



**International covenant
on civil and
political rights**

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HUMAN RIGHTS COMMITTEE
Eighty-second session
18 October - 5 November 2004

DECISION

Communication No. 958/2000

Submitted by: Nuri Jazairi (not represented by counsel)

Alleged victim: The author

State party: Canada

Date of initial communication: 10 August 2000 (initial submission)

Document references: Special Rapporteur's rule 91 decision, transmitted to the State party on 6 December 2000. (not issued in document form)

Date of decision: 26 October 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-second session

concerning

Communication No. 958/2000*

Submitted by: Nuri Jazairi (not represented by counsel)

Alleged victim: The author

State party: Canada

Date of initial communication: 10 August 2000 (initial submission)

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

Meeting on 26 October 2004

Adopts the following:

Decision on admissibility

1. The author of the communication is Nuri Jazairi, a Canadian national, born in 1941 in Iraq. He claims to be a victim of violations by Canada of article 26, and of articles 2, paragraphs 1 and 2, 19, paragraph 1, and 50 taken in conjunction with article 26, of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented

2.1 The author is an associate professor of economics at York University in Toronto. The university is not part of the State party's federal or provincial government. In August 1984,

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèle Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

Under Rule 90 of the Committee's Rules of Procedure, Mr. Maxwell Yalden did not participate in the Committee's consideration of the case.

The text of a separate opinion by Committee members Ms. Christine Chanet, Mr. Glèle Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah is appended to the present document.

after having applied for promotion to a full tenure professorship, a university promotions committee received and considered two unsolicited letters from other professors of the author's faculty that were critical of him. In September 1984, a further university promotions committee withdrew the letters from the file, but in apparent violation of its procedures heard *in camera* representations by the Chair of the author's faculty about the author's application, without disclosing those representations to him or allowing him an opportunity to respond. In December 1984, the Committee recommended that the author's application for promotion be delayed, and, in November 1985, the university's president accepted this recommendation.

2.2 In July 1989, the author complained to the Ontario Human Rights Commission, alleging that his right to equal treatment with respect to employment without discrimination and harassment had been infringed because of his race, ethnic origin, creed and association, in contravention of the Ontario Human Rights Code, 1981 (henceforth "the Ontario Code").¹ He alleged that certain members of his faculty had come to view him as anti-Semitic, and that his political opinions at the relevant time that Israel could be criticised for not doing more to resolve the Palestinian question, together with other facts, including his race, ethnic origin and religion, became an issue which adversely affected his right to equal treatment in employment, and specifically in his application for promotion to full professor. Between December 1989 and May 1993, the Commission investigated the complaint.

2.3 The Commission rejected the author's complaint on 29 August 1994, finding that: i) while the evidence indicated that his application for promotion to Full Professor did not receive a fair and timely evaluation, the irregularities in the process did not appear to be related to any prohibited ground of discrimination; and ii) while the evidence indicated that he might have been differently treated, there was insufficient evidence to indicate that this was a result of his creed rather than his political beliefs, the latter not being a prohibited ground of discrimination under the Ontario Code. The Commission decided not to request the appointment of a Board of Inquiry and dismissed the complaint. The author requested reconsideration of the Commission's decision.

2.4 On 2 May 1995, the Commission upheld its original decision, holding that political belief is not included in the meaning of the word "creed", and that whatever differential treatment the author may have received from his employer, York University, was not based on creed or any other prohibited ground of discrimination. The author applied for judicial review of this decision.

2.5 On 19 September 1995, the Commission declared null its decision of 2 May 1995, on the basis that submissions made to it by the author had not been taken into account. On 29 November 1995, the Commission released its second decision on reconsideration, again upholding the original decision. It again held that "political belief" is not included in the meaning of the word "creed", and that whatever differential treatment the author may have received, it was not based on creed or any other prohibited ground of discrimination. There was thus insufficient evidence to warrant a reversal of the original decision.

