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Eightieth session
15 March - 2 April 2004

VIEWS

Communication No. 1051/2002

Submitted by:	Mansour Ahani (represented by counsel, Ms. Barbara L Jackman)
Alleged victim:	The author
State party:	Canada
Date of communication:	10 January 2002 (initial submission)
Document references:	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 11 January 2002 (not issued in document form)
Date of adoption of Views:	29 March 2004

On 29 March 2003, the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1051/2002. The text of the Views is appended to the present document.

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eightieth session

concerning

Communication No. 1051/2002[**]

Submitted by:	Mansour Ahani (represented by counsel, Ms. Barbara L. Jackman)
Alleged victim:	The author
State party:	Canada
Date of communication:	10 January 2002 (initial submission)

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

Meeting on 29 March 2004,

Having concluded its consideration of communication No. 1051/2002, submitted to the Human Rights Committee on behalf of Mansour Ahani under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

[**] 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 Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, 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 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

Two separate individual opinions signed by Mr. Nisuke Ando and Ms. Christine Chanet and one combined dissenting opinion signed by Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Roman Wieruszewski are appended to the present document.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, initially dated 10 January 2002, is Mansour Ahani, a citizen of the Islamic Republic of Iran ('Iran') and born on 31 December 1964. At the time of submission, he was detained in Hamilton Wentworth Detention Centre, Hamilton Ontario, pending conclusion of legal proceedings in the Supreme Court of Canada concerning his deportation. He claims to be a victim of violations by Canada of articles 2, 6, 7, 9, 13 and 14 of the International Covenant on Civil and Political Rights. The author is represented by counsel.

1.2 On 11 January 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party, in the event that the Supreme Court's decision expected the same day would permit the author's deportation, "to refrain from deportation until the Committee has had an opportunity to consider the allegations, in particular those that relate to torture, other inhuman treatment or even death as a consequence of the deportation". By Note of 17 May 2002, the Committee, having been informed by counsel of a real risk that the State party would not comply with the Committee's request for interim measures of protection, reiterated its request. On 10 June 2002, the State party deported the author to Iran.

The facts as submitted by the author

2.1 On 14 October 1991, the author arrived in Canada from Iran and claimed protection under the Convention on the Status of Refugees and its Protocol, based on his political opinion and membership in a particular social group. He contended, on various occasions, that he had been beaten by members of the Islamic Revolutionary Committee in Iran for being intoxicated, (ii) that his return to Iran would endanger his life due to his knowledge of Iranian covert operations and personnel, knowledge which he had acquired as a forced conscript in the foreign assassins branch of the Iranian Foreign Ministry, (iii) that he had been jailed for four years as a result of refusing to carry out a drug raid which was in fact a raid on the home of an Iranian dissident, with women and children, in Pakistan, and (iv) that he had been released after pretending to repent. On 1 April 1992, the Immigration and Refugee Board determined that the author was a Convention refugee based on his political opinion and membership in a particular social group.

2.2 On 17 June 1993, the Solicitor-General of Canada and the Minister of Employment & Immigration, having considered security intelligence reports stating that the author was trained to be an assassin by the Iranian Ministry of Intelligence and Security ("MIS"), both certified, under s40(1) of the *Immigration* Act ("the Act"), that they were of the opinion that the author was inadmissible to Canada under section 19(1) of the Act as there were reasonable grounds to believe that he would engage in terrorism, that he was a member of an organization that would engage in terrorism and that he had engaged in terrorism. On the same date, the certificate was filed with the Federal Court, while the author was served with a copy of the certificate and, pursuant to section 40(1)(2)(b) of the Act, he was taken into mandatory detention, where he remained until his deportation nine years later.

2.3 On 22 June 1993, in accordance with the statutory procedure set out in section 40(1) of the Act for a determination of whether the Ministers' certificate was "reasonable on the basis of the information available", the Federal Court (Denault J) examined the security

intelligence reports *in camera* and heard other evidence presented by the Solicitor-General and the Minister, in the absence of the plaintiff. The Court then provided the author with a summary of the information, required by statute to allow the affected person to be "reasonably" informed of the circumstances giving rise to the certification while being appropriately redacted for national security concerns, and offered the author an opportunity to respond.

2.4 Rather than exercising his right to be heard under this procedure, the author then challenged the constitutionality of the certification procedure and his detention subsequent to it in a separate action before the Federal Court. On 12 September 1995, the Federal Court (McGillis J) rejected his challenge, holding that the procedure struck a reasonable balance between competing interests of the State and the individual, and that the detention upon the Ministers' certification pending the Court's decision on its reasonableness was not arbitrary. The author's further appeals against that decision were dismissed by the Federal Court of Appeal and the Supreme Court on 4 July 1996 and 3 July 1997, respectively.

2.5 Following the affirmation of the constitutionality of the section 40(1) procedure, the Federal Court (Denault J) proceeded with the original reasonableness hearing, and, following extensive hearings, concluded on 17 April 1998 that the certificate was reasonable. The evidence included information gathered by foreign intelligence agencies which was divulged to the Court *in camera* in the author's absence on national security grounds. The Court also heard the author testify on his own behalf in opposition to the reasonableness of the certificate. The Court found that there were grounds to believe that the author was a member of the MIS, which "sponsors or undertakes directly a wide range of terrorist activities including the assassination of political dissidents worldwide". The Federal Court's decision on this matter was not subject to appeal or review.

2.6 Thereafter, in April 1998, an immigration adjudicator determined that the author was inadmissible to Canada, and ordered the author's deportation. On 22 April 1998, the author was informed that the Minister of Citizenship & Immigration would assess the risk the author posed to the security of Canada, as well as the possible risk that he would face if returned to Iran. The Minister was to consider these matters in deciding under section 53(1)(b) of the Act[1] (which implements article 33 of the Convention on the Status of Refugees) whether the prohibition on removing a Convention refugee to the country of origin could be lifted in the author's case. The author was accordingly given an opportunity to make submissions to the Minister on these issues.

2.7 On 12 August 1998, the Minister, following representations by the author that he faced a clear risk of torture in Iran, determined, without reasons and on the basis of a memorandum attaching the author's submissions, other relevant documents and a legal

[1] Section 53(1)(b) reads, in relevant part: "… [N]o person who is determined … to be a Convention refugee … shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

…

(b) the person is a member of an inadmissible class described in paragraph 19(1)(e), (f), (g),(j),(k) or (l) and the Minister is of the opinion that the person constitutes a danger to the security of Canada".

analysis by officials, that he (a) constituted a danger to the security of Canada and (b) could be removed directly to Iran. The author applied for judicial review of the Minister's opinion. Pending the hearing of the application, the author applied for release from detention pursuant to section 40(1)(8) of the Act, as 120 days has passed from the issue of the deportation order against him.[2] On 15 March 1999, the Federal Court (Denault J), finding reasonable grounds to believe that his release would be injurious to the safety of persons in Canada, particularly Iranian dissidents, denied the application for release. The Federal Court of Appeal upheld this decision.

