COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

B. M. S. v. Australia

Communication No. 8/1996

19 August 1997

CERD/C/51/D/8/1996

ADMISSIBILITY

Submitted by: B. M. S. (represented by counsel)

Alleged victim: The author

State party: Australia

Date of communication: 19 July 1996 (initial submission)

Date of present decision: 19 August 1997

Decision on admissibility

1. The author of the communication is B. M. S., an Australian citizen since 1992, of Indian origin; he is currently a practicing doctor. He claims to be a victim of violations of CERD by Australia. He is represented by counsel.

The facts as submitted by the author

2.1 The author graduated from Osmania University (India). He holds a diploma in Clinical Neurology (DCN) from the University of London. He had practiced medicine in England, India, Ireland and the United States. He has worked as a medical practitioner, under temporary registration, in a teaching hospital in New South Wales (Australia) for eight years. Currently, he is a senior medical hospital officer in the intensive care unit at Dandenong (Australia).

2.2 The author states that doctors trained overseas who have sought medical registration in Australia have to undergo and pass an examination involving two stages, a multiple choice examination (MCQ) and finally a clinical examination. The whole process is conducted by the Australian Medical Council (AMC), a non governmental organization partly funded by the Government.

2.3 In 1992, the Australian Minister of Health imposed a quota on the number of doctors trained overseas who pass the first stage of this examination. Therefore, doctors who were trained abroad and who are Australian residents and Australian citizens may not be registered precisely because they fall outside the quota. On the other hand, quota places may be allocated to persons without any immigration status in Australia. In October 1995, the quota system was discontinued (see State party's submission of 17 January 1997).

2.4 Since the quota system has been imposed, the author has sat the MCQ examination set by the AMC on three occasions. He has satisfied the minimum requirements of the MCQ examination but was always prevented, by the quota system, from proceeding to the clinical examination.

2.5 In March 1993, the author filed a formal discrimination complaint against the Australian Human Rights and Equal Opportunity Commission (HREOC) complaining about the quota and the examination system. In August 1995, the Commission found the quota policy unlawful under the Australian Race Discrimination Act, considering it "grossly unfair, resulting in unnecessary trauma, frustration and a deep sense of injustice". The Commission considered "scandalous" that the author was denied the right to proceed to the clinical examination only by reason of the quota.

2.6 The Australian Government and the AMVC appealed the decision of the HREOC. On 17 July 1996, the Federal Court of Australia ruled in the Government's favour, on the grounds that the quota set by the Minister of Health and the examination system were reasonable.

2.7 The author did not appeal this decision to the High Court of Australia. In this respect, counsel claims that there is no automatic right of appeal to the High Court, since the Court must first grant special leave to appeal. Furthermore, the author does not have the means to pursue the appeal without being awarded legal aid, and a cost order will be imposed on him if the appeal is unsuccessful. Counsel contends that the appeal to the High Court is not an effective remedy within the meaning of article 14, paragraph 7 (a), of the Convention.

The complaint

3.1 Counsel claims that both the AMC examination system for overseas doctors, as a whole and the quota itself, were unlawful and constitute racial discrimination.

3.2 Counsel contends that the judgement of the Federal Court of Australia acknowledges the discriminatory acts of the Australian Government and the AMC and thereby reduces the protection accorded to Australians under the Racial Discrimination Act. It is also said to eliminate any chance of reform of this discriminatory legislation.

3.3 Counsel contends that the restrictions to practice their profession imposed on overseas trained doctors, before they can be registered, aim at limiting the number of doctors to preserve "the more lucrative areas of medical practice" for domestically trained doctors.

The State party's information and author's comments thereon

4.1 In its submission under rule 92 of the Committee's rules of procedure, dated 17 January 1997, the State party informs the Committee that the quota system was discontinued in October 1995, as a result of a decision of August 1995 of the Human Rights and Equal Opportunity Commission, which considered the quota system to be racially discriminatory. The author was the complainant in the case. All parties sought review of this decision before the Federal Court of Australia, the court found that the quota system was reasonable and therefore not racially discriminatory.

4.2 As a result of the decision by the AMC to discontinue the application of the quota to overseas trained doctors within the examination process, the 281 candidates who had fallen outside the quota, including the author, were informed that they were eligible to undertake the clinical exams.

4.3 The State party notes that the author has sat the AMC clinical exam and failed it three times. An independent observer appointed by the author was present during his first two attempts, but not at the last; the presence of the observers was the result of a decision of the HREOC in the author's case. Under the current AMC regulations, the author may re-sit the clinical exam in the next two years, without having to re-sit the MCQ exam. It further states that currently there is no restriction other than satisfactory performance on the author's progress through the AMC examinations.