¹ Section 5(1) of the Ontario Code provides : "Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap."

2.6 The author applied to the Divisional Court for judicial review of the interpretation of the word "creed" in the Ontario Code as a matter of statutory construction, as well as of the constitutional issue concerning the omission of "political opinion" from the Ontario Code as a prohibited ground of discrimination. On 16 April 1997, the Court dismissed the application, on the basis that "creed" did not encompass "political opinion", and that the omission of "political opinion" from the Ontario Code did not violate the equality provision of the Canadian Charter of Fundamental Rights and Freedoms (henceforth "the Charter").² The author appealed to the Court of Appeal for Ontario.

2.7 On 28 June 1999, the Court of Appeal dismissed the appeal. It held that the author's personal opinion on the "single issue of the relationship between Palestinians and Israel" did not amount to a "creed" for purposes of the Ontario Code. On the facts of the case, the Court also declined to add on constitutional grounds a new ground of discrimination, namely political opinion, analogous to those enumerated in section 5(1) of the Ontario Code. On 3 May 2000, the Supreme Court refused the author's application for leave to appeal.

The complaint

3.1 The author claims to be a victim of violations of article 26, and of articles 2, paragraphs 1 and 2, 19, paragraph 1, and 50 taken in conjunction with article 26 of the Covenant. His principal contention is that the State party has failed to protect against discrimination on the basis of political opinion, which is specifically enumerated in article 26. The author makes three subsidiary arguments.

3.2 Firstly, the omission of "political opinion" from the enumerated grounds in the Ontario Code violates the provisions of the Covenant invoked. He argues that the inclusion of this ground in the human rights legislation of seven other provinces and territories in the State party highlights the absence of such a ground under the Ontario Code and thus discloses an additional violation of article 50 of the Covenant. The author refers to the Committee's concluding observations in 1999 on the State party's fourth periodic report under the Covenant, where it was "concerned at the inadequacy of remedies for violations of articles 2, 3 and 26" and "recommend[ed] that the relevant human rights legislation be amended so as to guarantee access to a competent tribunal and to an effective remedy in all cases of discrimination".³

3.3 Secondly, the author contends that fundamental errors of law were made in the resolution of his claim by the Commission and the domestic courts, in violation of article 26. At the level of the Commission, the author argues that the decision was without jurisdiction, that it disregarded the Ontario Code's preamble and international human rights law, that its interpretation of "creed" was unduly narrow, that it failed properly to take into account the intersection of political opinion, race and religion in his case, and that it failed to draw an inference of discrimination.

² Section 15(1) of the Charter provides : "Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour religion, sex, age or mental or physical disability."

³ A/54/40, at paragraph 231.

3.4 At the level of the Divisional Court, the author contends that fundamental errors of law were made (i) in its failure to read the ground of “political opinion” into the Ontario Code and in requiring him to be a member of a “discrete and insular minority”, (ii) in its rejection of the contention that political and religious commitments may be so aligned as to constitute “creed”, and (iii) in its holding that “creed” requires an element of religious belief. At the level of the Court of Appeal, the author argues that the fundamental errors of law committed were an improper failure to apply a binding prior decision, allegedly mistaken findings of fact, an incorrect *Charter* analysis, and an overly narrow interpretation of “creed” as not covering political opinion. Finally, the author attacks the Supreme Court’s failure to grant leave to appeal, on the basis that the questions presented novel and fundamental issues. He views the denial as inconsistent with the Court’s criteria for leave and negating the “equal and effective protection against discrimination” guaranteed him by article 26.

3.5 In addition, the author makes a series of claims as to alleged enforcement problems of human rights law in Ontario. He argues that delay is a serious problem and that “the many roles of the Commission, especially in assigning the same officer to investigate a complaint and to attempt a settlement, give rise to problems of conflict of interest, and could lead to coercion.” He contends that the referral of between 2-4% of complaints to a board of inquiry for hearing deprives complainants of an effective remedy. He refers to under funding and organizational problems at the Ontario Commission.