2.8 On 23 June 1999, the Federal Court (McGillis J) rejected the author's application for judicial review of the Minister's decision, finding there was ample evidence to support the Minister's decision that the author constituted a danger to Canada and that the decision to deport him was reasonable. The Court also dismissed procedural constitutional challenges, including to the process of the provision of the Minister's danger opinion. On 18 January 2000, the Court of Appeal rejected the author's appeal. It found that "the Minister could rightly conclude that the [author] would not be exposed to a serious risk of harm, let alone torture" if he were deported to Iran. It agreed that there were reasonable grounds to support the allegation that the author was in fact a trained assassin with the Iranian secret service, and that there was no basis upon which to set aside the Minister's opinion that he was a danger to Canada.

2.9 On 11 January 2001, the Supreme Court unanimously rejected the author's appeal, finding that there was "ample support" for the Minister to decide that the author was a danger to the security of Canada. It further found the Minister's decision that he only faced a "minimal risk of harm", rather than a substantial risk of torture, in the event of return to Iran to be reasonable and "unassailable". On the constitutionality of deportation of persons at risk of harm under section 53(1)(b) of the Act, the Court referred to its reasoning in a companion case of Suresh v Canada (Minister of Citizenship & Immigration)[3] decided the same day, where it held that "barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice". As Suresh had established a *prima facie* risk of torture, he was entitled to enhanced procedural protections, including provision of all information and advice the Minister intended to rely on, receipt of an opportunity to address the evidence in writing and to be given written reasons by the Minister. In the author's case, however, the Court considered that he had not cleared the evidentiary threshold required to make a *prima facie* case and access these protections. The Court was of the view that the author, in the form of the letter advising him of the Minister's intention to consider his danger to Canada as well as the possible risks to him in the event of expulsion, "was fully informed

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[2] Section 40(1) provides, in material part :
"(8) Where a person is detained under subsection (7) and is not removed from Canada within 120 days of after the making of a removal order relating to that person, the person may apply to the [Federal Court].
(9) On [such] an application, the [Federal Court] may, subject to such terms and conditions as the [Federal Court] deems appropriate, order that the person be released from detention if the [Federal Court] is satisfied that
(a) the person will not be removed from Canada within a reasonable time; and
(b) the person's release would not be injurious to national security or the safety of persons."

[3] [2002] 1 SCR.

of the Minister's case against him and given a full opportunity to respond". The process followed, according to the Court, was therefore consistent with principles of fundamental justice and not prejudicial to the author even though it had not followed the Suresh requirements.

2.10 The same day, the Committee indicated its request pursuant to Rule 86 of its Rules of Procedure for interim measures of protection, however the State party's authorities proceeded with arrangements to effect removal. On 15 January 2002, the Ontario Superior Court (Dambrot J) rejected the author's argument that the principles of fundamental justice, protected by the *Charter*, prevented his removal prior to the Committee's consideration of the case. On 8 May 2002, the Court of Appeal for Ontario upheld the decision, holding that the request for interim measures was not binding upon the State party. On 16 May 2002, the Supreme Court, by a majority, dismissed the author's application for leave to appeal (without giving reasons). On 10 June 2002, the author was deported to Iran.

The complaint

3.1 In his original communication (preceding expulsion), the author claims that Canada had violated, or would violate if it expelled him, articles 2, 6, 7, 9, 13 and 14 of the Covenant. Firstly, he contends that the statutory and administrative processes to which he was determined are not consistent with the guarantees of articles 2 and 14 of the Covenant. In particular, the discretion of the Minister of Immigration in directing a person's return to a country may be affected by considerations adverse to human rights concerns, including negative media coverage of a case. In addition, the Minister of Immigration's role in the expulsion process is neither independent nor impartial. The author argues that the Minister initially signs a security certificate that a person presents a security threat, defends the certification before the "reasonableness" hearing in Federal Court and prosecutes against the person at the deportation inquiry, all before having to decide whether a person thereafter eligible for expulsion should be expelled. In the author's view, it should not be an elected politician, without giving reasons, making such a decision on a subjective basis, but rather an independent and impartial tribunal.

3.2 The author also argues the process is further procedurally deficient in that it provides insufficient notice of the case against the affected individual. A person is simply advised that immigration officials will recommend to the Minister that a person be subject to expulsion under section 53(1) of the Act, without reasons provided, and is invited to make submissions. The submissions of the Minister's officials in response to those of the affected person are not provided and thus cannot be rebutted. The absence of any reasons provided in the decision makes judicial review of the decision against the submissions made to the Minister impossible.

3.3 The author further argues that the inability to apply for appeal or review of the Federal Court's "reasonableness" decision on the initial security certificate is deficient. Nor could he raise (fundamental) concerns as to the fairness of the process at the "reasonableness" hearing. He argues the Court does not test the evidence and does not hear independent witnesses. There are no national security reasons warranting a due process exception as, in the author's view, there was no evidence of either a threat by him to Canadian national security or of (even a threat of) criminal conduct in Canada. In the author's view, the security

concern accordingly does not satisfy the standards set out in the 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information.*[4]

3.4 The author also claims he has been subjected to arbitrary detention, contrary to article 9 of the Covenant. Since his detention in June 1993, he was only eligible for a detention review 120 days after issuance of his deportation order in August 1998. By that point, he had spent five years in detention without access to bail, detention review or *habeas corpus* (the latter unavailable to non-citizens in respect of detention relating to a person's status in Canada). He points out that his detention under the Immigration Act was mandatory, as well as arbitrary in that while the Federal Court described his detention as "unfortunate", it did not regard it an infringement of his liberty. He regards this as an example of discriminatory treatment of non-citizens. He also argues that it is perverse and therefore arbitrary to continue a person's detention while s/he is exercising a basic human right, that is, access to court.

3.5 The author argues that expulsion would expose him to torture, in breach of article 7 of the Covenant. He refers to the Committee's General Comment 15 on aliens and 20 on article 7, as well as the decision of Chahal v United Kingdom[5] of the European Court of Human Rights, for the proposition that the principle of *non-refoulement* admits of no exceptions. He contends that the State party is thus in error in respect of both its alleged claims that (i) he is not at risk of torture, and (ii) even if he were, he may be expelled on the grounds of threat to national security.

