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HUMAN RIGHTS COMMITTEE
Eighty- ninth session
12 – 30 March 2007

DECISION

Communication No. 1341/2005

Submitted by:	Ernst Zundel (represented by counsel, Barbara Kulaszka)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 January 2005 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 13 January 2005 (not issued in document form)
Date of adoption of decision:	20 March 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Holocaust denial, deportation of persons representing a threat to national security

Procedural issues: exhaustion of domestic remedies, abuse of the right of submission, inadmissibility *ratione materiae*

Substantive issues: arbitrary detention, detention conditions, fair hearing by a competent and impartial tribunal, presumption of innocence, undue delay, freedom of opinion and expression, discrimination, notion of "suit at law"

Articles of the Covenant: Articles 7; 9, paragraphs 1 and 3; 10; 14, paragraphs 1, 2, and 3; 18; 19 and 26

Articles of the Optional Protocol: 3 and 5, paragraph 2(b)

[ANNEX]

ANNEX

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

Eighty-ninth session

concerning

Communication No. 1341/2005**

Submitted by:	Ernst Zundel (represented by counsel, Barbara Kulaszka)
Alleged victim:	The author
State party:	Canada
Date of communication:	4 January 2005 (initial submission)

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

Meeting on 20 March 2007

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Ernst Zundel, a German citizen born in 1939, currently imprisoned in Germany after his deportation from Canada to Germany. He claims to be a victim of violations by Canada[1] of article 7; article 9, paragraphs 1 and 3; article 10; article 14, paragraphs 1, 2 and 3; article 18; article 19 and article 26 of the International Covenant on Civil and Political Rights. He is represented by counsel, Barbara Kulaszka.

1.2 On 10 January and 1 March 2005, the Special Rapporteur on New Communications and Interim Measures denied the author's requests for interim measures to prevent his deportation from Canada to Germany.

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, 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 and Ms. Ruth Wedgwood.

[1] The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

1.3 On 11 March 2005, the Committee's Special Rapporteur on New Communications decided to separate the consideration of the admissibility and merits of the communication.

The facts as presented by the author

2.1 The author lived in Canada for 42 years, from 1958 to 2000, as a permanent resident. In 1959 he married a Canadian and has two sons in Canada and several grandchildren. Towards the end of the 1960s, the author's application for Canadian citizenship was refused by the Minister for Immigration, without any reason being given to him. He has written and published materials from his own publishing company on what he describes as anti-German propaganda. In the 1980s, he published a booklet entitled "Did six million really die?", exploring the historical issue of the treatment of Jews during World War II by Germany, and expressing doubt that six million Jews were killed by the Nazis. It also questioned whether gas chambers ever existed in concentration camps such as Auschwitz and Birkenau. In 1984, he was privately charged by Sabina Citron, the head of the Canadian Holocaust Remembrance Association, with the criminal offence of spreading false news in this booklet. These proceedings were taken over by the Crown as a public prosecution.

2.2 According to the author in 1984, shortly before his trial began, a bomb exploded outside his house, damaging his garage. No-one was charged with this offence. He was beaten on the steps of the courthouse allegedly by members of a violent Jewish group when he appeared for court dates. No one was convicted for these attacks.

2.3 The author was convicted as charged and sentenced to fifteen months' imprisonment, plus three years' probation with the condition that he "not publish in writing or by speaking in public by word of mouth, directly or indirectly, in his name or in any other name, corporate or personal, anything on the subject of the Holocaust or on any subject related directly or indirectly to the Holocaust". The author appealed his conviction and was granted a new trial. In May 1988, he was convicted on the charge of spreading false news in the above-mentioned booklet and sentenced to nine months imprisonment. An appeal to the Ontario Court of Appeal was dismissed on 5 February 1990. However, on appeal to the Supreme Court of Canada, the author was acquitted in 1992, on the ground that the "false news" law was in violation of the author's guarantees to freedom of expression.

2.4 In 1993, the author applied for Canadian citizenship again. When this was revealed by the press, various newspaper stories and editorials demanded that he not be given citizenship because of his revisionist views. According to the author, in the spring 1994, several Marxist street groups attempted to drive him out of his neighbourhood. Pamphlets were distributed calling him a "hatemonger" and "white supremacist". Posters were put up across Toronto with his face in a "rifle sight", giving directions to his home and instructions on how to make Molotov cocktails. The author lodged complaints with the police but no investigation took place. On 14 April 1995, he received a razorblade attached to a mousetrap in his mail from the group called "Anti-Fascist Militia". The group warned that a bomb would be next. No one was charged in this context.