The State party’s submissions on the admissibility and merits of the communication

4.1 By submission of 21 December 2001, the State party challenged the admissibility and merits of the communication, on the grounds that no violation of the Covenant was substantiated. As to the allegation that the Ontario Code does not include “political opinion” as a prohibited ground of discrimination, the State party refers to the Court of Appeal’s findings that even considering the matter in a light most favourable to the author, there was no evidence that the University had discriminated against him on the basis of his political belief. The Court concluded: “There is nothing on the record to suggest that his political beliefs disentitled him to consideration for advancement in the Department of Economics.” The State party contends that there is no evidence in any of the impugned decisions of the university, the Commission or the courts that the author was treated differently because of his political beliefs. Nor is there evidence that the Commission would have viewed the evidence as warranting an inquiry if “creed” were to include “political belief”. In the light of these evidentiary findings, the claim concerning the Ontario Code is an abstract challenge without factual foundation.⁴

4.2 The State party rejects the author’s allegations that fundamental errors of law were made, characterizing these as contentions that Canadian law had been misinterpreted by Canadian courts. It refers to the Committee’s constant jurisprudence that it does not substitute its views on the interpretation of domestic law for those of national courts. The author’s arguments were fully reviewed and dismissed by three tiers of the Canadian court system,

⁴ The State party refers to Aumeeruddy-Cziffra et al. v Mauritius Case No 35/1978, Views adopted on 9 April 1981, Disabled & Handicapped Persons in Italy v Italy Case No 163/1984, Decision adopted on 10 April 1984, and J.H. v Canada Case No 187/1985, Decision adopted on 12 April 1985.

with no basis to support a claim that their interpretation of the law was arbitrary or amounted to a denial of justice.

4.3 As to the claims relating to “enforcement problems” in Ontario, the State party points out that much of the documentary evidence submitted by the author related to the federal Human Rights Commission, a distinct body to the Ontario Commission, which was uninvolved in the case. The material submitted concerning the Ontario Commission is nearly 10 years old and does not represent a current picture of its operations. The State party refers to the Commission’s annual report for 2000-2001, showing considerable progress in case management, timeliness of complaint handling, promotion of human rights and public education. For the fifth year, the Commission closed more cases than it opened, and the average age of a complaint was 10 months. Average overall processing time for a complaint was 15 months.

4.4 The Commission’s investigations were free, and cases are referred to a board of inquiry if a settlement is not possible. Such a board has broad remedial powers, including monetary awards, and the decisions can be judicially reviewed. In 1999-2000, 68% of 1700 complaints made were resolved at voluntary mediation with the parties’ input. 70% of complainants considered their claims properly addressed, 78% considered the process fair and 87% indicated they would use it again.

4.5 The State party denies that the omission of “political opinion” from the Ontario Code as a ground of prohibited discrimination violates the Covenant. It contends that States parties may choose the method of implementing their obligations, and that domestic legislation need not exactly mirror them. Freedom of expression, which includes freedom of political opinion and belief, is constitutionally guaranteed by section 2 of the federal Charter, as well as the *Public Service Act* with respect to public servants.

4.6 Finally, with respect to the claim under article 2, the State party refers to the Committee’s constant jurisprudence that this article is of accessory nature only. In the absence of a violation of any other right, which the author has not made out, no separate issue thus arises under article 2.

Comments by the author on the State party’s submissions

5.1 By letter of 12 April 2002, the author commented on the State party’s submissions, rejecting the State party’s characterization of his complaint as unsubstantiated, in general, and the Court of Appeals’ findings, in particular. He argues that recent attempts on his part to secure before the courts the production of additional relevant documents from the Commission have been rebuffed.⁵ He argues that the “plain meaning” of the Commission’s decisions is that there had been differential treatment, but that jurisdiction was declined as “political belief” was not covered by the Ontario Code. The author argues that the Commission’s public record of the case is insufficiently complete, and that in any event does not fairly reflect the evidence. The author regards the Court of Appeals’ evidentiary findings in his case as “unwarranted and highly inappropriate”, and not based on the whole record. The author goes on to seek to distinguish the case law relied on by the State party from his case.

