



**International Convention on
the Elimination of all Forms
of Racial Discrimination**

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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Seventy-fifth session
(5- 23 August 2009)

OPINION

Communication No. 42/2008

<u>Submitted by:</u>	D.R.(not represented)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Australia
<u>Date of the communication:</u>	1 June 2008 (initial submission)
<u>Date of the present decision</u>	14August 2009

[Annex]

* Made public by decision of the Committee on the 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-fifth session

concerning

Communication No. 42/2008

<i>Submitted by:</i>	D.R.(not represented)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Australia
<i>Date of the communication:</i>	1 June 2008 (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 14 August 2009,

Having concluded its consideration of communication No. 42/2008, submitted to the Committee on the Elimination of Racial Discrimination by Mr. D.R. 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 author of the communication, his counsel and the State party,

Adopts the following:

OPINION

1.1 The author is Mr. D.R., a New Zealand citizen currently residing in Australia. He claims to be a victim of violations by Australia of articles 5(e)(iv), 5(e)(v), and 5(d)(iii), read in connection with article 2(1)(a) 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 The petitioner is a New Zealand citizen residing in Australia. He holds a Special Category Visa (SCV), which allows him to live and work indefinitely in Australia. This special immigration status is the result of the bilateral Trans-Tasman Travel Arrangement between Australia and New Zealand, which allows citizens of both countries to live in either country indefinitely.

2.2 The petitioner claims that a number of Australian laws unlawfully restrict his rights to social security, education, and nationality, on the basis of his national origin, in violation of articles 5(e)(iv), 5(e)(v), and 5(d)(iii), in connection with article 2(1)(a) of the Convention. He also argues that there are no national laws or judicial avenues which he could avail himself of to seek effective protection and remedies for discrimination on the ground of national origin in Australia. As such, the author argues that the State party also breached article 6 of the Convention in his regard.

2.3 Regarding the right to social security, the petitioner argues that the Social Security Act (SSA), which restricts access to the full range of social security payments to New Zealand citizens, unless they hold permanent visas, differentiates between Australian nationals and other legal residents, based on their immigration status. The author claims that to the extent that they impose conditions which only apply to non-Australian residents, these restrictions constitute discrimination based on nationality. The author's allegations refer mainly to the meaning of the term "Australian resident", which defines eligibility for most social security benefits under the SSA. "Australian residents" include Australian citizens, permanent visa holders, and "protected" SCV holders. 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, are considered as "protected" SCV holders, and treated as Australian residents for the purposes of the Act. Other New Zealand citizens must meet normal migration criteria to become "Australian residents" for the purposes of the Act. The author first arrived in Australia after the pertinent date, and therefore does not hold "protected SCV" status for the purposes of the SSA. He is therefore required to apply for, and obtain a permanent residence visa if he wishes to enjoy the same social benefits afforded to Australian citizens and permanent-visa holders. 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 six years. The author further claims that another consequence of these restrictions is that his six years of residency in Australia will not count towards the 10- year minimum eligibility period for pension benefits, as long as he is not considered an "Australian resident" under the SSA. The petitioner has not attempted to apply for a permanent resident visa. He contends that the requirement imposed by the SSA on New Zealand nationals to hold a permanent-visa is superfluous and incompatible with the Convention, since they are *de facto* permanent residents, on the basis of the bilateral Trans-Tasman Travel Arrangement between Australia and New Zealand. He further argues that these restrictions constitute unequal treatment between Australians and legally resident non-

Australians, and directly discriminate against him on the basis of his nationality. He adds that these restrictions are devoid of any legitimate aim.

2.4 Secondly, the petitioner argues that the State party violated his right to education under the Convention. Persons entitled to a higher education tuition fee loan (“HECS-HELP” Programme) from the Australian Government, under the Higher Education Support Act (2003) (HESA), must be either Australian citizens, or “permanent humanitarian visa holders”, i.e. refugees, who reside in Australia for the duration of the unit of study. The author alleges that under the HECS-HELP Programme, the Government pays a significant portion of higher education tuition fees for a student who qualified for a subsidised place, and enables the student to borrow the balance. Students who are eligible for the HECS-HELP loan are also eligible for a substantial tuition fee discount by paying their fees upfront. Students who do not qualify for a subsidised place must pay the full tuition fee, but the “FEE-HELP” Programme¹ would enable them to borrow the full amount. Persons who qualify for FEE-HELP assistance are Australian citizens, permanent humanitarian visa holders, and permanent visa holders undertaking study as part of a bridging course for overseas-trained professionals.