3.6 For the proposition that he is, in fact, at risk of torture, the author refers to a variety of reports and evidence generally regarding the human rights situation in Iran, including arbitrary detention, torture and extra-judicial and summary murder of political dissidents.[6] He contends that in his case, the senior Canadian intelligence officer who testified believed that he was afraid of what might happen to him in Iran and that he had defected. In addition, his refugee status had been recognized after a full hearing. He contends that his case has a high public profile and that he was not aware that he could seek a closed hearing. The details of the co-operation and (confidential) information he provided to the State party's authorities, as well as his resistance to deportation, could "very likely" constitute treason in Iran, which has

[4] UN Doc E/CN.4/1996/39 (Annex).

[5] (1996) 23 E.H.R.R. 413.

[6] The author refers to "Iran : Trial of Political Activists Begins – Basic Rights Violated in Secret Detentions" Human Rights Watch, 8 January 2002 ; "Iran : Journalists at Risk" Human Rights Watch, 22 December 2001 ; "Iran: Release Detainees from Iran Freedom Movement" Human Rights Watch, 10 November 2001; "Iran: Human Rights Developments" in *World Report 2001* and *World Report 1998*, Human Rights Watch; "Iran: A Legal System that Fails to Protect Freedom of Expression & Association" Amnesty International, December 2001; "Iran: Halt the Surge of Executions" Amnesty International, 17 August 2001; "Iran: The Revolutionary Court Must End Arbitrary Arrests" Amnesty International, 11 April 2001; "Iran: Time for Judicial Reform and End to Secret Trials" Amnesty International, 16 September 1999; "Iran: Country Reports on Human Rights Practices for 2000" United States Department of State, 23 February 2001; "Iran: Country Reports on Human Rights Practices for 1997" United States Department of State, 30 January 1998; "Iran" in *Annual Report for 1997*, Amnesty International; "U.N. Urges Halt to Public Executions", New York Times, 23 April 1998; "U.N. Rebukes Iran Over Human Rights Violations", Toronto Star, 19 April 1998.

been monitoring his case. On either the State party's or his own account of his past relationship with the MIS, therefore, there "could not be a clearer case" of a person who could expect torture in Iran.

3.7 On the same basis, the author fears that his removal will result in his execution in Iran, breaching his rights under article 6. The author also makes a corollary claim under article 7 that his detention since June 1993 in a cell in a short-term detention facility with no programmes or gainful occupation is itself cruel.

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

4.1 By submissions on 12 July 2002, the State party contested the admissibility and the merits of the communication, arguing that, for the reasons described below, the claims are all inadmissible as not having made out a *prima facie* claim and thus inadmissible, as well as being unfounded on the merits. In addition, certain elements of the communication are also said to be inadmissible for failure to exhaust domestic remedies.

4.2 As to the alleged violation of article 2, the State party refers to the Committee's jurisprudence that article 2 confers an accessory, rather than a freestanding, right, which arises only after another violation of the Covenant has been established. Accordingly, no prima facie violation is established. Alternatively, there has been no violation – the State party's constitutional *Charter of Rights and Freedoms* protects Covenant rights, and the domestic courts found no *Charter* violation. As to the contention that *Charter* rights are not equally enjoyed between citizens and non-citizens, the State party argues that most rights, including the right to life, liberty and security of the person, apply to all persons in Canada. As to freedom of expression and association, the Supreme Court held in Suresh that these rights do not include persons who, to use the State party's words, "are or have been associated with things directed at violence". This finding applies equally to Canadians as well as to non-Canadians.

4.3 Concerning the alleged violations of articles 6 and 7 in the event of a return to Iran, the State party argues that the facts, as determined by its courts, do not support these allegations. In addition, the author is not credible, in the light of his inconsistent accounts of his involvement MIS, the implausibility of important aspects of his story, and repeated, proven dishonesty. In addition, current human rights abuses are directed against regime opponents in Iran, rather than persons with the author's profile.

4.4 As to the allegations of risk, the State party points out that the Minister's staff assessed any risk of harm as "minimal", a finding upheld by all federal courts up to the Supreme Court, which regarded it as "unassailable". In addition, the courts clearly determined as fact that the author was not credible, based *inter alia* on inconsistent, contradicted, embellished and repeatedly untruthful statements. They also relied upon his recognition that he had received specialized training upon recruitment into the secret service, his disclosure of the details of assassination of two dissidents and his contact with the secret service, after receipt of refugee status, including meeting a "known assassin" in Europe. The State party refers to the Committee's approach that it is not generally its function to weigh evidence or re-assess findings of fact such as these made by the domestic courts, and requests, should the Committee decide to review the factual conclusions, the opportunity of making further submissions.

4.5 Neither, in the State party's view, are the author's allegations of risk supported by independent evidence. The State party observes that the documents cited by the author refer primarily to arrest and trials of reformists, dissidents and other government opponents, rather than persons of the author's profile, members current or former of the MIS. Indeed, the most recent human rights report of the United States' Department of State indicates that MIS personnel are prominent agents, rather than targets, of persecution, committing "numerous serious human rights abuses".[7] While the human rights situation remains problematic, the State party, relying on reports of Amnesty International[8] and the U.N. Special Representative of the Commission on Human Rights on the human rights situation in Iran, identifies signs of progress towards reduced use of torture.[9] Nor, for its part, has the case law of the Committee against Torture characterized the human rights situation in Iran as "a consistent pattern of gross, flagrant or mass violations of human rights". Thus the general human rights situation is not, per se, of the type or severity to support the allegations.

4.6 The State party regards the contention that he would be summarily executed for treasonous conduct in the event of a return as merely speculative and self-serving. The author has not established such an action to be the "necessary and foreseeable" consequence of deportation. The author had full opportunity to establish this at all levels of the Canadian courts, and failed to do so. Alternatively, even if he was regarded as treasonous, he has not shown that he would fail to receive a trial and punishment consistent with the Covenant. Similary, with respect to torture, the courts found that only a minimal risk of harm existed. The State party emphasizes that the author was recognized to be a refugee before he voluntarily traveled to Europe with a commander of MIS and came to the attention of the Canadian security service. It adds that if the author's identity as a trained operative had earlier been known, he would not have been admitted to the country. It also rejects that any awareness that Iran has of the case must imply torture, as well as any substantiation of the claim that the senior Canadian intelligence officer believed he defected. Nor has he provided any evidence of mistreatment of family, or shown why alleged co-operation with the Canadian authorities would of itself give rise to torture. As a result, these claims are unsubstantiated on even a *prima facie* basis.

4.7 As to the alleged violation of article 7 through conditions of detention, the State party argues the author did not file a *Charter* claim raising this issue before the courts, despite being advised of complaints possibilities, and thus the claim is inadmissible for lack of exhaustion of domestic remedies. In any case, the absence of activities during treatment cannot be considered cruel, and the author has not shown that his conditions of detention caused any adverse physical or mental effects.