2.5 At the end of May 1995, a pipe bomb was mailed to the author. Suspicious of the parcel, he took it unopened to the police. Toronto police determined that it would have killed the person who

opened it and anyone else within 90 metres of the blast. The author implies that the Canadian Security Intelligence Service knew about the bomb. Although two men were charged in March 1998, they were not charged with attempted murder of the author. In 2000, all charges against the two men were stayed.

2.6 In August 1995, the author was given notice that his application for citizenship had been suspended as the Minister for Citizenship and Immigration was of the view that reasonable grounds existed to believe that he was a threat to Canada's national security. In October 1995, he received a Statement of Circumstances outlining why he was a threat to security. While he had never committed any violence himself, his status in the "right wing" meant that he might advocate others to do so in the future. In December 2000, the author withdrew his application for citizenship.

2.7 In 2000 the author left Canada, to live with his wife in the US. He was deported from the US to Canada on 19 February 2003, on grounds of irregularities in immigration proceedings. He claimed refugee status and was initially detained under section 55[2] of the Immigration and Refugee Protection Act (the Act). On 24 February 2003, the Refugee Protection Division was notified by the Citizenship and Immigration Canada that pursuant to section 103 (1) of the Act, the Division was required to suspend consideration of the refugee claim on the grounds that the author's case had been referred to the Immigration Division for a determination on inadmissibility on grounds of national security.

2.8 The author has had a series of detention review hearings pursuant to section 58 of the Act. In each of these hearings, it was held that the Minister was taking steps to inquire whether reasonable grounds existed that the author was a threat to national security.

2.9 On 1 May 2003, the Minister of Citizenship and Immigration and the Solicitor General of Canada (the Ministers) issued a certificate finding the author to be inadmissible to Canada on grounds of security, under section 77 of the Act[3]. He was served with an arrest warrant, under section 82 of the Act[4], while detained at Niagara Detention Centre. The matter was referred to the Federal Court of Canada for a review of the reasonableness of the security certificate and a review of the need for the author's continued detention, pending the outcome of security certificate reasonableness determination. Pursuant to section 77 of the Act, the Court reviewed the information

[2] Section 55(1) states: An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the offer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing or removal from Canada.

[3] Section 77(1): "The Minister and the Solicitor General of Canada shall sign a certificate stating that a permanent resident or a foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and refer it to the Federal Court, which shall make a determination under section 80."

[4] Section 82(1): "The Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77(1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal."

Ministers *in camera* and determined that portions of the information should not be disclosed, as its disclosure would harm national security. On 5 May 2003, the Court ordered that the author be provided with a "Statement Summarizing the Information and Evidence" (the Summary), outlining the author's position in the white supremacist movement and his contact with its members and other right-wing extremists. In addition to the Summary, the Ministers provided the author with a Reference Index containing more than 1600 pages of unclassified documents that support the information provided in the Summary.

2.10 On 6 May 2003, the author filed a Notice of Constitutional Question with the Federal Court of Canada. The Notice indicated that he would challenge the constitutionality of the security certificate scheme for non-compliance with the Canadian Charter of Rights and Freedoms (the Charter). In 2003, he also challenged his detention before the Ontario Superior Court of Justice for a writ of *habeas corpus,* at the same time as he challenged the constitutional validity of the Act. On 14 October 2003, he foreclosed the Federal Court's consideration of his constitutional challenge by withdrawing his Notice of Constitutional Question. On 25 November 2003, the Superior Court declined to hear the application on grounds that it was an attempt to bypass the comprehensive statutory scheme and usurp a process already underway, and that the constitutional arguments were already before the Federal Court. This decision was confirmed on appeal on 10 May 2004 by the Ontario Court of Appeal and 21 October 2004 by the Supreme Court.