2.5 The petitioner argues that the eligibility requirements imposed by the HESA unlawfully restrict access to higher education for all resident non-Australians who are not refugees, regardless of their capacity to pay back the loan. He contends that these restrictions do not use the notion of residence permit for the legitimate purpose of ascertaining whether a non-Australian has the right to reside, but instead uses it to define a condition which is constitutive of access to higher education. He argues that the State party should provide a legitimate explanation for the fact that while a person who obtained Australian citizenship by descent, but who has otherwise never resided in, nor paid taxes in Australia, would be eligible for a student loan and a tuition fee discount, a non-Australian who permanently resides in Australia, but is not a refugee, cannot benefit from such entitlements. He argues that this requirement discriminates against him on the basis of his nationality, and has no legitimate aim.

2.6 Thirdly, the petitioner contends that he is the victim of a violation by the State party of his right to nationality under the Convention. He argues that in order to be eligible for Australian citizenship, he would need to be a “permanent resident”, under the meaning of the Australian Citizenship Act (2007) (ACA). Section 5(1) of the ACA defines a “permanent resident” as the holder of a permanent visa who is present in Australia, or the holder of a permanent visa who is absent from Australia, but has previously been present in Australia and held a permanent visa immediately before last leaving Australia. Persons who hold, or have held, a Special Category Visa may also be considered “permanent residents” if they satisfy specific requirements similar to those provided by the Social Security Act (SSA) for the determination of “Australian residents”. In other terms, only 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, will qualify as “permanent residents” under the ACA.

¹ Sections 90.5 and 104.5 of the HESA.

New Zealand citizens who have a residence certificate issued under the SSA will also be deemed permanent residents for the purposes of the Act².

2.7 The petitioner holds a Special Category Visa, which enables him to reside legally in Australia for an indeterminate time period, and therefore makes him a *de facto* permanent resident. However, to be entitled to apply for Australian citizenship after a period of 2 to 4 years, he would need to become a legally-recognized permanent resident, or be deemed a permanent resident for the purposes of the Australian Citizenship Act (ACA). The petitioner claims that despite the fact that he has permanently resided in Australia for more than 4 years, he is excluded from the definition of “permanent resident” under the ACA, as a result of conditions which pertain directly to his nationality and immigration status. He argues that the imposition of specific conditions only applicable to New Zealand citizens discriminate upon him on the basis of his national origin, and are deliberately designed to limit his access to social security, which is not a legitimate aim. He notes that the deliberate nexus between the restrictions imposed upon New Zealand citizens with regard to access to citizenship and social security benefits is reinforced by the fact that the “permanent resident” criteria within the ACA are similar to those provided in the Social Security Act for the determination of the status of “Australian resident”. The author alleges that as a result of the restrictive conditions imposed by the ACA, he is ineligible to apply for Australian citizenship, and is therefore subject to the limitations imposed by Australian law *vis a vis* non-citizens for access to social security and higher education benefits.

2.8 Lastly, the petitioner affirms that the State party failed to offer him effective protection from, and remedy for the above allegations of discrimination under the Convention, and as such infringed articles 2(1)(a) and 6 of the Convention. He claims that Australia’s Racial Discrimination Act (1975) does not offer any effective protection or remedy for discrimination on the ground of nationality, since the term “national origin” in section 10 was interpreted by the Full Bench Federal Court as excluding nationality as a ground for discrimination³, an interpretation which was later confirmed by the High Court of Australia⁴. The author claims that this judicial interpretation of the Racial Discrimination Act precludes him from seeking remedy via the Australian court system. He submits that the only two possible avenues for the pursuit of any remedy are via the Commonwealth Ombudsman, or the Human Rights and Equal Opportunities Commission (HREOC). However, he has not made a formal complaint before any of these instances as he asserts that neither has the power to override the operation of Commonwealth legislation⁵, and because of the interpretation of the Racial Discrimination Law (1975) previously detailed, which excludes nationality as a ground of discrimination.

The complaint:

² Section 5(2), read with Schedule 1 of the ACA.

³ *Macabenta v. Minister of State for Immigration and Multicultural Affairs*, [1998] 385 FCA.

⁴ The author stresses that by rejecting special leave to appeal in the *Macabenta* case, the High Court settled the point that nationality is not a recognized ground of discrimination under the Racial Discrimination Act (1975).

