

2.1 The author, with her husband and their daughter, arrived in Australia in January 1997 on a tourist visa. On 2 April 1997, her husband lodged an application for a protection visa on behalf of the family with the department of immigration and multicultural affairs (DIMA). The application was based on threats received by the author and her husband in Vladivostok, Russia, as a consequence of their active involvement in the defence of human rights in Russia.

2.2 On 20 May 1997, DIMA rejected the application, after a request for further information from the author's husband was returned because it had been sent to the author's old address. No interview with the author was conducted.

2.3 On 19 June 1997, the author's husband applied to the Refugee Review Tribunal for review of DIMA's decision. On 11 August 1998, the Tribunal rejected the application.

2.4 On 9 September 1998, the author's husband lodged a second application for review. On 19 September 1998, the author requested the Tribunal to consider her application separately from her husband's. On 21 January 1999, they were informed that the second application for review was invalid. On 15 February 1999, the author's husband appealed to the Federal Court against the rejection of his application by the Refugee Review Tribunal. His appeal was dismissed on 7 February 2000. His further appeal to the Full Federal Court was dismissed on 14 December 2000. On 24 December 2000, he appealed to the High Court which allowed his appeal and remitted the application to the Refugee Review Tribunal on 8 May 2003.

2.5 On 29 January 1999, the author and her husband went to the DIMA office where they were informed that their stay in Australia had been unlawful since the Tribunal's rejection of their application and made to sign a letter of petition to the Minister in order to be given a bridging visa. The bridging visa did not allow either of the spouses to work.

2.6 On 11 August 2000, the author wished to lodge an application for a protection visa in her own right, but DIMA refused to register the application as it considered it invalid since her previous refugee claim had been finally determined. On 5 September 2000, the author applied to the Federal Court of Australia for review of DIMA's decision. On 29 January 2001 the Federal Court rejected the appeal. Upon request for leave to appeal, the Full Federal Court, on 22 June 2001, found in the author's favour that she should be allowed to make her own application for a protection visa. On 13 August 2001, the Minister applied for leave to appeal the judgement to the High Court but discontinued the application on 30 November 2001, following amendments to the Migration Act in order to prevent repeat applications in cases such as that of the author.

2.7 Parallel to the above procedure, the author, on 27 September 2000, had filed a complaint with the Human Rights and Equal Opportunity Commission. In March 2001 the President of the HREOC rejected the author's complaint and the author appealed to the Federal Magistrates Court. On 18 February 2002, her appeal was dismissed and on 8 March 2002 the author filed a further appeal with the Federal Court. The Federal Court dismissed the appeal on 5 December 2002. The author then applied for special leave to appeal which was refused by the High Court on 25 June 2003.

2.8 On 14 November 2002, DIMA informed the author that no further action would be taken on her protection visa application, since she had not paid the fee of 30 dollars. It transpires from the letter that, following the Federal Court's decision in the author's case, the author had been informed four times since February 2002 that her application would be deemed valid as of 22 June 2001 if she would forward the 30 dollar fee. Any new application that the author would wish to make would be treated in accordance with the revised Migration Act.

2.9 On 6 December 2002 the author filed an application in the High Court seeking an order Nisi which was refused by the Court on 25 June 2003.

The complaint

3.1 The author claims that she is a victim of violations by Australia of articles 2, 23 and 26 of the Covenant, (a) for not allowing her to file a refugee claim in her own right; (b) for failure to conduct an interview with her as a woman included in her husband's family unit; (c) for implementing allegedly discriminatory amendments to the Migration Act. The author claims that she has been discriminated on the basis of sex and marital status.