4.8 On the issue of arbitrary detention, the author could have appealed the Federal Court of Appeal's confirmation of his detention under section 40(1)(8) of the Act to the Supreme Court but did not do so. Nor did he file any subsequent motion for release under the section. As a result, the claims are inadmissible for non-exhaustion of domestic remedies.

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[7] "Iran: Country Reports on Human Rights Practices for 2001", United States' Department of State.
[8] "Iran: Time for Judicial Reform and End to Secret Trials", op.cit.
[9] A/56/278, 10 August 2001.

4.9 In any event, there is no prima facie violation of article 9 as the detention was not arbitrary. Guidance may be drawn from article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), which explicitly permits detention with a view to deportation. Indeed, in the Chahal case cited by the author, the European Court considered that such detention is justified as long as deportation proceedings are in progress and being pursued with due diligence. Chahal's detention on the basis that successive Secretaries of State had maintained he was a threat to national security was not arbitrary, in view of the process available to review the national security elements. Neither is it arbitrary, argues the State party, for it to detain a non-Canadian individual under a procedure where two Ministers determine, pursuant to law, that an individual has a terrorist background or propensities. This determination is then expeditiously reviewed in court. Of 22 cases where this process has been followed, 11 cases were reviewed in 1 to 2 months, 3 cases in 3 to 4 months, 4 cases in 6 to 13 months and one case is ongoing.

4.10 The State party refers to the Committee's jurisprudence that an individual's insistence not to leave a State's territory is relevant to the article 9 assessment.[10] Similarly, the European Commission has held that an individual cannot complain of passage of time if at no stage he requested expeditious termination of proceedings and pursued any litigation avenue he could find.[11] The author did not ask the Minister of Citizenship & Immigration to exercise his power under section 40(1)(7) of the Act to release, for purposes of departure, a person named in a security certificate.

4.11 The State party argues it has exercised due diligence in pursuing the deportation proceedings, and that the author is responsible for the length of time they have taken. All of the delay prior to the section 40(1) "reasonableness" hearing on the security certificate was due to the author's request for adjournment to challenge the constitutionality of the procedure. He let this challenge lapse for long periods without taking steps within his control necessary to advance the process. In fact, the State party details numerous steps it took in this period seeking to advance the procedure expeditiously. Similarly, after issue of the removal order, the additional delay of the removal was caused by the author's exercise of numerous remedies available to him. The State party details the steps it took to expedite the procedures described in the chronology of the case, noting that the author took no such steps of expedition.

4.12 Concerning the author's contention that *habeas corpus* is not available to non-citizens in respect of detention regarding immigration status, the State party submits that as continued detention depends on the outcome of the Federal Court's "reasonableness" hearing on the security certificate, there is no need for a separate hearing on detention. In other words, the mandatory "reasonableness" hearing is a statutory detention review, within the power of Parliament to prescribe for such purposes. The Canadian courts have also held this procedure an adequate and effective alternative remedy to *habeas corpus*. Accordingly, the State party rejects the author's contention that its courts found that his detention was "unfortunate" but not a loss of liberty: the courts in fact held that while the certification has the immediate

[10] V.M.R.B. v Canada Case No 236/1987, Decision adopted on 26 July 1988.
[11] Osman v United Kingdom, Khan v United Kingdom and Kolompar v Belgium.

effect of leading to arrest and detention, a fate normally reserved to criminals, there was no violation of articles 7 and 9 of the *Charter*, both of which protect liberty interests.[12]

4.13 In term of the claim under article 13 of the Covenant, the State party argues, firstly, that, according to the Committee's jurisprudence, this provision requires that an alien is expelled according to the procedures laid down by law, unless the State had acted in bad faith or abused its power.[13] The author has not argued, much less established, any such exception here, and thus it would be appropriate for the Committee to defer to the Canadian authorities' assessment of the facts and law. Secondly, the State party pleads national security grounds in connection with the procedures followed. In its jurisprudence, the Committee has held that "it is not for the Committee to test a sovereign State's evaluation of an alien's security rating"[14] and that it would defer to such an assessment in the absence of arbitrariness.[15] The State party invites the Committee to apply the same principles, emphasizing that the decision of expulsion was not summary but followed careful deliberation through full and fair procedures in which the author was legally represented and submitted extensive arguments.

4.14 Concerning the process of the Federal Court "reasonableness" hearing on the security certificate, while constitutional issues could not be raised at that hearing, which is an expedited one, they can be the subject of a separate constitutional challenge, as the author himself pursued to the level of the Supreme Court. The State party observes that the judge has a "heavy burden" of ensuring that the author is reasonably informed by way of summary of the case against him, and he can present a case in reply and call witnesses; indeed, the author himself cross-examined two Canadian security service officers.

4.15 As to the process of the Minister's risk determination, the State party points out that the Supreme Court has indicated in Suresh the minimum requirements of fairness, including that reasons be given, applicable when a *prima facie* case of torture has been made out. As to the objection that the decision is made by a Minister previously involved in the process, the State party points out that the courts hold, through judicial review, the decision to law. While deferring to the Minister's weighing of evidence unless patently unreasonable, the courts insist that all relevant, and no irrelevant, factors are considered. The State party argues that as the procedures were fair, in accordance with law, and properly applied with the author having access to courts with legal representation and without any other factors of bias, bad faith or impropriety being present, the author has not established a *prima facie* violation of article 13.

4.16 As to the article 14 claims, the State party finds this provision inapplicable as deportation proceedings are neither the determination of a criminal charge nor a rights and obligations in a "suit at law". They are rather public law proceedings, whose fairness is guaranteed in article 13. In Y.L. v Canada,[16] the Committee, given the existence of judicial

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[12] Article 7 of the *Charter* provides: "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", while article 9 provides: "Everyone has the right not to be arbitrarily detained or imprisoned."

[13] Maroufidou v Sweden Case No 58/1979, Views adopted on 9 April 1981.

[14] V M R B v Canada, op cit., and J R B v Costa Rica Case No 296/1988,Decision adopted on 30 March 1989.

[15] Stewart v Canada, Case No 538/1993, Decision adopted on 18 March 1994.

[16] Case No 112/1981, Decision adopted on 8 April 1986.

review, did not decide whether proceedings before a Pension Review Board came within a "suit at law", while in V.M.R.B.,[17] the Committee did not decide whether deportation proceedings could be so charactersied as in any event the claim was unsubstantiated. The State party submits that given the equivalence of article 6 of the European Convention with article 14, the Committee should find persuasive the strong and consistent jurisprudence that such proceedings fall outside the scope of this article. It follows that this claim is inadmissible *ratione materiae*.

4.17 In any event, the proceedings satisfied article 14 guarantees: the author had access to the courts, knew the case he had to meet, had a full opportunity to make his views known and to make submission throughout the proceedings and was legally represented at all stages. The State party also refers the Committee to its decision in V.M.R.B., where it found the certification process under section 40(1) of the Immigration Act consistent with article 14. There is thus no *prima facie* violation of the right claimed.