⁵ The author refers to the Human Rights Committee’s Communication N°900/1999, *C. v. Australia*, decision of 28 October 2002, and CERD Communication N° 39/2006 and *D.F. v. Australia*, decision of 22 February 2008.

3. The petitioner claims that there is no effective remedy available to him in Australia. He claims that the Social Security Act (1991) (SSA), the Higher Education Support Act (2003) (HESA), and the Australian Citizenship Act (2007) (ACA) discriminated against him on the basis of his New Zealand nationality, by withdrawing entitlements to social security, and unlawfully restricting his access to education and citizenship, in breach of articles 5(e)(iv), 5(e)(v) and 5(d)(iii), in connection with article 2(1)(a) of the Convention. By so doing, the State party committed an act of racial discrimination against him. The State party also failed to offer him effective protection and remedies, and therefore failed to pursue without delay a policy of eliminating racial discrimination, in breach of articles 6 and 2(1)(a) of the Convention.

State party's submission on admissibility and merits:

4.1 On 5 February 2009, the State party submitted that the communication should be declared inadmissible, as its allegations are incompatible with the provisions of the Convention, and the author has not exhausted all available domestic remedies. Subsidiarily, the State party submits that the allegations are misconceived and not substantiated by evidence of racial discrimination, and are without merit.

4.2 For the State party, the communication is inadmissible *ratione materiae* under rule 91(c) of the Committee's rules of procedure, as the Committee is only competent to examine communications alleging racial discrimination, under the meaning of the Convention. A claim on discrimination on the basis of nationality does not constitute racial discrimination as defined in article 1(1) of the Convention⁶. The State party refers to article 1(2) of the Convention, which states that the Convention "shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens".

4.3 Regarding allegations regarding his right to social security and education, the State party asserts that the petitioner failed to exhaust domestic remedies, noting that he had a number of administrative and judicial avenues open to him, the most relevant of which would have been to bring a complaint under the Racial Discrimination Act (1975) to the Human Rights and Equal Opportunity Commission (HREOC). In the event that the complaint was not resolved by the HREOC, the author could have applied to have the matter heard by the Federal Magistrates Court or the Federal Court of Australia to obtain an enforceable remedy for unlawful discrimination. It was also possible for him to make a complaint to the Commonwealth Ombudsman. The State party notes that the doubts expressed by the petitioner about the effectiveness of available remedies do not absolve him from pursuing them⁷. It further notes that the author failed to use the most obvious available remedy of applying for permanent residency in Australia, which would allow him to access certain social security payments not covered by the bilateral Social Security Agreement between Australia and New Zealand (2001). Permanent residency would also entitle the author to apply for Australian citizenship, which in turn would enable him to access the higher education loan schemes and tuition discounts available to Australian citizens. Had the author

⁶ The State party also refers to Australia's Racial Discrimination Act (1975), which implements Australia's obligations under the Convention.

⁷ The State party refers to CERD Communication N°009/1997, *D.S. v. Sweden*, inadmissibility decision of 17 August 1998, para 6.4.

successfully applied for permanent residency and subsequently claimed social security payments, a significant number of administrative and judicial avenues would have been opened to him to challenge decisions made in relation to his claim.

4.4 On the merits, the State party submits that the petitioner's claims are misconceived, as the limitations on his ability to access certain social security payments and higher education loans and discounts do not arise by reason of his national origin, but rather from the fact that he is neither a permanent resident nor a citizen of Australia. The Australian Government introduced legislative changes in 2001, so as to provide a more equitable situation between all migrants. Previously, New Zealand citizens received preferential treatment; the subsequent withdrawal of such advantages merely places New Zealand citizens on an equal footing with people of other nationalities who are neither permanent residents nor Australian citizens. This was recognized by the Committee as a legitimate aim.⁸ The State party dismisses as incorrect the petitioner's assertion that his six years of residency in Australia will not count towards the 10 year period which is a prerequisite to obtain age pension, and confirms that upon reaching 65 years, he will be able to rely on the Social Security Agreement between Australia and New Zealand and ensure that his six years of residence are taken into account. It is open for the author to apply for permanent residency, which would make him eligible to apply for Australian citizenship, so as to enable him to receive the same entitlements to social security payments as all Australian citizens.