2.11 With reference to the review of the certificate proceedings, the author submits that "secret" evidence was submitted against him, to which neither he nor his lawyer had access. No witnesses were called against him during the hearing and the only evidence against him consisted of 5 volumes mainly of newspaper articles, other media articles, website printouts, extracts from books and similar materials written by people who the Ministers failed to call as witnesses. Unsuccessful motions were brought to have the Presiding Judge of the Federal Court (the Presiding Judge) step down from the case because of bias, including the fact that he was the former Solicitor General who was in charge of the Canadian Security Intelligence Service (CSIS), the organisation providing all the evidence against the author during the time period in question. On the last of these motions, the Federal Court of Appeal held, on 23 November 2004, that he had fallen short of meeting the high threshold required to establish a reasonable apprehension of bias. At the time of the author's and State party's submissions, the author was still awaiting a decision of the Supreme Court of Canada as to whether it would hear an appeal of this decision (see paragraph 4.18 below on the Supreme Court's decision).

2.12 On 21 January 2004, the judge presiding at the security certificate and detention review hearing ordered the author's detention to continue, as he was found to present a danger to national security. The Court found that the author was directly involved with and had consulted a number of individuals who were within "the violent racist and extremist movement." Despite the author's contention that his involvement was limited to a general interest in their ideas, the Court found the author had dealt with these individuals to a great extent and in some cases, had funded their activities. The Court determined that the Ministers had met the test for establishing reasonable grounds to believe that the author was a danger to national security, warranting his continued detention. The Presiding Judge refused to grant bail although the author is not violent. The author contends that he is not entitled under the Act to any appeal against the decision of the Presiding Judge to deny him bail.

2.13 On 24 November 2004, the author filed a Statement of Claim in the Federal Court, claiming that the provisions of the Act under which he was detained violated sections 7, 9 and 10(c)[5] of the Charter, and that his detention in solitary confinement, while the Federal Court was reviewing the reasonableness of the security certificate, was unlawful and unconstitutional.

2.14 The hearing of the reasonableness of the security certificate was completed on 4 November 2004. The Federal Court upheld the reasonableness of the security certificate in reasons issued on 24 February 2005. It found that the evidence in support of the certificate conclusively established that the author was a danger to the security of Canada. The author took no further legal steps to prevent the deportation made possible by the Federal Court's decision, and was deported from Canada to Germany on 1 March 2005, where he was promptly arrested on charges of publicly denying the Holocaust. On 14 February 2007, the Regional Court of Mannheim convicted the author of incitement to racial hatred and for denial of the Shoah, and sentenced him to five years imprisonment.

The complaint

3.1 The author claims violation of articles 7 and 10 due to his prolonged detention from February 2003 to March 2005and his conditions of detention. He complains that he suffers from depression as a result of his prolonged detention in solitary confinement. He also complains that: he is not allowed to have a chair in his cell; he is not allowed to wear shoes; lights are on 24 hours a day in his cell and only dimmed slightly at night; he is not allowed to use a pen, only a pencil stub; he is not allowed to take his herbal medicines for his arthritis and high blood pressure; his request to see a dentist was ignored for one year; he is only allowed ten minutes a day outside and has no access to any gym or other facilities for walking or exercising; the cell in winter is cold, so that he has to wrap himself in sheets and blankets; the food is always cold and of poor quality; mail is often withheld for weeks; there are numerous unnecessary strip searches; he suffers from a "mass" in his chest which "may or may not be" cancerous. Despite being aware of this condition for over a year, the authorities refused to grant him bail.

3.2 The author claims a violation of article 9, paragraph 1, because of the failure of the State party to ensure the security of his person, in particular, because of the failure to investigate and prosecute the numerous threats and attacks on his person and property outlined above.

3.3 He claims a violation of article 9, paragraph 3, because of his alleged arbitrary and prolonged detention and because of the denial of bail. Although he was detained under national security legislation, he has never been informed of the "real" case against him. According to counsel, the

[5] Section 7 of the Charter: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
Section 9: "Everyone has the right not to be arbitrarily detained or imprisoned."
Section 10: "Everyone has the right on arrest or detention (a) to be informed promptly of the reasons therefore; (b) to retain and instruct counsel without delay and to be informed of that right; and (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful."

government has admitted that the case against him does not prove that he is a threat to national security. Thus, it is in the secret proceedings that the real case against him is being presented to the judge without the author being privy to this information or given an opportunity to contest it. The detention hearing was not considered in a timely manner and it took eight months to decide to refuse bail. Bail was refused even though he is not violent, has no criminal record in Canada and has a record of fulfilling all bail conditions imposed on him from 1985 to 1992 during criminal proceedings then in process. There is no appeal procedure to question the denial of bail.