⁵ Stay of Application, dated 20 March 2002, Jazairi v Ontario Human Rights Commission, Ontario Superior Court of Justice. (Wilkins J)

5.2 The author argues, with reference to the Committee's approach to burden of proof, that it was incumbent on the State party to provide to the Committee "the entire investigative record, including all witness statements, legal opinions, and evaluations of documentary evidence by Commission staff and their notes of interviewing witnesses" in order to enable it to draw proper conclusions. He also invites the Committee to draw inferences from allegedly systematic practices of the Ontario Commission being "wholesale rejection of human rights complaints on the basis of inaccurate accounts of the events and facts and spurious arguments and considerations made 'behind closed doors'".

5.3 On the omission of "political opinion" from the Ontario Code, the author repeats his argument that the failure to list this ground is a manifest violation of article 26, where the State party has failed in its obligation to implement its obligation. He maintains that his criticisms on the interpretation of law by the courts are "serious, detailed and sustained", and refers to certain public criticism of the Court of Appeal's decision.

5.4 The author maintains his claims of "enforcement problems" in connection with article 2, as victims of discrimination in Ontario cannot bring a court action for discrimination but must file a complaint with the Commission. He claims that the unsatisfactory situation at the Commission he portrayed in his communication was that occurring at the time his complaint was considered by the Commission. Indeed, he argues that "same or similar enforcement problems of human rights legislation in Ontario are continuing and increasing". He also argues that the procedures are ineffective as legal costs make them prohibitively expensive. He argues that lodging and pursuing a complaint without a lawyer is "not a practical option", that legal aid is not available for complaints, that some costs awards by the courts are "unreasonable and could be punitive", and that deduction of legal costs for income tax purposes is not allowed. He further argues that the absence of a Commission facility of interim measures – which he wished to invoke following "escalating acts of reprisals" following filing of his complaint – is a violation of article 2, taken in conjunction with articles 19 and 26.

5.5 As to the State party's argument that section 3 of the *Charter* protects freedom of opinion and expression, the author argues that the Court of Appeal erred in holding that this ground need not be read into the Ontario Code as it was already protected in the Charter. He argues however that the Charter only protects against State action, and not that of entities such as universities. He also argues that the *Charter* protection is incomplete as it is expressed as being subject to reasonable limits, as shown by the alleged invocation thereof "by Jewish groups in many reported and unreported cases". He also argues that the *Public Service Act* does not apply to universities. As a result, the author claims he did not enjoy protection against private sector discrimination on the grounds of political opinion. He goes on to claim that the judge delivering the Court of Appeal's judgment "committed fundamental errors of law", thus bringing into question "the credibility of his entire legal reasoning".

5.6 The author argues that the evidentiary threshold for a claim under article 19 is lower than 26, and is also met in his case. He contends that the proper test is whether there is a restrictive effect on political opinion through its omission in the Ontario Code. As the result is an absence of protection against private sector discrimination on this ground, he claims a straightforward case is made out. In this case, he accordingly submits: "The author was punished in his employment by some of his Israeli and Jewish colleagues at York University

for holding and expressing particular opinions with which they did not agree. The employer York University failed him. The Ontario Human Rights Commission refused to protect him on jurisdictional grounds. The domestic courts agreed with the Commission.”

5.7 As a result of the foregoing, the author seeks declarations of violations of the Covenant, compensation for legal costs and appropriate compensation, including for lost salary.