4.5 On the right to education, the State party submits that citizenship and residency restrictions contained in the Higher Education Support Act (2003) with regard to access to the "HECS-HELP" and "FEE-HELP" schemes are consistent with Australia's obligations under the Convention. These restrictions were introduced for the legitimate purpose of ensuring that publicly funded higher education meets, first and foremost, the needs of Australian citizens, and for assisting in managing the debt avoidance potential related to non-Australian residents borrowing taxpayer funds through student loans, and then moving back overseas. New Zealand citizens living in Australia are, for that purpose, treated in the same way as all foreign nationals who are not Australian citizens, permanent humanitarian visa holders, or permanent visa holders undertaking study as part of a bridging course for overseas-trained professionals. The State party notes that as a New Zealand citizen, the author has access to employment services, health care, public housing, primary and secondary education and family tax benefits in Australia. New Zealand citizens can 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 foreign nationals of other States. It is open to the author to apply for permanent residency, like migrants of other nationalities. This would allow him to apply for Australian citizenship, which would enable him to receive the same entitlements to loan schemes and discounts as all Australian citizens.

4.6 On the claim that the eligibility requirements for acquiring Australian citizenship are unequally imposed upon New Zealand citizens so as to render them ineligible to apply for Australian citizenship, the State party submits that the author has not exhausted all domestic remedies, as he has not taken steps preparatory to applying for Australian citizenship. Had he taken such steps, there would have been a range of domestic remedies available to him to seek a review of Government decisions made in relation to his application, such as appeals to

⁸ The State party refers to General Recommendation 30, and to Communication N° 39/2006, *D.F. v. Australia*, decision of 22 February 2008.

the Administrative Appeals Tribunal, the Federal Court, and the High Court of Australia. The petitioner also had available to him the ability to make complaints to the Human Rights and Equal Opportunity Commission (HREOC) under Australia's anti-discrimination legislation, the Commonwealth Ombudsman, or commence legal proceedings in the Federal Magistrates Court and the Federal Court of Australia.

4.7 Subsidiarily, the State party submits that the petitioner's allegations are without merit⁹. The eligibility criteria set forth in the Australian Citizenship Act require that the person be a permanent resident, a condition which equally applies to all migrants seeking to apply for Australian citizenship, without distinction as to national origin. The author has not attempted to gain permanent residency as a step preparatory to applying for Australian citizenship, nor has he provided evidence suggesting that he faces any impediment to becoming a permanent resident, arising specifically from his national origin, or the fact that he is a New Zealand citizen.

4.8 On the final claim of the petitioner, the State party submits that there is no evidence to suggest that the author made any attempts to access and seek relief through the various domestic remedies which were available to him. As the author did not invoke any of these remedies, the State party submits that it does not have a case to answer on the merits as to its provision of protection and remedies. It is only once available remedies are operationalised that any assessment can be made as to whether those remedies did indeed provide the author with protection against any alleged acts of discrimination under the Convention.

Author's comments on State party submission:

5.1 The petitioner reaffirms that he is the victim of discrimination as a New Zealand national, as a result of Australia's laws and denial of protection and remedies. Nationality is a recognised ground for discrimination under the Convention, and is encompassed in the concept of national origin. The Committee is therefore competent to consider his claims. On the issue of exhaustion of domestic remedies, he argues that he should not be required to pursue domestic remedies, since the State party itself acknowledged that nationality is not recognised as a ground for discrimination under Australian law. In these conditions, he considers that domestic remedies do not offer him any reasonable prospect of success.

5.2 In the petitioner's view, the concept of "permanent resident" is ambiguous under Australian law, since he has the right to reside permanently in Australia, but yet is not legally recognized as a permanent resident. He argues that the State party only addressed the issue of differential treatment between Australian citizens and residents of other nationalities, but failed to respond to his claim of differential treatment between New Zealand nationals specifically and residents of other nationalities.

5.3 The petitioner acknowledges the fact that if he held a permanent visa, he would eventually be able to access certain social security payments not already covered by the bilateral Social Security Agreement between Australia and New Zealand. He maintains,

⁹ It refers to article 1(3) of the Convention and to General Recommendation N°30, para. 14.

however, that it is a discriminatory requirement, and that the State party failed to establish that it has any legitimate rationale. The range of domestic remedies cited by the State party would only be relevant to the holder of a permanent visa who has been denied social security payments as a result of an administrative decision. In his case, he claims to have been denied his right to certain social security benefits by the direct operation of legislation, which he deems discriminatory.