3.4 The author claims a violation of article 14, paragraph 1, as he was denied a prompt and fair hearing before a competent and impartial tribunal. He further claims a violation of article 14, paragraph 2, because he was not presumed innocent. The proceedings against him are not criminal but are under national security legislation. He is charged with no offence but classified as "engaging in terrorism", "being a danger to the security of Canada", "engaging in acts of violence that would or might endanger the lives or safety of person in Canada", and "being a member of an organisation that there are reasonable grounds to believe engages, has engaged or will engage" in the above-noted acts. He faces deportation to Germany, where he may face further prosecution for offences not applicable in Canada. He claims that he should be presumed innocent and afforded due process and that the government should be required to prove its case beyond mere reasonableness. Finally the author claims a violation of article 14, paragraph 3, because of undue delay in bringing the case to trial, and a violation of all rights of due process and fair hearing as he reasonably assumes that the Presiding Judge of the Federal Court is biased against him, as the former Solicitor General of Canada and had direct ministerial responsibility for CSIS in 1989, within the time frame during which the author became an alleged security threat.

3.5 The author claims a violation of articles 18 and 19, because in his view his detention is based on his opinions on historical matters and because of his expression of such opinions. He is classified as a national security threat because of what he allegedly might say in the future and what others might do who listen to him and read his materials. He has never been violent. Although the State party may not like his historical views, he has never been charged with inciting hatred against Jews or any other group in Canada, notwithstanding the efforts by many groups to have such charges laid against him. He claims that he is being held under national security allegations based solely on his belief that there are numerous aspects of the established historiography on the fate of the Jews during World War II that require further research and revision, and on his work in sharing that information with others. He argues that this is the type of activity that articles 18 and 19 are designed to protect, and that the national security charges against him are politically motivated and arbitrary, in violation of these articles.

3.6 Finally, he claims a violation of article 26, because over the years he has not been treated equally by the Canadian authorities, and has been subjected to discrimination and denied citizenship because of his historical and political opinions. Repeated complaints and prosecutions were made regarding the same publications including "Did Six Million Really Die?" These prosecutions were conducted under various statutes dealing with mail, crimes, human rights and national security, but all had the purpose of persecuting the author for his lawful opinions regarding World War II. The State party allegedly used the claim that he was a threat to the security of Canada to refuse his application for citizenship, thereby applying national security provisions in a discriminatory manner.

3.7 On the issue of exhaustion of domestic remedies, with reference to the proceedings pending in the Federal Court challenging his detention and the constitutionality of the legislation, the author claims that the case could take up to five years to be heard and argues that the pursuit of domestic remedies would be unreasonably prolonged. He adds that his detention is unlimited, because in the event the certificate was quashed as unreasonable, the Crown may issue a new certificate and start the entire process again.

3.8 The author claims not to have submitted his complaint to any other international procedure of investigation or settlement.

The State party's observations

4.1 On 9 March 2005, the State party challenged the admissibility of the communication on three grounds: non-exhaustion of domestic remedies, inadmissibility *ratione materiae* with respect to the claims under articles 9 and 14, and abuse of the right to submission with respect to the claims under article 9, paragraph 1.

4.2 The State party submits that the author is a leader of the white supremacist movement, with a long and notorious history in Canada. He has had associations with, and exercises influence over, influential and violent individuals and organizations within the white supremacist movement, both nationally and internationally, who have propagated violent messages of hate and advocated the destruction of governments and multicultural societies. His status in the white supremacist movement is such that adherents are inspired to actuate his ideology. The State party believes that the author is engaged in the propagation of serious political violence to a degree commensurate with those who execute the acts. On this basis, it contends that the author is indeed a danger to the State party's national security and a threat to the international community, which justifies his deportation.

4.3 The State party points out that the hearing of evidence into the reasonableness of the security certificate and the need for ongoing detention occurred on various dates in 2003 and 2004. In 2003 in particular, the hearing was prolonged due to the repeated unavailability of author's counsel. The hearing was also interrupted several times by the author's last minute motions, including to have the presiding judge recuse himself for alleged bias, which all failed.

4.4 On admissibility, the State party submits that the author has failed to show that the availability of any domestic remedies would be unreasonably prolonged. The State party refers to the Committee's jurisprudence that seeking redress for alleged violations of rights and freedoms, like those guaranteed under the Charter and other public law remedies, via the normal judicial process would not be unreasonably prolonged within the meaning of article 5(2)(b) of the Optional Protocol.[6] It further submits that the author has failed to exhaust available remedies and that he has implicitly admitted that he has not done so.

