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HUMAN RIGHTS COMMITTEE
Ninety-third session
7-25 July 2008

DECISION

Communication No. 1534/2006

Submitted by:	The-Trinh Pham (not represented by counsel)
Alleged victim:	The author
State party:	Canada
Date of communication:	18 July 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 4 December 2007 (not issued in document form)
Date of decision:	22 July 2008
Subject matter:	Dismissal of the author for discriminatory reasons
Procedural issues:	Re-evaluation of the facts and evidence
Substantive issues:	Right to a fair hearing, discrimination
Articles of the Covenant:	14 and 26
Article of the Optional Protocol:	2

[ANNEX]

* Made public by decision of the Human Rights Committee.

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninety-third session

concerning

Communication No. 1534/2006*

Submitted by: The-Trinh Pham (not represented by counsel)

Alleged victim: The author

State party: Canada

Date of communication: 18 July 2006 (initial submission)

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

Meeting on 22 July 2008,

Adopts the following:

Decision on admissibility

1. The author of the communication received on 18 July 2006 is The-Trinh Pham, a Canadian national, born on 21 July 1951 in Viet Nam. He claims to be a victim of violations by Canada of articles 14 and 26 of the Covenant. The author is not represented by counsel. The Covenant and the Optional Protocol to the Covenant entered into force for Canada on 19 August 1976.

The facts as presented by the author

2.1 The author had worked as a computer analyst at Hydro-Québec since May 1981 and, until 1986, had received excellent evaluations from his superiors. After this date, he was accused

* The following members of the Committee took part in the consideration of the communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè-Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

of having difficulty communicating with his co-workers. In the course of a reorganization of the enterprise in 1989, he was given leave of absence and invited to transfer to another post within 12 months. Over the course of seven years, he was assigned to a variety of jobs and training courses in the field of information technology. He applied for numerous vacancies, but without success. The reasons given by his superiors varied. Some considered the author's qualifications to be inadequate, others referred to his record of poor evaluations. In certain cases, his handicap was mentioned.[1] Eventually, on 9 February 1996, the author was dismissed. At that point, he decided to initiate three separate proceedings against Hydro-Québec: one before the Labour Standards Commission, one before the Commission on Human Rights and Children's Rights and one for damages in the Superior Court.

2.2 On 20 February 1996, the author lodged an appeal with the Labour Standards Commission under article 124 of Quebec's Act on labour standards. He complained that his dismissal was without just and sufficient cause and sought reinstatement. He said the labour commissioner had refused to exercise jurisdiction with regard to discrimination since that complaint had been made to another court (see paragraph 2.3 below), and the question of discrimination had therefore not been addressed. On 10 February 1998 the labour commissioner rejected the claim. On 16 June 1998 the Superior Court rejected the author's application for review. On 10 May 2001 the Court of Appeal of Quebec rejected his appeal. On 7 February 2002 the Supreme Court rejected the author's application for leave to appeal.

2.3 On 16 March 1996 the author filed a complaint with the Commission on Human Rights and Children's Rights (CDPDJ). He claims to have suffered discrimination on grounds of race, colour, ethnic or national origin and disability. On 17 February 2000 the CDPDJ decided to close the case on the ground that, on the basis of the same facts, the author had lodged another appeal with the Labour Standards Commission. On 20 March 2000 the author filed for review with the Superior Court, requesting that his case should be transferred to the Human Rights Tribunal.[2] On 31 August 2000 his request was denied. On 27 October 2000 the Court of Appeal of Quebec rejected the author's appeal.

2.4 On 21 January 1999 the author filed a parallel claim for damages against Hydro-Québec before the Superior Court. Following the Superior Court decision of 31 August 2000 in the

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[1] In his decision of 10 February 1998, the labour commissioner noted, with regard to the reasons for the rejections received by the author over the years, that certain people considered his qualifications to be insufficient; they said that he had an inadequate grasp of Hydro-Québec's information systems. Others pointed to his poor record; his previous evaluations were unfavourable. In some cases, his response was unsatisfactory; in others, it was his handicap. The fact is that Mr. The-Trinh Pham suffers from a severe stammer. Recruitment managers would therefore note some difficulty in communication (p. 6).