4.18 By Note of 6 December 2002, the State party, while re-iterating its view of the limited scope of the Committee's function to re-evaluate factual and evidentiary determinations, supplied extensive additional information on these issues in the event the Committee wished to do so. The State party submitted that a fair assessment of the information provided inevitably lead to the same conclusions reached by the domestic courts: that the author was a trained operative of the MIS, that he was at minimal risk of harm in Iran, and that his evidence was neither credible nor trustworthy.

Further issues arising in relation to the Committee's request for interim measures

5.1 By letter of 2 August 2002 to the State party's representative to the United Nations in Geneva, the Committee, through its Chairperson, expressed great regret at the author's deportation, in contravention of its request for interim protection. The Committee sought a written explanation about the reasons which led to disregard of the Committee's request for interim measures and an explanation of how it intended to secure compliance with such requests in the future. By Note of 5 August 2002, the Committee, acting through its Special Rapporteur for New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party to monitor closely the situation and treatment of the author subsequent to his deportation to Iran and to make such representations to the Government of the Islamic Republic of Iran that were deemed pertinent in order to prevent violations of the author's rights under articles 6 and 7 of the Covenant.

5.2 By submissions dated 5 December 2002, the State party, in response to the Committee's request for explanation, argued that it fully supported the important role mandated to the Committee and would always do its utmost to co-operate with the Committee. It contended that it took its obligations under the Covenant and the Optional Protocol very seriously and that it was in full compliance with them. The State party points out that alongside its human rights obligations it also has a duty to protect the safety of the Canadian public and to ensure that it does not become a dafe haven for terrorists.

5.3 The State party noted that neither the Covenant nor the Optional Protocol provide for interim measures requests and argues that such requests are recommendatory, rather than binding. Nonetheless, the State party usually responded favourably to such requests. As in

[17] Op. cit.

other cases, the State party considered the instant request seriously, before concluding in the circumstances of the case, including the finding (upheld by the courts) that he faced a minimum risk of harm in the event of return, that it was unable to delay the deportation. The State party pointed out that usually it responds favourably to requests its decision to do so was determined to be legal and consistent with the *Charter* up to the highest judicial level. The State party argues that interim measures in the immigration context raise "some particular difficulties" where, on occasion, other considerations may take precedence over a request for interim measures. The particular circumstances of the case should thus not be construed as a diminution of the State party's commitment to human rights or the Committee.

5.4 As to the Committee's request to monitor the author's treatment in Iran, the State party argued that it had no jurisdiction over the author and was being asked to monitor the situation of a national of another State party on that State party's territory. However, in a good faith desire to co-operate with the Committee, the State party stated that on 2 October 2002 the Iranian authorities had advised that the author remained in Iran and was well. In addition, on 26 September 2002, the State party was contacted by a representative of the Iranian Embassy, advising that the author had called to inquire about three pieces of luggage he had left at the detention centre. The Embassy had agreed to convey the luggage back to the author. In the State party's view, this showed that the author does not fear the Iranian government, which is willing to assist him. Finally, on 10 October 2002, the author visited the State party's Embassy in Iran, met with two employees and handed over a letter. Neither the conversation nor the letter raised ill treatment issues, rather, he had difficulty obtaining employment. In the State party's view, this showed he was able to move about Teheran at will. The State party stated it had indicated to Iran that it expected it to comply fully with its international human rights obligations, including as owed to the author.

Comments of the author's counsel

6.1 By letter of 10 September 2003, counsel for the author responded to the State party's submissions. Procedurally, counsel observed that she had received instructions from the author prior to removal that she should continue the communication if he encountered difficulties, but that she should desist pursuit of the case if the author experienced no difficulties after his return to Iran, in order not to place him at increased risk. On the basis of a telephone call one month after deportation, counsel believed that the author had been arrested upon arrival, but not mistreated, and released. A journalistic source subsequently rumoured that he had been detained or killed. Upon repeated attempts to call the family, counsel was told he was at another location and/or that he was sick. Canadian officials had indicated several contacts from the author in fall 2002, but they had reported nothing since. Similarly, Amnesty International had been unable to confirm further details. In this light, counsel assumed the author had come to harm and thus pursued the communication.

6.2 As to the substance, counsel does not wish to pursue the claim on conditions of detention, in light of an admitted failure to exhaust domestic remedies. As to the remaining issues, she develops her argument in respect of the process followed by the State party authorities. The initial security certification was made by two elected officials (Ministers) without, any input from the author, as to whether it was "reasonable" to believe that he was a member of a terrorist organization or himself so engaged. The sole Federal Court hearing thereafter only determined whether that belief was itself reasonable. The Crown evidence was led *in camera* and *ex parte*, without being tested by the court or supported by witnesses.

Counsel thus argues that the conclusion of a national security threat, which was subsequently balanced at the removal stage by one elected official (a Minister) against the risk of harm, was reached by an unfair process. The decision to remove, in turn, was reviewed by the courts only for patent unreasonableness, rather than correctness.

6.3 Counsel responds to the State party's arguments on the author's credibility by referring to UNHCR practice to the effect that a lack of credibility does not of itself negate a well-founded fear of persecution.[18] Counsel notes that his initial application refugee claim was accepted despite variations in his account as to his past, and further that the Canadian security agencies destroyed their evidence, including interviews with the author and polygraph records, and provided only summaries. This evidence could have been tested as is the case before the Security Intelligence Review Committee, where an independent counsel, cleared on security grounds, could call witnesses and cross-examine in secret hearing.

6.4 Counsel proceeds to attack the decision of the Supreme Court handed down in the author's case subsequent to submission of the communication. Counsel observes that Mr. Suresh, whose appeal was upheld on the basis of insufficient procedural protections, and the author, whose appeal was rejected, both underwent the same process. The basis of the Court's decision in the author's case was that he had not made out a *prima facie* risk of torture, however, the entire premise of a fair process is that an accurate determination of precisely this question can be made. Instead, all the author received was a post-decision judicial review on whether it was "reasonable" to so conclude, which, in counsel's view, is an inappropriately low standard for a decision that could result in torture or loss of life. Counsel also recalls that the Court in Suresh envisaged some extra-ordinary situations where a person could be returned where a substantial risk of torture had been made out, contrary to the absolute ban on torture in international law.