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[6] The State party refers to Communication No. 67/1980, *E.H.P.* v. *Canada,* decision of 27 October 1982, para.8; Communication No. 358/1989, *R.L. et al.* v. *Canada*, decision of 5 November 1991, para.6.4; Communication No.228/1987, *C.L.D.* v. *France*, decision of 18 July 1988, para.5.3; and Communication No. 296/1988, *J.R.C.* v. *Costa Rica*, decision of 30 March 1989, para.8.3.

4.5 On the claims under article 7 and 10, the State party indicates that the Charter guarantees that conditions of detention respect the dignity of detainees. The author could have challenged his conditions of detention under any of Sections 2, 7, 8, 10 and 12 of the Charter. In addition, other more particular legal rules governed the author's detention, the enforcement of which by a domestic court through judicial review could have provided a remedy to the type of complaints made by the author.[7]

4.6 On the author's claims under article 9, paragraphs 1 and 3, relating to his detention, the State party submits that the author has initiated domestic legal proceeding based on the Charter, alleging essentially the same complaints that he raises under article 9 in the present communication. The author's constitutional action before the Federal Court of Canada alleges that the national security certificate process as applied to the author violates sections 7, 9 and 10(c) of the Charter. As in this communication, the author alleges Charter violations based on the non-disclosure of all of the evidence against him, the duration of his detention, and the promptness and fairness of the hearing. In light of available domestic remedies, which are actually being pursued by the author, the State party submits that this portion of the communication is inadmissible for failure to exhaust domestic remedies.

4.7 On the author's claim under article 9, paragraph 1, relating to alleged violations arising from incidents dating from 1984 to 1995, the State party contends that the author has failed to demonstrate that he ever attempted to pursue domestic remedies that would have been available to redress any proven misconduct by law enforcement officials and/or Crown prosecutors. Various judicial remedies were and are potentially available to the author, including judicial review for *mala fides*, bias, flagrant impropriety, abuse of power, etc., and actions based on the Charter. Additionally, administrative complaint procedures could have provided effective remedies, but the author has not apparently pursued such remedies either. The author makes no claim to have pursued such remedies in relation to the law enforcement agencies that he seeks to impugn. Still in relation to the claim under article 9, paragraph 1, the State party adds that the author did not act diligently in presenting his claims that it failed to protect his security by not investigating and prosecuting alleged attacks made against him and his property between 1984 and 1995. For the State party, a delay of ten to twenty years without reasonable justification renders this claim inadmissible as an abuse of the right of submission.[8]

4.8 On the author's claims under article 14, paragraphs 1 to 3, the State party indicates that the author has initiated domestic proceedings before the Federal Court of Canada alleging essentially the same complaints that he raises in this communication pursuant to article 14.[9] One action relates to

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[7] See sections 28 and 33-34 of the *Ministry of Correctional Services Act,* R.R.O. 1990 Reg. 778, which provides an avenue for inmates held in Ontario facilities, as was the author, to complain about their treatment.

[8] See Communication No. 787/1997, *Gobin* v. *Mauritius*, Views adopted on 16 July 2001, para.6.3.

[9] Although the author has now been deported from Canada, this fact does not preclude him in law from continuing with his action, nor does it necessarily deprive him of a meaningful remedy if he ultimately proves successful. Pursuant to s. 24(1) of the Charter and s. 52 of the Constitution Act, 1982, Canadian courts have robust powers to remedy any constitutional wrongs.

the alleged bias of the judge presiding over the reasonableness of the national security certificate and the ongoing reviews of his detention[10], while the other challenges the constitutionality of the national security certificate process as it applies to the author. In this constitutional challenge, the author makes claims under sections 7, 9 and 10(c) of the Charter, in relation to the promptness and fairness of the hearing, including matters of standard of proof, disclosure of evidence and procedural rights, and in relation to the duration and lawfulness of his continued detention. Given available domestic remedies, which are actually and still being pursued by the author, the State party considers that this portion of the case is inadmissible for failure to exhaust domestic remedies.

4.9 As to the author's claims under articles 18 and 19 of the Covenant, the State party argues that section 2 of the Charter protects freedom of conscience, thought, opinion and expression, limited consistently with the terms of articles 18 and 19 of the Covenant where the needs of a free and democratic society so require. The author has failed to pursue this potential domestic remedy, and so this portion of his claim is also inadmissible.