[2] As of 24 July 1997, private individuals no longer have direct access to the Human Rights Tribunal. Only the Commission on Human Rights and Children's Rights (CDPDJ) may bring legal action before the Tribunal, on behalf of a victim.

second set of proceedings mentioned above (para. 2.2), the author amended his statement to the Superior Court to unite the causes of action; these now comprised the period of notice of dismissal, "moral" damages, discrimination and fraud. On 7 May 2003 the Superior Court declared the application inadmissible, finding that the claims regarding period of notice and discrimination were res judicatae.[3] The author appealed against this judgement with the Court of Appeal of Quebec. On 13 April 2004 the Court rejected the appeal. On 28 October 2004 the Supreme Court of Canada rejected the author's application for leave to appeal.

The complaint

3. The author considers that he was a victim of discrimination and that the judges used various ruses to block his legitimate access to the courts. He asks the Committee to find that he is a victim of violations by the State party of articles 14 and 26 of the Covenant and that the State party should pay him compensation for all the damages he has incurred.

State party's observations on the admissibility and merits of the communication

4.1 On 31 July 2007 the State party argued that the communication was inadmissible for the following reasons. First of all, the author has not exhausted domestic remedies because he has not seized the national courts of the rights violations that he is alleging in his communication to the Committee. Regarding the alleged partiality of the labour commissioner, the State party considers that the author could have contested this partiality in a variety of ways. He could have applied to have the commissioner recused; he could have applied to the Office of the General Labour Commissioner for review or revocation of the commissioner's decision; or he could have applied for a judicial review of the commissioner's decision. Even though the author had in fact filed for judicial review, his application did not raise the matter of the commissioner's conduct with either the Superior Court or the Court of Appeal of Quebec. Lastly, he could have challenged the labour commissioner's institutional independence.

4.2 With regard to the Human Rights Commission, the State party notes that the Commission is an administrative body to which article 14 of the Covenant does not apply. This characterization of the legal status of the Commission was confirmed in the Superior Court decision of 31 August 2000 and the Court of Appeal ruling of 27 October 2000. The State party notes that the author did not challenge the Court of Appeal decision. It asks the Committee not to consider the author's allegations against the Commission on the grounds that the Commission is not a tribunal within the meaning of article 14 of the Covenant.

[3] The Superior Court decided that, at the risk of needlessly reopening an 11-day inquiry before the labour commissioner, it was clear that the claims in respect of period of notice and discrimination were res judicatae in that the parties were the same, there was identity of cause, namely dismissal, and identity of claim, namely reinstatement and compensation on those grounds (decision, para. 14).

4.3 With regard to the judges in the higher courts, the State party asserts that at no time did the author avail himself of domestic remedies against judges of the higher courts in respect of rights under article 14 of the Covenant. He could have filed for recusal of a judge of the Superior Court of Canada or of a judge of the Court of Appeal of Quebec, or complained to the Canadian Judicial Council.

4.4 With regard to article 26, the State party considers that the author fails to adduce in his communication the necessary evidence relating to the rights protected under article 26[4] and that his allegations concern rather the rights protected under article 14. The author has therefore failed to substantiate his claim for the purposes of admissibility. Moreover, he has at no time invoked any remedy under domestic law to challenge a statutory provision that might violate the rights protected under article 26 of the Covenant.

4.5 Secondly, the State party maintains that the author's demands are incompatible with the provisions of the Covenant in that they consist primarily of a request to the Committee to review the national courts' judgements in his case. What the author challenges is basically the labour commissioner's assessment of the testimony and evidence in his decision of 10 February 1998. The State party recalls that the Committee is not itself an appellate court.[5] With regard to the author's action for damages in the Superior Court, it notes that the author asks the Committee to determine whether the rules of law have been properly interpreted and applied by the domestic courts, which is not the Committee's role. The author provides no evidence to show that the decisions referred to in his allegations were marred by any irregularity that would warrant the Committee's intervention. The State party considers that the mere fact that the law has not upheld the author's claims does not mean he was deprived of the right to a fair hearing or to equal protection under the law.[6] The communication is therefore inadmissible under article 3 of the Optional Protocol.