6.5 On the issue of the author's credibility, counsel points out that the senior Canadian security officer corroborated at the security certificate hearing the author's claim that he had defected – the only dispute with the author was whether that was to avoid joining or after first joining the MIS. Either way, his defection makes him an opponent, real or perceived, of the Iranian regime, and this was the way press coverage described him. An Iranian consular official visited him in detention prior to removal, and the Iranian government was fully aware of his claims and the nature of his case. In any event, counsel considers the reliance on credibility disingenuous, where much of the material for this conclusion was based on untested evidence led *in camera* and *ex parte*. Counsel also argues it is inaccurate to describe the author as an agent of the regime and thus not a target of abuses, as being a defector and providing security intelligence to Canada, he will more likely than not be regarded as a regime opponent. If, as is suggested, the author was simply a "discovered" undercover agent, he would not have resisted removal, in detention, for nine years. In addition, an alleged move to restrict torture in Iran must be seen against the recent admitted torture and killing of a Canadian national in that country. It is more likely that opponents will be tortured and executed, rather than be given a fair trial, which the State party provides no evidence of. Nor, according to counsel, did the State party monitor the author's return to Iran.

[18] *Handbook on Procedures and Criteria for Determining Refugee Status*, Office of the United Nations High Commissioner for Refugees, at para 198 *et seq.*

6.6 On the issue of the risk of torture or other forms of cruel treatment, counsel observes that the Supreme Court found "unassailable" the conclusion that the author only faced a minimal risk in the context of paying "considerable deference" to the Minister's decision, who considered issues "largely outside the realm of the reviewing courts". As to the actual risk involved, counsel points out that it is impossible to "prove" what would be likely to happen to him, but rather the author has made reasonable inferences from the known facts, including the Iranian government's interest in the case, the human rights violations in Iran against perceived regime opponents, the public knowledge of his co-operation with Canadian officials in releasing classified information, and so on.

6.7 On the issues of arbitrary detention and expulsion process within articles 9, 13 and 14, counsel argues that the author was detained for five years, under mandatory and automatic terms, before his detention review. Under the Act's regime, security certification results in automatic detention of non-citizens until the proceedings are completed, a person is ordered deported and then remains in Canada for a further 120 days. No judge made a decision to detain him, and *habeas corpus* was unavailable to him as a non-citizen detained under immigration legislation, while his constitutional challenge to the certification process was dismissed. Counsel points out that it was open to the State party to use other removal processes that would not have had these effects. She observes that the State party's practice belies its assertion that detention is necessary on national security grounds, as not all alleged terrorists are in fact detained. Counsel emphasizes that in V.M.R.B.,[19] detention was, in contrast to the present regime, not automatic or mandatory, and weekly detention reviews existed. Rather, counsel refers to Torres v Finland and A v Australia for the proposition that non-citizens have the right to challenge, in substantive terms, the legality of detention before a court promptly and *de novo*, and then with reasonable intervals.[20] She observes that the European Convention, under which the Chahal decision referred to by the State party was adopted, specifically provides for detention for immigration purposes.

6.8 Counsel observes, with respect to the author's application under section 40(1)(8) of the Act for release after passage of 120 days from the deportation order, that release may be ordered if the person will not be removed within a reasonable time and the release would not be injurious to national security or others' safety. The Federal Court found that the onus was on the author to show these two criteria were satisfied, however counsel points out that both the trial court and the appellate court considered he could be removed within a reasonable time were it not for his own repeated recourse to the courts, and that thus he could not satisfy this branch of the necessary requirements. The appellate court also found that as the author had been detained for security reasons, and thus would normally have to show "some significant change in circumstances or new evidence not previously available" in order to be released under the detention review mechanism – in counsel's view, this plainly does not satisfy the requirement under the Covenant for a *de novo* review of detention.

6.9 Counsel rejects the State party's argument that the security certificate "reasonableness" hearing in Federal Court was a sufficient detention review, arguing that this hearing concerned only the reasonableness of the certificate rather than the justification for

[19] Op.cit.

[20] Case No 291/1998, Views adopted on 5 April 1990 and Case No 560/1993, Views adopted on 30 April 1997. Counsel also cites, to similar effect, Ferrer-Mazorra v United States, Inter-American Commission of Human Rights, Report No 51/01 of 4 April 2001.

detention. In addition, if this hearing was a detention review, there would be no need for a further detention review 120 days after a deportation order. In response to the argument that the prolonged detention was caused by the author himself, counsel responds that even if the security certificate "reasonableness" hearing had been heard without interruption, it would have been months before it was completed, a deportation inquiry undertaken and 120 days passed so as to allow a detention review under section 40(1)(8). Counsel observes that other cases less complicated than the author's have resulted in detention reviews only becoming available well after a year. Finally, counsel observes that the State party never assisted the author in finding another country to which he could depart. He had no other alternative to detention as he had no other country to which he could travel.

Supplementary submission by the State party

7.1 By submission of 15 October 2003, the State party argues that the material advanced by counsel as to events subsequent to expulsion is insufficient basis for a conclusion that the author was in fact detained, disappeared, tortured or otherwise treated contrary to article 7, much less for a conclusion that a real risk thereof existed at the time of expulsion. The State party emphasizes that counsel acknowledges that he was not mistreated upon arrival, and that the reporter's rumour that he "was detained or killed" dated prior to his presentation to the State party's embassy in Tehran. The State party adds that in the week 6 to 10 October 2003, a representative of the State party in Tehran spoke with the author's mother, who indicated that he was alive and well, though receiving regular medical treatment for an ulcer. According to the State party, the author's mother had said that he was currently unemployed and leading a pretty normal existence. No details of the possible confidentiality and other arrangements of the discussion are given. The State party submits that it did not violate the author's rights under the Covenant in expelling him to Iran.[21]

7.2 The State party also disputes the reliance placed upon the decisions of the Committee and other international bodies. With respect to the Ferrer-Mazorra decision of the Inter-American Commission of Human Rights that Cuban nationals who Cuba refused to accept could not be indefinitely detained, the State party points out that in the present case there was no automatic and indeterminate presumption of detention. Rather than being detained on a "mere assumption", he was detained upon the dual Ministers' security certification that he was a threat to the safety and security of the Canadian public. In addition, in contrast to the Cuban case, there had been a decision to remove him, and his detention was appropriate and justified for that purpose.

7.3 With respect to the onus being found by the Federal Court to lie on the author to justify his release under the section 40(1)(8) application, the State party observes that the Minister had already satisfied the onus to justify arrest, and thus the lengthy proceedings that had been undertaken would have to be repeated if onus to justify continued detention lay with the Minister. It is thus not arbitrary, having shown that there are reasonable grounds to believe an alien is a member of a terrorist group, for the onus to lie with that person to justify release. As to the court review of detention required by the Committee in A v Australia, the

[21] The State party also provided an article, dated 13 September 2003 and entitled "Deported Iranian admits he lied", from the National Post newspaper. In light of the State party's express statement that it "does not rely on [the article]", the Committee does not refer to this article further.