5.4 On access to higher education, he claims that the State party did not explain why non-Australian residents do not have access to the same higher education loan schemes and tuition discounts as Australian citizens. He adds that while non- New Zealand permanent residents will eventually be entitled to apply for citizenship, and therefore benefit from access to the Government loan scheme, he, as a New Zealand national, cannot comply with the discriminatory citizenship requirement imposed by law, as he is not considered a permanent resident. He adds that holding a permanent visa would in any case not entitle him to apply for tuition loans and discounts, unless he held a permanent *humanitarian* visa. He maintains that this differentiation based on nationality and immigration status has no legitimate aim.

5.5 Regarding the right to nationality, the petitioner reiterates that the requirement for permanent residency is discriminatory. He stresses that his New Zealand nationality is being used as an illegitimate impediment to receiving Australian citizenship. The range of domestic remedies cited by the State party would only be relevant to the holder of a permanent visa who has been denied citizenship as a result of an administrative decision. In his case, he claims to have been denied his right to nationality by the direct operation of legislation, which he deems discriminatory. He also notes that the application procedure for a permanent visa is an onerous one, requiring that the applicant meet strict conditions, which represent significant barriers preventing long-term residents from enjoying social security and higher education benefits, as well as access to Australian citizenship.

5.6 The petitioner reaffirms that all domestic remedies are illusory. He notes that the State party did not dispute that domestic law does not offer him any protection or remedy for discrimination based on New Zealand nationality concerning eligibility for Australian citizenship. Such discrimination falls within the ambit of the concept of racial discrimination. By failing to offer him effective protection from, and remedy for such racial discrimination, the State party breached articles 2(1) (a) and 6 of the Convention.

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 the current communication is admissible.

6.2 The Committee has noted the State party's contention that the author's communication should be considered inadmissible as it is incompatible with the provisions of the Convention (rule 91(c) of the Committee's rules of procedure), and the author failed to exhaust domestic remedies (rule 91(e)).

6.3 On the compatibility of the communication with rule 91(c) of the Committee's rules of procedure, the State party argues that the author's allegations do not fall *ratione materiae* within the scope of the definition of racial discrimination, as provided in article 1(1) of the Convention. The State party noted that this definition does not recognise nationality as a

ground of racial discrimination. It further noted that article 1(2) of the Convention specifically excluded distinctions, exclusions, restrictions, or preferences made by a State party between citizens and non-citizens from the Convention. Taking into account General Recommendation No.30 of 2004 and in particular the necessity to interpret article 1, paragraph 2, of the Convention in the light of article 5, the Committee does not consider that the communication as such is *prima facie* incompatible with the provisions of the Convention.

6.4 The Committee notes the State party's contention that the communication should be considered inadmissible under rule 91(e) of the rules of procedure, as the author failed to exhaust domestic remedies. The petitioner in turn maintains that complaints to the Human Rights and Equal Opportunity Commission (HREOC) or the Commonwealth Ombudsman would have no prospect of success. The Committee observes that the HREOC cannot proceed with any complaint under the Convention, and that the HREOC Act does not cover complaints where the events complained of are the result of the direct operation of legislation. The Committee recalls that discrimination on the ground of a person's citizenship is not a ground covered by the Racial Discrimination Act (1975). The State party has conceded this. The Committee refers to its decision on communication N° 39/2006, *D.F. v. Australia*¹⁰, where the complaint had been rejected by the HREOC on the three grounds evoked above. It is therefore reasonable to assume that had the author in this case brought a complaint before the HREOC, it would have failed on the same grounds. In any event, the Committee notes that any decision of the HREOC or the Commonwealth Ombudsman, even if they had accepted the petitioner's complaint and decided in his favour, would only have had recommendatory rather than binding effect, and the State party would be free to disregard such decisions. The Committee therefore considers that none of the proposed remedies can be described as one which would be effective¹¹.

6.5 As for the State party's contention that the author also had a number of judicial instances before which he could have sought remedy, the Committee reiterates that domestic remedies need not be exhausted if they objectively have no prospect of success. This is the case where under applicable domestic law, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result. Taking into account the clear wording of the decision of the Full Court of the Federal Court of Australia in the *Macabenta* case¹², which excluded nationality as a recognized discrimination ground within the Racial Discrimination Act (1975), the Committee concludes that there were no effective remedies that the author could have pursued. As the Committee sees no other impediment to admissibility, it proceeds to the consideration of the case on its merits.

7.1 The Committee observes 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 observed that prior to amendments introduced in 2001, New Zealand citizens residing in Australia enjoyed preferential treatment with regards to access to

¹⁰ Decision of 22 February 2008.