4.6 Lastly, the State party contends that the author has not sufficiently substantiated his allegations with regard to the judicial system. These allegations are general in nature, and the author provides no evidence to support them. The author's claims concerning the domestic courts' - and in particular, the labour commissioner's - impartiality and independence are general accusations of partiality.[7] As for his allegations regarding access to the courts, a simple perusal

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[4] See communication No. 802/1998, *Rogerson v. Australia*, Views adopted on 15 April 2002, para. 7.8.

[5] See communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 3 April 2007, para. 7.3.

[6] See communication No. 761/1997, *Singh v. Canada*, inadmissibility decision of 14 August 1997, para. 4.2.

[7] See communication No. 378/1989, *E.E. and M.M. v. Italy*, inadmissibility decision of 28 March 1990, para. 3.2.

of the 11 decisions and judgements handed down in the actions filed by the author shows that he had access to the various domestic authorities and courts. Regarding his claims that the courts did not provide equal treatment under the law, the State party recalls that the communication contains no fact showing that the author has been treated any differently than other litigants in Quebec who are in a similar situation. The author also accuses the Court of Appeal of Quebec of violating his right to a fair hearing. However, the State party notes that the author had ample opportunity to be heard by the Court of Appeal of Quebec, given that the hearing lasted an entire morning instead of an hour. The communication is therefore inadmissible under article 2 of the Optional Protocol.

4.7 Alternatively, the State party contends that the communication is unfounded.

Author's comments on the State party's observations

5.1 On 28 January 2008 the author recalled that his complaint to the Committee was based primarily on the following four claims: his complaint to the Commission on Human Rights and Children's Rights (CDPDJ) of discrimination on grounds of language and disability, and of harassment; his claim regarding discrimination; his claim regarding fraud; and his claim regarding notice of dismissal. He maintains that he has exhausted domestic remedies. He argues that he had no reason to file for recusal of the labour commissioner, since it was only after reading the decision that he realized that the commissioner had not acted impartially. He contested the decision, but to no avail. With regard to domestic remedies against judges in the higher courts, he recalls that the conduct and attitude of the judges were respectful and that there was therefore no basis for filing for recusal. As to the State party's suggestion that he could have complained to the Canadian Judicial Council, the author notes that complaints against judges do not permit court decisions to be overturned. All the remedies proposed by the State party were futile proceedings that had no chance of success. With regard to article 26 of the Covenant, the author recalls that the CDPDJ refuses to exercise jurisdiction in respect of applications on grounds of discrimination. Although the State party argues that the author did not invoke domestic remedies to challenge a statutory provision that might violate the rights protected under article 26, the author recalls that this remedy is no longer available to him since the Court of Appeal and the Supreme Court have already closed the case.

5.2 As to his claim of discrimination in the CDPDJ, the author reiterates that the decision of the CDPDJ to close the case before completing its investigation was arbitrary. He recalls that the Committee has recommended that the State party should amend its legislation to ensure that all complainants in matters relating to discrimination have access to justice and to effective remedies.[8] In his view the CDPDJ has an unchallengeable right of triage and, in the case at hand, the State party has exercised arbitrary control over his access to the Human Rights Tribunal, with

[8] See CCPR/C/79/Add.105, 7 April 1999, para. 9.

no right of appeal. In view of the fact that the assessment of the evidence and the application of domestic law by the courts and the CDPDJ were clearly arbitrary and represented a denial of justice, the Committee is competent to intervene.[9]