4.4 With respect to counsel's allegation that the Federal Court ordered the author to pay the legal costs of the AMC, the State party informs the Committee that in November of 1996 the AMC agreed to discontinue pursuit of costs against the author. The Federal Court had made no order for costs in respect of the Commonwealth of Australia, which agreed to bear its own costs.

4.5 In the light of the above the State party considers the author's complaint to be moot.

5.1 In his comments, counsel informs the Committee that the author does not wish to withdraw his case. He notes that although it is true that the quota system was discontinued in October 1995, it may be reintroduced at any time (sic) in light of the Federal Court's decision which overturned the Human Rights and Equal Opportunity Commission's decision. According to counsel the State party authorities have contemplated the possibility of reintroducing the quota system.

5.2 The author contends that the discontinuation of the quota system has not solved the problem of discrimination, as the AMC has simply increased the pass criteria to compensate for the absence of the restrictive effects of the quota. He further claims that although Mr. B. M. S. has been allowed to proceed to the clinical examination, he was failed on each occasion, in circumstances which suggest that he is being penalized for having originally complained to the Human Rights and Equal Opportunity Commission. About this issue, he has lodged a further complaint with the Commission.

5.3 Counsel contends that the fact that a discriminatory practice has been discontinued does not change its previous discriminatory nature or render void complaints concerning its application and operation when it was still in force. Consequently, it is argued that the author's rights were violated from 1992 to 1995, causing him a detriment which has not been redressed by the discontinuation of the quota system.

Issues and proceedings before the Committee

6.1 Before considering any claims contained in a communication the Committee on the Elimination of Racial Discrimination must, in accordance with rule 91 of its rules of procedure, determine whether or not it is admissible under the International Convention on the Elimination of All Forms of Racial Discrimination.

6.2 The main issues before the Committee are (a) whether the State party failed to meet its obligation under article 5 (e) (i) to guarantee the author's right to work and free choice of employment (b) whether the order of costs against the author by the Federal Court violated the author's rights under article 5 (a) to equal treatment before the courts.

6.3 As to the author's complaint that he was discriminated against because the pass criteria have been raised in order to compensate for the discontinuation of the quota system, the author himself concedes that this matter has been submitted to the Australia Human Rights and Equal Opportunity Commission which does not appear to have decided on this issue at the time of the Committee's present decision. Consequently, this part of the communication is inadmissable for non-exhaustion of domestic remedies, pursuant to article 14, paragraph 7 (a), of the Convention.

6.4 The Committee has noted the author's claim that costs ordered by the Court against him constitute discrimination against him as the Federal Court rarely imposes costs in cases such as his. It noted, however, that the State party has indicated that the AMC will not be further pursuing the costs imposed by the Court. In the circumstances of the case, the Committee considers that the author is not a "victim" of a violation of the Convention within the meaning of article 14, paragraph 2, of the Convention, in respect of this claim. This part of the communication is, therefore, inadmissible.

6.5 As to the claim relating to the discriminatory nature of both the AMC examination and its quota system for overseas trained doctors, the Committee notes that the author filed a complaint with the HREOC, which found in his favour in respect of the quota system and in favour of the Commonwealth in respect of the examination system itself. It notes that the quota system was found to be discriminatory by the Human Rights and Equal Opportunity Commission: its decision was appealed, and the Federal Court overturned the Commission's decision. Notwithstanding this judgment, the Commonwealth has not reintroduced the quota system. The Committee notes however that the Federal Court's decision provide a legal basis for the reintroduction of the quota system any time. Furthermore, the Committee does not share the State party's reasoning that since the quota system has now been discontinued, the author's complaint, for the alleged discrimination between 1992 and 1995, has become moot. The Committee considers that the author has sufficiently substantiated his claim, for purpose of admissibility, and consequently, considers this part of the communication admissible.

6.6 Finally, in respect of the fact that the author did not appeal of Federal Court's decision of 17 July 1996 to the High Court of Australia, the Committee considers that even if this possibility were still open to the author and taking into account the length of the appeal process, the circumstances of the present case justify the conclusion that the application of domestic remedies has been

unreasonably prolonged within the meaning of article 14, paragraph 7 (a), of the Convention.

7. The Committee on the Elimination of Racial Discrimination therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with rule 94 of the Committee's rules of procedure, the State party shall be requested to submit to the Committee, within three months of the date of transmittal to it of the present decision, written explanations or statements clarifying the case under consideration;

(c) that any explanation or statements submitted by the State party pursuant to rule 94 shall be transmitted to the author of the communication under rule 94, paragraph 4, of the rules of procedure, for comments;

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

[Done in English, French, Russian and Spanish, the English text being the original version.]