Subsequent submissions of the parties

6.1 By letter of 31 July 2002, the author provided a first instance decision of the Prince Edward Island Supreme Court holding that political belief was an “analogous” prohibited ground of discrimination and should be fully available in provincial human rights legislation.⁶

6.2 By Note verbale of 5 December 2002, the State party made additional submissions, arguing that the author’s response made new claims not in the original submission, contained many anonymous or individual opinions which should not be given weight and continued in large part to challenge the interpretation of domestic law. The State party argues that after having received its submissions, the author then made his application to the Ontario Superior Court (see paragraph 5.1) to secure evidence to fill his “evidentiary gap” before the Committee. He did not bring these proceedings before his original case was heard, and thus should not be able – on principles of failure to exhaust domestic remedies – to argue that the court’s original decisions were wrong. Nor, at the time, did he challenge the sufficiency of the record before the courts. In any event, his new application has not been dismissed but only stayed in order to permit him to make a proper application under the *Freedom of Information and Privacy Act* which sets up a compulsory production process safeguarding third party interests. Moreover, the documents sought are irrelevant to the issues before the Committee.

6.3 The State party emphasizes that his challenge on the *Charter’s* protection – upon which the Supreme Court has yet to be presented with the proper concrete circumstances enabling it to pronounce – is hypothetical and abstract. The university senate made its decision on the author’s application for full professorship *without* consideration of the two impugned letters or his political belief. There is no contrary evidence.

6.4 The State party rejects any accusation of bias against the judge delivering the judgment of the Court of Appeal, contending that all applicable ethical principles were followed. It also states that the author at no point raised this issue before the domestic courts or the Canadian Judicial Council. As to the “reprisals” alleged by the author, the State party argues that the letter provided is a letter from the university indicating that the author refused to teach a course assigned to him as part of his normal teaching load. The State party has no knowledge of contractual disputes with the university, not a part of government, and submits these are of no relevance to the case. The State party rejects criticisms of the Ontario system of human rights adjudication, referring to commentators’ praise of its strengths. Finally, the State party states that the Prince Edward Island decision is under appeal, and points out that the court referred to the finding in the author’s case that “there was no evidence which showed his human dignity was even engaged, much less violated, or that his political views disintitiled him to consideration for promotion.”

⁶ Condon v Prince Edward Island [2002] P.E.I.J. No.56

6.5 By letter of 17 February 2003, the author responded, claiming that his motion for production of documents was not related to the substance of his claim before the Committee. In any case, he contends that pursuing his application under the Act would be unreasonably prolonged and would not be effective as the Commission seeks to rely on exemptions. He argues that as there were only questions of law before the appellate courts, he did not make arguments on sufficiency of facts. He goes on to refer to Pezoldova v Czech Republic⁷ as an instance where the Committee reviewed the domestic courts' decisions, and invites the Committee to do so in his case.

6.6 The author contends that his case also raises issues under the first sentence of article 14, paragraph 1, and article 14, paragraph 3(c), as the domestic courts' evaluations were manifestly arbitrary and amounted to a denial of justice, as remedies were ineffective, as the Ontario Commission refused to produce evidence and delays were undue. The author argues that the "reprisals" complaint is part of the evidence produced to show the ineffectiveness of domestic remedies, rather than being a substantive claim. Finally, he supports the more expansive reasoning of the Prince Edward Island court, in contrast to the Court of Appeal in his own case, and argues that in any event the fact of appeal does not justify Ontario's violation of his rights.

6.7 By further letter of 17 November 2003, the author supplies three decisions of provincial courts endorsing the holding of the Divisional Court in his case concerning the fact-finding expertise of human rights commissions and the appropriate level of deference.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 As to the claim under article 14, paragraphs 1 and 3(c), of the Covenant, the Committee observes that this issue was first raised in the author's penultimate supplementary submission to the Committee, and accordingly did not form part of the arguments which the State party's submissions were requested as to the admissibility and merits thereof. The author has not demonstrated why this claim could not have been raised at an earlier stage of the pleadings. In the Committee's view, it would thus be an abuse of process for this claim to be addressed and it is inadmissible under article 3 of the Optional Protocol.