5.3 Regarding the claim of discrimination, the author notes that the State party has not commented on the merits of the issue. He recalls that the Superior Court judge made numerous errors in his decision of 7 May 2003. The judge did not review the evidence effectively presented to the labour commissioner. He assumed that the commissioner had dealt with the issue of discrimination. He failed to take into account several pieces of evidence that went in the claimant's favour. Lastly, he alleged that the author claimed compensation for discrimination from the commissioner, which is incorrect. The author therefore argues that the judge's decision is clearly arbitrary or represents a denial of justice. As to his application to the Court of Appeal, the author recalls that the Court gave no arguments for its rejection of the author's claims and that it was selective in examining the evidence. He considers the Superior Court judgement of 7 May 2003 and the Court of Appeal ruling of 23 April 2004 somewhat cursory and their lack of factual and legal substantiation tantamount to a violation of the rules of natural justice and of article 14 of the Covenant. He maintains that the national courts have arbitrarily denied him access to an effective remedy and a judgement on the merits of his claim of discrimination based on his disability, in violation of articles 2 and 26 of the Covenant.

5.4 Regarding his claim of fraud (concealment of evidence, forgery and obstruction of justice), the author notes that the State party has made no comment on this. He considers that the Court of Appeal decision is clearly arbitrary or represents a denial of justice. He submits that he was the victim of fraud and that he was prevented from gaining access to justice.

5.5 As to his claim regarding notice of dismissal, the author again notes that the State party has made no comment on the merits. He considers the Court of Appeal to have erred in fact and in law.

Additional comments by the State party

6.1 On 30 June 2008, the State party again argued that the communication was inadmissible. It provided further details about appeals against loss of employment and discrimination under article 124 of the Act on labour standards. This legislative provision allows employees who can show that they have three years of continuous service in the same enterprise and who believe that they have been dismissed without just and sufficient cause to submit a complaint, in writing, to the Labour Standards Commission. The labour commissioner must assess all the circumstances of each case in order to determine whether the measure taken by the employer was just and fair. After 11 days of hearings, the labour commissioner found that the weight of evidence supported the conclusion that the author had lost his job as a result of administrative dismissal and not discrimination. He concluded that the author was not the victim of a dismissal without just and sufficient cause.

[9] See communication No. 1403/2005, *Gilberg v. Germany*, inadmissibility decision of 25 July 2006, para. 6.6.

6.2 The State party recalls that the Superior Court also rendered a decision on the question of consideration of the discrimination alleged by the author. It notes that the discrimination issue was frequently discussed at hearings before the labour commissioner. The author took the case to appeal several times. He also referred the same issues to other bodies. He therefore had access to effective remedies before domestic courts of law. The State party contends that the author is clearly dissatisfied with the results of the domestic remedies pursued. It nevertheless recalls that the Committee is not an appeal court.

6.3 The State party notes that, as with the allegations set out in the initial communication, the allegations made by the author in his comments are also based on an assessment of the facts and evidence placed before the domestic courts. The author is basically asking the Committee to review the judgements of the domestic courts.

6.4 The State party repeats that the author has not exhausted all the available domestic remedies. The author alleges that all the remedies not pursued were, in his view, ineffective and futile but has not shown in what way the proposed remedies were ineffective.

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 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

7.3 With regard to the complaint of discrimination, the Committee takes note of the State party's argument that the author fails to adduce in his communication the necessary evidence relating to the rights protected under article 26 and that his allegations concern rather the rights protected under article 14. The Committee notes that the author provides no evidence that he was a victim of discrimination and that he mainly confines himself to contesting the courts' assessment of the evidence and application of domestic law. Consequently, the Committee considers that the author has not sufficiently substantiated his allegations under article 26 for the purposes of admissibility and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

7.4 With regard to the author's claims concerning the assessment of evidence by the domestic courts, the Committee notes that the author basically requests a review of the courts' judgements in his case. The Committee recalls its consistent case law according to which it is generally for the courts of the States parties to the Covenant to evaluate the facts and evidence or the application of domestic law in a particular case, unless it can be established that the evaluation is clearly arbitrary or represents a denial of justice.[10] The evidence submitted to the Committee

[10] See for example communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision of 3 April 1995, para. 6.2.

does not show that the proceedings before the authorities of the State party were marred by such irregularities. Consequently, the Committee considers that the author has not sufficiently substantiated his allegations under article 14 for the purposes of admissibility and finds this part of the communication inadmissible under article 2 of the Optional Protocol.

8. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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

[Adopted in English, French and Spanish, the French 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.]