3.2 The author further claims that she has been denied a fair hearing in violation of article 14 (1) of the Covenant. She claims that the Refugee Review Tribunal is not independent, since it is Government-funded and its members are appointed by the Governor-General on recommendation of the Minister of Immigration. She claims that the Minister of Immigration heavily influences the Tribunal's decisions and she refers in this context to newspaper articles which reported that after a controversial decision made by the Tribunal, the Minister had indicated that he was unlikely to renew fixed term appointments of Tribunal members who took decisions outside international refugee law. In the case of her husband's application for a protection visa, the author claims that the Tribunal is breaching the rules of natural justice by delaying determination of his refugee claim, following the High Court's decision of 8 May 2003 to remit the matter for consideration to the Tribunal.

3.3 Finally, the author claims that she would be a victim of violation by Australia of articles 6, 7 and 9 of the Covenant if she were to be deported to Russia.

3.4 The author claims damages of \$ 420,000 for the suffering occurred, plus the full costs of reunification with the author's mother and parents-in-law.

The State party's observations on admissibility and merits

4.1 By submission of 16 August 2005, the State party comments both on the admissibility and the merits of the communication. It submits that the author, her husband and their daughter have

been granted a permanent protection visa on 10 February 2005 following reconsideration by the Refugee Review Tribunal of the husband's application on behalf of the family on 19 August 2004.

4.2 As to the facts, the State party explains that when the author's husband filed the application for a protection visa on behalf of the family in April 1997, the author did not fill out the relevant section of the application to be assessed as an applicant in her own right and was accordingly assessed as a member of the family unit.

4.3 The State party challenges the admissibility of the author's allegations under articles 6, 7 and 9 of the Covenant on the basis that the author has failed to substantiate her claims, that she had not exhausted available domestic remedies at the time of submitting her communication to the Committee and that subsequently her concerns have been remedied by having been granted a protection visa.

4.4 The State party further challenges the admissibility of the author's claim under article 23 of the Covenant as incompatible with the provisions of the Covenant.

4.5 As to the merits of the author's claim under articles 2 and 26 of the Covenant, the State party denies that any violation took place and submits that the author's original application was correctly processed according to the form which she submitted. In the form, the author filled out the part for members of the family not having their own, separate, claim instead of the part for members of the family with claims in their own right. As a consequence the author was assessed as part of the family unit on the basis of her husband's claim. In the light of these facts, the State party argues that there is no basis for suggesting any discriminatory conduct in relation to the original application.

4.6 The State party further denies that it was under any obligation to conduct a separate interview with the author in the context of her husband's asylum claim and that, even if it was, the failure would not constitute discrimination. In this context, the State party explains that DIMA's Gender Guidelines 1996 assist decision-makers in how best approach claims of gender-based persecution and advice on the desirability of a separate interview with a woman who is included in the application as a member of the family in case gender-related claims are raised or suspected or if she requests a separate interview. The State party submits that the family's claim did not raise the issues of gender-based persecution and that the author did not request a separate interview. Accordingly, there was no obligation to conduct an interview with the author and the failure to do so does not constitute discrimination.

4.7 As to the author's application of 11 August 2000, DIMA rejected the validity of the application due to its understanding of section 48A(1) of the Migration Act, which precluded non-citizens from making more than one application for a protection visa.¹ On 22 June 2001, the Full Federal Court reversed DIMA's interpretation of the Migration Act and held that section 48A(1) did not prevent a member of the family who had not submitted claims in their own right from making a further application for a protection visa. As a result of the judgement, it was open

¹ The relevant text of the section reads: "... a non-citizen who, while in the migration zone, has made ... an application for a protection visa ... may not make a further application for a protection visa while in the migration zone."

to the author to submit an application for a protection visa in her own right. She was indeed invited to do so and informed that if she paid the \$ 30 fee her earlier application would be deemed valid as of the date of the Federal Court's judgement, 22 June 2001. However, the author never paid the nominal application fee and thus no valid application was made.