7.3 Concerning the claim under article 50 of the Covenant, the Committee recalls that a substantive violation of the Covenant by a provincial authority engages the State party's international responsibility to the same degree as an act of its federal authorities. The Committee refers, however, to its constant jurisprudence that it is only with respect to articles in Part III of the Covenant, interpreted as appropriate in the light of the other provisions of the Covenant, that an individual communication may be presented to it. Accordingly, article 50 of the Covenant, by itself, cannot give rise to a free-standing claim that is independent of a substantive violation of the Covenant. In the Committee's view, therefore, this claim under article 50 is subsumed by the author's arguments on the substantive Covenant articles and is by itself inadmissible, for incompatibility with the provisions of the Covenant, under article 3 of the Covenant.

⁷ Case No 757/1997, Views adopted on 25 October 2002.

7.4 Turning to the major claim that the omission of political belief from the enumerated grounds of prohibited discrimination in the Ontario Code violates the Covenant, the Committee observes that an absence of protection against discrimination on this ground does raise issues under the Covenant.⁸ Moreover, the exclusion in the Ontario Code of political opinion as a prohibited basis of discrimination suggests that the State party may have failed to ensure that, in an appropriate case, there would be a remedy available to a victim of discrimination on political grounds in the field of employment. The Committee observes however that the Court of Appeal, having found that the author's views did not amount to a protected "creed", went on to conclude that even considering the matter in the light most favourable to the author, there was nothing on the record to suggest that the author's political beliefs had disentitled him to consideration for advancement in the Department of Economics. It is not for the Committee to substitute its views for the judgment of the domestic courts on the evaluation of facts and evidence in a case, unless the evaluation is manifestly arbitrary or amounts to a denial of justice. If a particular conclusion of fact is one that is reasonably available to a trier of fact on the basis of the evidence before it, *ipso facto* a showing of manifest arbitrariness or a denial of justice will not have been made out. In the Committee's view, the author has failed to discharge the burden of showing that the factual assessment of the domestic courts was thus flawed. In the light of this conclusion, the claim under article 26 concerning the absence of protection of political belief in the Ontario Code is rendered hypothetical. The claim is accordingly unsubstantiated and inadmissible under article 2 of the Optional Protocol.

7.5 As to the claims that the Commission, the Divisional Court at first instance and on appeal, and the Supreme Court committed fundamental errors of law, the Committee recalls its constant jurisprudence that the interpretation of domestic law is a matter for the domestic courts, unless the interpretation is manifestly arbitrary or amounts to a denial of justice. In the Committee's view, the author has not shown the exceptional circumstances necessary to make out such a claim. Accordingly, these claims are inadmissible, for lack of sufficient substantiation for purposes of admissibility, under article 2 of the Optional Protocol.

7.6 As to the general claims that the enforcement machinery of the Ontario scheme of human rights protection is flawed and fails to provide an effective remedy, the Committee recalls its constant jurisprudence that, in order to bring a claim, an individual must be personally and directly affected by the violations claimed. Accordingly, to the extent that the author argues that the scheme as a whole is in breach of the Covenant, this claim amounts to an *actio popularis* reaching beyond the circumstances of the author's own case. It is therefore inadmissible under article 1 of the Optional Protocol.

8. The Committee therefore decides:

- a) that the communication is inadmissible under articles 1, 2 and 3 of the Optional Protocol;
- b) that this decision shall be communicated to the author and to the State party.

[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.]

⁸ See Love et al. v Australia Case No 983/2001, Views adopted on 25 March 2003.

APPENDIX**Individual opinion of Committee members Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil and Mr. Rajsoomer Lallah
(dissenting)**

1. We agree, as the majority in the Committee does in the first two sentences in paragraph 7.4 of the Views, that the absence of protection from discrimination on the ground of political opinion in the Ontario Human Rights Code raises an issue under Article 26 of the Covenant.