4.10 On the discrimination claim under article 26, the State party indicates that section 15 of the Charter guarantees to everyone the right to equality without discrimination. It refers to the Committee's earlier decision in a case about the author[11], and recalls that failure to pursue a section 15 claim domestically in relation to a particular discrimination complaint makes that complaint inadmissible before the Committee.

4.11 The State party argues that the author has failed to substantiate his claims. In relation to his claim under article 9, it points out that it relates to his detention as a threat to national security and refers to the Committee's jurisprudence that there is nothing arbitrary, *ipso facto*, about detention of an alien based on the issuance of a security certificate provided for by law[12]. For the State party, the communication clearly discloses that the author knows why he was detained pursuant to the Act, and knows the applicable legal standards that governed his detention and ultimate deportation. He had ample opportunity to make arguments before various courts and judges concerning the lawfulness of his continued detention, and to make arguments against the finding by the Ministers that he represents a threat to national security. By the express terms of the Act, as a permanent resident of Canada the author was entitled to have his detention reviewed at least every six months.[13] In the author's case, reviews did not lead to his release because he was repeatedly found to be a danger to national security. However, reviews are meaningful and can help to secure release from detention. The State party thus argues that this claim is incompatible *ratione materiae* with the Covenant.

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[10] At the time of the State party's submissions, the author's latest attempt to have the Presiding Judge removed for bias was still pending before the Supreme Court of Canada, which was to decide whether to grant leave to appeal. Leave to appeal was denied on 25 August 2005.

[11] Communication No. 953/2000, *Zündel* v. *Canada*, inadmissibility decision of 27 July 2003, para.8.6.

[12] Communication No. 1051/2002, *Ahani* v. *Canada*, Views adopted on 29 March 2004, para.10.2. See also Communication No. 236/1987, *V.M.R.B.* v. *Canada*, inadmissibility decision of 18 July 1988, para.6.3.

[13] See Immigration and Refugee Protection Act, section 83(2)

4.12 On the claims under article 14, the State party submits that deportation proceedings do not involve either the determination of a criminal charge or rights and obligations in a suit at law, but are in the nature of the administration of public law. With respect to the "criminal charge" aspect of article 14, it claims that deportation proceedings are even less connected to the determination of a criminal charge than extradition proceedings, which the Committee has viewed as not falling within the scope of article 14.[14] Consequently, the State party submits that those of the author's claims that relate specifically to paragraphs 2 and 3 of article 14 are inadmissible as incompatible *ratione materiae* with the Covenant.

4.13 With respect to the "suit at law" aspect of article 14, the State party reiterates its arguments in *V.R.M.B.* v. *Canada*[15], that deportation proceedings are neither a determination of a "criminal charge" nor the determination of "rights or obligations in a suit at law". Rather, deportation proceedings are in the realm of public law and involve the State's ability to regulate citizenship and immigration. The Committee declined to express its view as to whether a deportation proceeding is a "suit at law" in that case, as well as in *Ahani* v. *Canada*, another case involving deportation proceedings of a person representing a threat to national security.[16]

4.14 The State party argues that, given the equivalence of article 6 of the *European* Convention and article 14 of the *Covenant*, the European Court's case law is persuasive that the deportation proceedings challenged by the author are not encompassed by article 14 of the *Covenant.* In this respect, it refers to the case of *Maaouia* v. *France*[17], where the European Court held that the decision of whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him, within the meaning of article 6, paragraph 1, of the European Convention.[18]

4.15 Subsidiarily, the State party submits that the author has failed to substantiate that the security certificate and detention reviews were conducted other than in full accordance with article 14. The author's deportation, predicated on Canada's reasonable belief that he is a threat to national security, proceeded according to Canadian law in a fair and impartial manner affording the author the assistance of legal counsel and the opportunity to challenge evidence, including by way of examination of a representative of the CSIS. To the extent that the author was restricted in his ability to challenge all the evidence against him, this was done for national security reasons,[19] in

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[14] Communication No. 1020/2001, *Cabal and Bertran* v. *Australia*, Views adopted on 7 August 2003, para.7.6; and Communication No. 961/2000, *Everett* v. *Spain,* para.6.4.

[15] Communication No. 236/1987, *V.M.R.B.* v. *Canada*, Views adopted on 18 July 1988.

[16] Communication No. 1051/2002, *Ahani* v. *Canada*, Views adopted on 29 March 2004, para.10.5.