4.8 Finally, the State party contests that the September 2001 amendments to the Migration Act discriminate against persons on the basis of gender or marital status. The State party explains that the amendment precludes the submission of a further application where the applicant has unsuccessfully claimed protection status on the grounds that he or she is the spouse or the dependant of a person who is owed protection obligations under the Refugees Convention. According to the State party, the purpose of the amendment was to prevent misuse of the protection visa process by family groups wishing to prolong their stay in Australia, each family member taking turns to advance claims for protection while the others apply as family members. The State party emphasizes however that the amendment does not prevent a spouse or dependant from advancing their own protection claim, independently from the main applicant, in the first instance. The State party thus concludes that the amendment does not discriminate against persons on the basis of gender or marital status or any other ground.

4.9 As to the merits of the author's allegation under article 14 (1) of the Covenant, the State party submits that the author's claim is unfounded and that appropriate legislative and administrative measures exist to ensure independence and impartiality of the Refugee Review Tribunal and its members. The Tribunal is governed by legislative provisions in the Migration Act, its members are appointed by the Governor-General and the members' tenure is limited to 5 years. A member who has a conflict of interest in relation to a case must not take part in proceedings. Tribunal members are statutory officers and independent from the Minister for Immigration.

4.10 As to the delay in the hearing of the husband's case, the State party acknowledges that the delay was longer than the aims of the Tribunal in the Client Service Charter and that for this reason the Tribunal, on 25 March 2004, wrote a letter of apology. The State party denies any deliberate intention on the part of the Tribunal to delay proceedings. The State party moreover argues that the delay cannot be considered undue delay within the meaning of international law. The State party explains that the first determination of the Tribunal in the family's application was made within 14 months and the second determination, after remittance by the High Court, 15 months. The State party submits that the length of time was caused by the complexity of the case, in which the Tribunal was required to issue a 199 page decision record in support of its reasons.

Author's comments

5.1 In her comments, dated 26 October 2005, on the State party's submission, the author claims that the application for leave to appeal filed by the Minister for Immigration against the Federal Court judgement in her case, deprived her of the possibility to file her own protection visa application before the amendment to the Migration Act.

5.2 As to her claim under articles 2 and 26 of the Covenant, the author states that she is seeking effective remedies to give effect to the rights recognized in the Covenant, as follows: To repeal the amendment to section 48A of the Migration Act as discriminatory, to remove the

determination process for refugee status from the Minister for Immigration, to ensure that the Refugee Review Tribunal is a competent, independent and impartial body, established by law, and to compensate her losses and damages.

5.3 The author reiterates that she is a victim of discrimination on the basis of gender and marital status because she was deprived of the right to seek asylum in her own right since 1997, when she was included in her husband's application. In this context, she claims that she had no access to legal representation and guidance in the completion of her refugee claim, that she was not provided with a qualified interpreter, that she was not given enough time to provide additional information and that she was not given a separate interview. The author submits that the structure of the visa protection application form as well as DIMA's interviewing policy implicitly uphold the assumption that asylum seekers are politically active males and that women should be regarded as dependants, with the effect of perpetuating discrimination and gender imbalances. She claims that despite appearing to be gender neutral, the amendments to section 48 of the Migration Act in fact discriminate against women asylum seekers. In the author's case, if her husband's application had not been successful, she would have been deported to Russia without having been given a chance to file her own refugee claim.

5.4 As to the State party's argument that she was invited to validate her protection visa claim following the Federal Court's judgement of 22 June 2001, it appears from the documents submitted with the author's submission that she declined to pay the fee because she preferred to await the final determination of her husband's case. She however claimed the right to do seek asylum in her own right in case her husband's application would fail.

5.5 With regard to her claim under article 14 of the Covenant, the author claims that the State party's assertions of independence of the Refugee Review Tribunal lack foundation because she was informed that the Tribunal falls under the responsibility of the Minister for Immigration. She further claims that the principal member of the Tribunal intentionally delayed the reconsideration of her husband's refugee claim. She further claims that the case officer to hear her husband's matter expressed sarcasm and arrogance towards the family and refused to disqualify himself. Consequently, the author and her husband sought an order from the High Court for contempt of court against both the principal member and the case officer of the Tribunal. The author reiterates her claim that in practice the appointments of the members and officers in the Tribunal, their remuneration and the duration of their terms are greatly dependant on the Minister for Immigration.