State party submits that the Federal Court "reasonableness" hearing, providing real rather than formal review, satisfies this purpose. The length of these proceedings, during which he was detained, was reasonable in the circumstances, as delay was mainly due to the author's own decisions, including his resistance to leaving the State party. The State party continues that the Committee, in assessing the presumptive detention not individually justified at issue in A v Australia, distinguished the V.M.R.B. case, which case is more analogous one to the present case. In V.M.R.B., as presently, an individual Ministerial assessment led to arrest of the individual in question. That detention was reasonable and necessary to deal with a person posing a risk to national security, and did not continue beyond the period for which justification could be provided.

The State party's failure to respect the Committee's request for interim measures of protection

8.1 The Committee finds, in the circumstances of the case, that the State party breached its obligations under the Optional Protocol, by deporting the author before the Committee could address the author's allegation of irreparable harm to his Covenant rights. The Committee observes that torture is, alongside the imposition of the death penalty, the most grave and irreparable of possible consequences to an individual of measures taken by the State party. Accordingly, action by the State party giving rise to a risk of such harm, as indicated *a priori* by the Committee's request for interim measures, must be scrutinized in the strictest light.

8.2 Interim measures pursuant to rule 86 of the Committee's rules adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Protocol. Flouting of the Rule, especially by irreversible measures such as the execution of the alleged victim or his/her deportation from a State party to face torture or death in another country, undermines the protection of Covenant rights through the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 The Committee notes, with respect to the claim of arbitrary detention contrary to article 9, the State party's contention that the claim is inadmissible for failure to exhaust domestic remedies in the form of an appeal to the Supreme Court with respect to his application for release under section 40(1)8) of the Act. The Committee observes that, by law, the author's ability to apply for release under this section only arose in August 1998 following expiry of 120 days from the issuance of the deportation order was made, that point being a total of five years and two months from initial detention in the author's case. In the absence of any argument by the State party as to domestic remedies which may have been available to the author prior to August 1998, the Committee considers that the author's claim under article 9 prior to August 1998 until that time is not inadmissible for failure to exhaust domestic remedies. The author's failure to pursue to the Supreme Court his application for release under section 40(1)(8) however does render inadmissible, for failure to exhaust

domestic remedies, his claims under article 9 related to detention after that point. These latter claims are accordingly inadmissible under article 5, paragraph 2(b), of the Optional Protocol.

9.3 The Committee notes that counsel for the author has withdrawn the claims relating to conditions of detention on the grounds of non-exhaustion of domestic remedies, and thus does not further address this issue.

9.4 The Committee observes that the State party argues that the remaining claims are inadmissible, for, in the light of substantial argumentation going to the merits of the relevant facts and law, the claims are either insufficiently substantiated, for purposes of admissibility, and/or outside the Covenant *ratione materiae*. In such circumstances, the Committee considers that the claims are most appropriately dealt with at the merits stage of the communication.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.

10.2 As to the claims under article 9 concerning arbitrary detention and lack of access to court, the Committee notes the author's argument that his detention pursuant to the security certificate as well as his continued detention until deportation was in violation of this article. The Committee observes that, while the author was mandatorily taken into detention upon issuance of the security certificate, under the State party's law the Federal Court is to promptly, that is within a week, examine the certificate and its evidentiary foundation in order to determine its "reasonableness". In the event that the certificate is determined not to be reasonable, the person named in the certificate is released. The Committee observes, consistent with its earlier jurisprudence, that detention on the basis of a security certification by two Ministers on national security grounds does not result *ipso facto* in arbitrary detention, contrary to article 9, paragraph 1. However, given that an individual detained under a security certificate has neither been convicted of any crime nor sentenced to a term of imprisonment, an individual must have appropriate access, in terms of article 9, paragraph 4, to judicial review of the detention, that is to say, review of the substantive justification of detention, as well as sufficiently frequent review.

10.3 As to the alleged violation of article 9, paragraph 4, the Committee is prepared to accept that a "reasonableness" hearing in Federal Court promptly after the commencement of mandatory detention on the basis of a Ministers'security certificate is, in principle, sufficient judicial review of the justification for detention to satisfy the requirements of article 9, paragraph 4, of the Covenant. The Committee observes, however, that when judicial proceedings that include the determination of the lawfulness of detention become prolonged the issue arises whether the judicial decision is made "without delay" as required by the provision, unless the State party sees to it that interim judicial authorization is sought separately for the detention. In the author's case, no such separate authorization existed although his mandatory detention until the resolution of the "reasonableness" hearing lasted four years and ten months. Although a substantial part of that delay can be attributed to the author who chose to contest the constitutionality of the security certification procedure instead of proceeding directly to the "reasonableness" hearing before the Federal Court, the latter procedure included hearings and lasted nine and half months after the final resolution of

the constitutional issue on 3 July 1997. This delay alone is in the Committee's view too long in respect of the Covenant requirement of judicial determination of the lawfulness of detention without delay. Consequently, there has been a violation of the auhtor's rights under article 9, paragraph 4, of the Covenant. 10.4 As to the author's later detention, after the issuance of a deportation order in August 1998, for a period of 120 days before becoming eligible to apply for release, the Committee is of the view that such a period of detention in the author's case was sufficiently proximate to a judicial decision of the Federal Court to be considered authorized by a court and therefore not in violation of article 9, paragraph 4.

10.5 As to the claims under articles 6, 7, 13 and 14, with respect to the process and the fact of the author's expulsion, the Committee observes, at the initial stage of the process, that at the Federal Court's "reasonableness" hearing on the security certification the author was provided by the Court with a summary redacted for security concerns reasonably informing him of the claims made against him. The Committee notes that the Federal Court was conscious of the "heavy burden" upon it to assure through this process the author's ability appropriately to be aware of and respond to the case made against him, and the author was able to, and did, present his own case and cross-examine witnesses.. In the circumstances of national security involved, the Committee is not persuaded that this process was unfair to the author. Nor, recalling its limited role in the assessment of facts and evidence, does the Committee discern on the record any elements of bad faith, abuse of power or other arbitrariness which would vitiate the Federal Court's assessment of the reasonableness of the certificate asserting the author's involvement in a terrorist organization. The Committee also observes that the Covenant does not, as of right, provide for a right of appeal beyond criminal cases to all determinations made by a court. Accordingly, the Committee need not determine whether the initial arrest and certification proceedings in question fell within the scope of articles 13 (as a decision pursuant to which an alien lawfully present is expelled) or 14 (as a determination of rights and obligations in a suit at law), as in any event the author has not made out a violation of the requirements of those articles in the manner the Federal Court's "reasonableness" hearing was conducted.