2. The majority in the Committee then goes on to conclude that, in the light of the judgment of Ontario Court of Appeal, there was nothing to suggest that the author's political beliefs had disentitled him to consideration for advancement in the Department of Economics in which he held tenure as associate professor. We are quite unable to agree with the majority view in the Committee for a number of reasons.

3. Firstly, the conclusion of the majority of the Committee was clearly based, in our view, on an unfortunate confusion between a judicial review (an inherently limited administrative law recourse based on a mere application supported by affidavit evidence) and an ordinary action where the judgment is based on the evidence of witnesses, who are heard in court and are subject to cross-examination, from which the Court makes proper findings of fact. A judicial review does not purport to review the facts and is an extraordinary remedy in respect of which the Court has a discretion to grant or not to grant the remedy. This is well explained in the judgment of the Court of Appeal itself at [42] of the judgment quoting the following from Blake on Administrative Law in Canada 2nd ed. 1997:

“On judicial review there is no right to a remedy even if all the necessary criteria are met. A court may choose not to grant a remedy to an applicant who is otherwise entitled.”

It is to be noted that the proceedings before the Court of Appeal concerned the question whether the divisional court should or should not grant an order, by way of judicial review, against the Commission requiring it to appoint a Board of Enquiry pursuant to the Human Rights Code. The purpose of a Board of Enquiry must presumably be to enquire whether the complaint was substantiated or not. In this connection, the State party explains, as appears from paragraphs 4.4 of the Committee's Views, that the Commission's investigations were free and cases are referred to a Board of Enquiry if a settlement is not possible.

4. Secondly, the question of admissibility before the Committee must be determined not in the light of the complaint as made before a domestic court, but in the light of the complaint laid before the Committee and this complaint is well laid out in paragraphs 2.1 to 3.5 in the Committee's views. The facts averred manifestly show that the author has sufficiently substantiated his claim for the purposes of admissibility.

5. Thirdly, as appears from paragraph 2.3 of the Views, the allegations of the author, incidentally confirmed to be substantiated by the Court of Appeal in paragraph [15], setting out the Commission's conclusions, is to the effect that the Commission did find that (i) while

the evidence indicated that the author's application for promotion to full professorship did not receive a fair and timely evaluation, the irregularities committed did not appear to be related to any prohibited ground of discrimination and (ii) while the evidence indicated that the author might have been differently treated, there was insufficient evidence to indicate that this was the result of his creed rather than his political beliefs, the latter not being a prohibited ground of discrimination under the Ontario Code.

6. So what do we have? The law in Ontario does not hold political opinion to be a prohibited ground of discrimination. This constitutes a violation of article 26 of the Covenant and the Commission felt unable to interpret creed as including political opinion with the result that it was unable to grant the remedy which the author was seeking, that is to say, the appointment of a Board of Enquiry by the Commission.

7. Much can be said about where the burden of proof lies in situations where an employee claims that he has been discriminated against on a ground prohibited by article 26 of the Covenant. It seems to us that the author must at least substantiate in some measure his complaint as the author has undoubtedly done in this case. However, it is for the State party to disclose all the facts to show not merely negatively by a mere statement that the different treatment of the author was not due to discrimination on the ground of his political opinion but positively that he was found, for example, to be unfit for a specified reason, or that the record of his performance did not justify promotion at least at that stage, or for other justifiable reasons.

8. For the above reasons, we conclude that the author's complaint is, in the first place, admissible and that, secondly, he has been deprived of protection against discrimination on the ground of political opinion as guaranteed under Article 26 of the Covenant, because the Ontario Code does not grant him such protection. The Ontario Human Rights Commission and the Court could not, therefore, give him a remedy not provided by the Ontario Code. In accordance with Article 3, paragraph 2(a), of the Covenant, the State party should, in our view, grant to the author the remedy which he has been seeking since 1 July 1989.

[Signed] Christine Chanet
[Signed] Maurice Glèlè Ahanhanzo
[Signed] Ahmed Tawfik Khalil
[Signed] Rajsoomer Lallah

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]