5.6 With regard to her claims under articles 6, 7 and 9 of the Covenant, the author reiterates that if her husband's application had not been successful, she would have been deported to Russia. She further states that she was subjected to inhuman and degrading treatment, since between January 1999 and February 2000 she was deprived of the right to work as a dependant of her husband when his permission to work was withdrawn. Because of the ensuing poverty and stress, she was admitted to hospital in 2000. She further states that the State party's discriminatory policy encourages the split of families, since only then can family members submit a refugee claim in their own right.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

6.3 In respect of the author's claims under articles 6, 7 and 9 of the Covenant if she were to be returned to the Russian Federation, the Committee notes that these claims have become moot since the author has been granted a protection visa in Australia. This part of the communication is thus inadmissible under article 1 of the Optional Protocol.

6.4 With regard to the author's claim that the State party's policy encourages the breaking up of families, in violation of article 23 of the Covenant, the Committee notes that the facts presented by the author do not show how she is a victim in this respect. The Committee considers therefore that this part of the communication amounts to an *actio popularis* and that it is inadmissible under article 1 of the Optional Protocol.

6.5 The Committee notes that the author claims that she is a victim of discrimination in violation of article 26 of the Covenant because she was not allowed to make a claim for a protection visa in her own right. The Committee considers that this claim is inadmissible for non-exhaustion of domestic remedies under article 5-2(b) of the Optional Protocol since, after a High Court judgement in her favour and after having been invited by the Immigration Department, the author failed to avail herself of the remedy that was offered to her.

6.6 Concerning the author's claim of a violation of article 26 in relation to the amendments to the Migration Act, annulling the effect of the High Court's judgement in her case, the Committee notes that the amended law was not applied to the author and that she can thus not claim to be a victim of a violation of the Covenant in this respect.² The Committee considers that this part of the communication amounts to an *actio popularis* and that it is inadmissible under article 1 of the Optional Protocol.

6.7 In respect of the author's claim under article 14(1) of the Covenant, the Committee notes that the State party has not raised any objections to its admissibility. The Committee considers however that the author's claims of lack of independence of the Refugee Review Tribunal because of its alleged dependence on the Minister for Immigration and because of the perceived arrogance of a Tribunal member are not substantiated for purposes of admissibility and are thus inadmissible under article 2(a) of the Optional Protocol.

² See Communications No 318/1988, E.P. et al. v. Colombia, para. 8.2, N°35/1978 Shirin Aumeeruddy-Cziffra et al. v. Mauritius e, para. 9.2.

6.8 The Committee notes that the State party has conceded that the Refugee Review Tribunal is a tribunal within the meaning of article 14, paragraph 1, of the Covenant³. The Committee is not aware of any obstacles to the admissibility of the author's claim that the delay in hearing her husband's case was intentional and shows the lack of independence and objectivity of the Refugee Review Tribunal. Accordingly it declares the communication admissible with regard to this claim under article 14(1) of the Covenant and proceeds immediately to the consideration of its merits.

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 by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

7.2 The author has claimed that she is a victim of a violation of article 14(1) of the Covenant since the Refugee Review Tribunal is not independent and objective as it deliberately delayed the review of her husband's case. The State party has rejected this allegation and has explained the safeguards taken to guarantee the Tribunal's independence. While the Committee is concerned about the delay in the determination of the author's husband's refugee claim, the Committee notes that this delay was caused by the totality of the proceedings - including the Federal Court (22 months) and the High Court (27 months) - and not just by the Refugee Review Tribunal (14 months for the first review, 15 months for the second). The Committee concludes that the information before it does not show that the author has been a victim of lack of independence of the Tribunal in this respect.

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 facts before it do not disclose a violation of article 14, paragraph 1, of the Covenant.

[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.]

³ See also Communication No. 1015/2001, *Perterer v. Austria*, para. 9.2 (Views adopted on 20 July 2004).