[17] *Maaouia* v. *France*, application no. 39652/98, decision rendered by the European Court of Human Rights on 5 October 2000.

[18] The State party refers to more than ten decisions of the European court supporting this statement, and provides copies of all of them in its annexes. These include the cases of *Elvis Jakupovic* v. *Austria*, application no. 36757/97, judgment of the European Court of Human Rights on 15 November 2001; and *Veselin Marinkovic* v. *Austria*, application no. 46548/99, judgment of the European Court of Human Rights of 23 October 2001.

[19] See Immigration and Refugee Protection Act, Division 9: "Protection of Information".

accordance with Canadian law which the Committee has viewed as satisfactory,[20] and which is consistent with the Covenant (article 13).

4.16 The State party submits that there was no bias with respect to the author's deportation proceedings. The domestic courts properly weighed the factual record and the applicable legal principles in rejecting the author's bias allegations. The State party invokes the Committee's established jurisprudence in this regard.[21] No case of arbitrariness and bias in evaluation of evidence can be made out by the author, let alone in a *prima facie* way. The State party submits that any article 14 claim based on allegations of bias is inadmissible pursuant to article 3 of the Optional Protocol.

4.17 On 16 September 2005, the State party informed the Committee that on 25 August 2005, the Supreme Court of Canada denied the author leave to appeal from the decision of the Federal Court of Appeal of 23 November 2004. The State party indicates that this decision does not affect its position that the communication is inadmissible, in particular with regard to the alleged bias of the judge presiding at the security certificate review hearing.

Authors' comments

5. On 3 November 2005, the author indicated that he wished to maintain his communication, but did not comment on the State party's observations.

Issues and proceedings before the Committee

6.1 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 it is admissible under the Optional Protocol.

6.2 The Committee notes that the State party challenges the totality of the communication. In respect of the author's claims under article 7 and 10 related to his conditions and length of detention, the State party contends that the author could have pursued remedies for violations of the Canadian Charter, in particular under section 12, according to which "Everyone has the right not to be subjected to any cruel or unusual treatment or punishment". In addition, the author could have complained about his detention conditions under the Ministry of Correctional Services Act, in particular under sections 28 on inmate complaints[22] and section 34 relating to segregation. In the absence of any comments or objection from the author, who filed a constitutional action under other sections of the Charter, the Committee concludes that this part of the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol, for failure to exhaust domestic remedies.

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[20] Communication No. 1051/2002, *Ahani* v. *Canada*, Views adopted on 29 March 2004, para.10.5.

[21] See e.g., Communication No. 1188/2003, *Riedl-Riedstein et al.* v. *Germany*, decision of 2 November 2004, para.7.3.

[22] Section 28: "Where an inmate alleges that the inmate's privileges have been infringed or otherwise has a complaint against another inmate or employee, the inmate may make a complaint in writing to the Superintendent."

6.3 With regard to the author's claims under article 9, paragraphs 1 and 3, because of his alleged arbitrary and prolonged detention and the denial of bail, the Committee notes that the author has introduced a constitutional action in the Federal Court of Canada, claiming that the national security certificate process applied to him violates sections 7, 9 and 10 (c) of the Charter. The Committee further notes that these sections, which deal with liberty, arbitrary detention and review of the validity of detention, cover in substance the author's claims of arbitrary and prolonged detention and denial of bail under article 9 of the Covenant. It observes that these proceedings remain pending. The Committee has taken note of the author's contention that the application of this remedy would be unduly prolonged. It observes that the author filed this action on 24 November 2004. At the time of the consideration of the communication, a little over two years had lapsed since the initial action. The author has not demonstrated why he believes that a constitutional challenge could take up to five years to be considered. In the circumstances, the Committee does not find that a delay of two years to consider a constitutional action is unduly prolonged. In view of the pending constitutional challenge, the Committee concludes that the author has failed to exhaust domestic remedies on these claims. Accordingly, this part of the communication is inadmissible pursuant to article 5, paragraph 2(b), of the Optional Protocol.

6.4 The claim under the same article that the author was not informed of the "real case" against him, with reference to the *in camera hearings*, appears to relate to, and is more appropriately dealt jointly with, the author's claims under article 14.