¹¹ The Committee here refers to a relevant and similar analysis made by the Human Rights Committee in Communication N° 900/1999, *Mr. C. v. Australia*, decision of 28 October 2002, para 7.3.

¹² *Macabenta v. Minister of State for Immigration and Multicultural Affairs*, [1998] 385 FCA, cited in para 2.11 above.

social security payments in Australia, as compared with foreign nationals of other States who were neither Australian citizens, nor permanent residents. Pursuant to the 2001 amendments, these benefits were withdrawn from all other New Zealand citizens, to ensure that regardless of their place of their place of birth, all were placed within the same position as migrants from other countries in Australia. The Committee notes that like other non-citizens, New Zealand citizens in Australia 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 social security benefits in question. In this context, the Committee refers to its Opinion on case N° 39/2006, *D.F. v. Australia*, where the Committee examined a comparable claim, and found that the 2001 amendments did not result in the operation of a distinction, but rather in the removal of such a distinction, which had placed the author and all New Zealand citizens in a more favourable position compared to other non-citizens. The Committee believes that this analysis is pertinent, and applicable in the present situation. The author has not demonstrated that the implementation of the Social Security Act (SSA) 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, which would make him eligible for the benefits in question under the SSA. For these reasons, the Committee concludes that the Act in question does not make distinctions based on national origin and thus finds no violation of either article 5 (e)(iv) or 2(1)(a), of the Convention.

7.2 Regarding the right to education, the Committee noted the author's contention that the eligibility criteria set forth in the Higher Education Support Act (2003) (HESA), requiring that the applicant of student loans and tuition fee discounts must be either an Australian citizen, or a "permanent humanitarian visa holder", i.e. a refugee, have unduly restricted his right to education. The Committee also took note of the State party's argument, alleging that the rationale for such restriction was to ensure that publicly funded higher education meets, first and foremost, the needs of Australian citizens, and to assist in managing the debt avoidance potential related to non-Australian residents borrowing taxpayer funds through student loans, and then moving back overseas. The Committee notes that the author's lack of entitlement to such benefits is not based on his national origin, but on the fact that he is not an Australian citizen, the holder of a permanent humanitarian visa, or the holder of a permanent visa undertaking a unit of study as part of a bridging course for overseas-trained professionals. New Zealand citizens living in Australia are treated in the same way as other foreign nationals who do not meet these objective requirements. Even if it favours Australian citizens and recognized refugees, it is not possible to reach the conclusion that the system works to the detriment of persons of a particular national origin. Like other non-citizens, New Zealand nationals in Australia can apply on the same terms as persons of other nationalities for a permanent resident's visa, which in turn would entitle them to apply for Australian citizenship subsequently, the receipt of which would bring them within the eligibility requirements of the HESA. The author has not demonstrated that the implementation of the HESA 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, which would make him eligible for benefits under the HESA. For these reasons, and insofar as the author's complaint is based on article 5 (e) (v) and 2(1) (a) of the Convention, the Committee considers it to be ill-founded.

7.3 With regards to the right to nationality, the Committee notes the author's contention that the restrictive definition of "permanent resident" under the Australian Citizenship Act

(2007) (ACA) unduly restricts his right to nationality under the Convention. The Committee also noted the State party's argument that the author, as a New Zealand citizen, can obtain a permanent resident visa and then apply for Australian citizenship. There is no evidence in the communication to suggest that the author made any such attempts to gain permanent residency as a step preparatory to applying to Australian citizenship. The Committee observes that there are no obstacles imposed particularly on New Zealand nationals to acquiring permanent residency in Australia or Australian citizenship. The author has not demonstrated that the implementation of the ACA results in unjustified or disproportionate 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, or Australian citizenship, 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 (d)(iii) or 2(1)(a) of the Convention.

7.4 The Committee noted the petitioner's argument that the State party failed to provide him effective protection from, and remedy for the preceding allegations of discrimination on the ground of nationality under the Convention, and that by doing so, Australia failed to pursue a policy of eliminating racial discrimination. The Committee also notes the State party's argument that it is not until the petitioner seeks relief through the various domestic remedies available that any assessment on their compliance with the Convention can be made. The Committee noted that the petitioner has not applied for permanent residency or for Australian citizenship, the acquisition of which is central to all his claims for entitlement to the various benefits sought. The Committee concluded that there is no violation by the State party of the Convention *vis a vis* the author, with regard to any of the above allegations. The State party cannot be held accountable to ensure protection from, or remedies for violations which it did not commit. The Committee thus finds no violation of either article 6, or article 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.]