6.5 On the claim under article 9, paragraph 1, of an alleged failure of the State party to ensure the security of the author, the State party claims that this part of the communication constitutes an abuse of the right of submission. The Committee recalls that there are no fixed time limits for submission of communications under the Optional Protocol and that mere delay in submission does not of itself involve abuse of the right of communication[23]. However, in certain circumstances, the Committee expects a reasonable justification for such a delay. The alleged attacks against the author occurred between 1984 and 1995, i.e. twelve to twenty-three years ago. The Committee notes that the author has availed himself of the procedure under the Optional Protocol twice before, but that he did not take this opportunity to file such a claim before. In the absence of any justification of such a delay, the Committee considers (French: le Comité estime…) that submitting the communication after such a time lapse should be regarded as an abuse of the right of submission. It finds that this part of the communication is inadmissible under article 3 of the Optional Protocol.

6.6 With regard to the author's claims under article 14, the Committee has noted the State party's contention that a constitutional action based on sections 7, 9 and 10(c) of the Charter was still pending in the Federal Court. However, as noted above, those sections of the Charter relate to detention issues, and not to issues of fairness and impartiality of hearings, which are covered by article 14 of the Covenant. The Committee observes that, in his Statement of Claim for constitutional action, the author challenged not only his detention, but also the entire process governing the determination of whether the security certificate is reasonable. However, the Committee considers that the guarantees under article 14 of the Covenant are substantively different from those protected

[23] Communication No. 787/1997, *Gobin* v. *Mauritius*, inadmissibility decision of 16 July 2001, para.6.3.

by article 9 of the Covenant, which in turn provides similar protection to the one provided by sections 7, 9 and 10(c) of the Charter. It concludes that a pending constitutional action under articles 7, 9 and 10(c) of the Charter does not preclude the Committee from examining claims under article 14 of the Covenant. In addition the proceedings relating to the alleged bias of the Presiding Judge were concluded on 25 August 2005, when the Supreme Court denied the author's leave to appeal from the Federal Court of Appeal's decision. The State party has not mentioned other remedies which could have been pursued by the author with respect to his claims under article 14. The Committee concludes that the author has exhausted domestic remedies in relation to claims under article 14, and that the communication is not inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.7 The Committee has noted the State party's argument that deportation proceedings do not involve either "the determination of any criminal charge" or "rights and obligations in a suit at law". It observes that the author has not been charged or convicted for any crime in the State party, and that his deportation is not a sanction imposed as a result of criminal proceedings. The Committee concludes that proceedings relating to the determination of whether a person constitutes a threat to national security, and his or her resulting deportation, do not relate to the determination of a "criminal charge" within the meaning of article 14.

6.8 The Committee recalls, in addition, that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties[24]. In the present case, the proceedings relate to the right of the author, who was a lawful permanent resident, to continue residing in the State party's territory. The Committee considers that proceedings relating to an alien's expulsion, the guarantees of which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author, who was found to represent a threat to national security, do not fall within the scope of article 14, paragraph 1, and are inadmissible *ratione materiae,* pursuant to article 3 of the Optional Protocol.

6.9 As regards the claim under articles 18 and 19, the Committee observes that the author has not availed himself of the remedy offered by the Canadian Charter, under section 2, according to which "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." This part of the communication is thus inadmissible under article 5, paragraph 2(b), for failure to exhaust domestic remedies.

6.10 The Committee reaches the same conclusion with respect to the author's claim under article 26, as he has failed to pursue any remedy under section 15 of the Charter, which reads: "Every

[24] Communication No. 112/1981, *Y.L. v. Canada*, inadmissibility decision adopted on 8 April 1986, para.9.1 and 9.2; Communication No.441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para.5.2; Communication No. 1030/2001, *Dimitrov v. Bulgaria*, decision on admissibility adopted on 28 October 2005, para.8.3.

individual is equal before and under the law and has the right to the 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." Although "discrimination on political or other opinion", which is explicitly referred to in article 26 of the Covenant, is not listed in Section 15 of the Charter[25], the list is preceded and qualified by the terms "in particular", which suggests that the list is not exhaustive. The author could therefore have availed himself of this remedy and once more has failed to fulfil the requirements under article 5, paragraph 2(b), of the Optional Protocol.

7. The Committee therefore decides:

a) That the communication is inadmissible under articles 3 and 5, paragraph 2(b), of the Optional Protocol;

b) That this decision shall be communicated to the State party and to the author, through counsel.

[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.]

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[25] Section 15, of the Charter : «**15**(1) Every individual is equal before and under the law and has the right to the 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.»