10.6 Concerning the author's claims under the same articles with respect to the subsequent decision of the Minister of Citizenship & Immigration that he could be deported, the Committee notes that the Supreme Court held, in the companion case of Suresh, that the process of the Minister's determination in that case of whether the affected individual was at risk of substantial harm and should be expelled on national security grounds was faulty for unfairness, as he had not been provided with the full materials on which the Minister based his or her decision and an opportunity to comment in writing thereon and further as the Minister's decision was not reasoned. The Committee further observes that where one of the highest values protected by the Covenant, namely the right to be free from torture, is at stake, the closest scrutiny should be applied to the fairness of the procedure applied to determine whether an individual is at a substantial risk of torture. The Committee emphasizes that this risk was highlighted in this case by the Committee's request for interim measures of protection.

10.7 In the Committee's view, the failure of the State party to provide him, in these circumstances, with the procedural protections deemed necessary in the case of Suresh, on the basis that the present author had not made out a *prima facie* risk of harm fails to meet the requisite standard of fairness. The Committee observes in this regard that such a denial of these protections on the basis claimed is circuitous in that the author may have been able to

make out the necessary level of risk if in fact he had been allowed to submit reasons on the risk of torture faced by him in the event of removal, being able to base himself on the material of the case presented by the administrative authorities against him in order to contest a decision that included the reasons for the Minister's decision that he could be removed. The Committee emphasizes that, as with the right to life, the right to be free from torture requires not only that the State party not only refrain from torture but take steps of due diligence to avoid a threat to an individual of torture from third parties..

10.8 The Committee observes further that article 13 is in principle applicable to the Minister's decision on risk of harm, being a decision leading to expulsion. Given that the domestic procedure allowed the author to provide (limited) reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question. In the Committee's view, the failure of the State party to provide him with the procedural protections afforded to the plaintiff in Suresh on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities' case against him l and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.

10.9 The Committee notes that as article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 of the Covenant, it would be inappropriate in terms of the scheme of the Covenant to apply the broader and general provisions of article 14 directly.

10.10 As a result of its finding that the process leading to the author's expulsion was deficient, the Committee thus does not need to decide the extent of the risk of torture prior to his deportation or whether the author suffered torture or other ill-treatment subsequent to his return. The Committee does however refer, in conclusion, to the Supreme Court's holding in Suresh that deportation of an individual where a substantial risk of torture had been found to exist was not necessarily precluded in all circumstances. While it has neither been determined by the State party's domestic courts or by the Committee that a substantial risk of torture did exist in the author's case, the Committee expresses no further view on this issue other than to note that the prohibition on torture, including as expressed in article 7 of the Covenant, is an absolute one that is not subject to countervailing considerations.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Canada of article 9, paragraph 4, and article 13, in conjunction with article 7, of the Covenant. The Committee reiterates its conclusion that the State party breached its obligations under the Optional Protocol by deporting the author before the Committee's determination of his claim.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation. In the light of the circumstances of the case, the State party, having failed to determine appropriately whether a substantial risk of torture existed such as to foreclose the author's

deportation, is under an obligation (a) to make reparation to the author if it comes to light that torture wasin fact suffered subsequent to deportation, and (b) to take such steps as may be appropriate to ensure that the author is not, in the future, subjected to torture as a result of the events of his presence in, and removal from, the State party. The State party is also under an obligation to avoid similar violations in the future, including by taking appropriate steps to ensure that the Committee's requests for interim measures of protection will be respected.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

APPENDIX

Individual opinion of Committee Member, Mr. Nisuke Ando

I am unable to share the Committee's conclusion that the facts in the present case reveals violations by the States party of article 9, paragraph 4, as well as article 13 in conjunction with article 7.

With respect to article 13 of the Covenant, the Committee states "[i]t would be inappropriate for the Committee to accept that, in the proceedings before it, "compelling reasons of national security" existed to exempt the State party from its obligation under that article to provide the procedural protections in question." (10.7). In the Committee's view, the author should have been provided with the same procedural protections as those provided to Suresh, another Iranian in a similar situation. However, the reason why the author has not been provided with the same procedural protections is that, while Suresh successfully made out a prima facie case for risk of torture upon his return to Iran, the author failed to establish such a case. Considering that the establishment of such a case is the precondition for the procedural protection, the Committee's conclusion that the author should have been provided the same procedural protection is tantamount to the argument that the cart should be put before the horse, which is logically untenable in my opinion.

With respect to article 9, paragraph 4, the Committee admits that a substantial part of the delay of the proceedings in the present case is attributable to the author who chose to contest the constitutionality of the security certification instead of proceeding to the "reasonableness" hearing before the Federal Court. And yet, the Committee concludes that the reasonableness hearing itself lasted nine and a half months and such a long period does not meet the requirement of article 9, paragraph 4, that the court may decide the lawfulness of detention "without delay". (10.3) Nevertheless, the process of the Federal Court's reasonableness hearing imposed a heavy burden on the judge to ensure that the author would be reasonably informed of the cases against him so that he could prepare himself for reply and call witnesses if necessary. Furthermore, considering that the present case concerned expulsion of an alien due to "compelling reasons of national security" and that the court had to assess various facts and evidence, the period of nine and a half months does not seem to be unreasonably prolonged. It might be added that the Committee fails to clarify why it is inappropriate for the Committee to accept that "compelling reasons of national security" existed for the State party in the present case (10.7), since the existence of those reasons primarily depends on the judgment of the State party concerned unless the judgment is manifestly arbitrary or unfounded, which is not the case in my opinion.

[*Signed*] Nisuke Ando

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

Individual opinion by Committee Member, Ms. Christine Chanet

I share the standing position of the Committee that the issue of an administrative detention order on national security grounds does not result ipso facto in arbitrary detention.

Nevertheless, if such detention is not to be regarded as arbitrary, it must be in conformity with the other requirements of article 9 of the Covenant, failing which the State commits a violation of the first sentence of article 9, paragraph 1, by failing to guarantee the right of everyone to liberty and security of person.

Article 9 is not the only provision of the Covenant which, in my view, should be given such an interpretation.

For example, the execution of a pregnant woman, a flagrant breach of article 6, paragraph 5, constitutes a violation of the right to life as set forth in article 6, paragraph 1.

The same applies in the case of a person who is executed without having been able to exercise the right to seek pardon, in breach of article 6, paragraph 4, of the Covenant.

This reasoning is also applicable to the articles in the Covenant which begin in the first paragraph by setting forth a principle and, in the body of the article, identify the means required to guarantee the right (article 10) ; these means take the form either of positive steps that the State must take, such as ensuring access to a judge, or of prohibitions, as in article 6, paragraph 5.

Consequently, when a female prisoner has not had prompt access to a judge, as required by article 9, paragraph 4 of the Covenant, there has been a failure to comply with the first sentence of article 9, paragraph 1.

[*Signed*]: Christine Chanet

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

Individual of Committee members, Sir Nigel Rodley, Mr. Roman Wieruszewski, Mr. Ivan Shearer (dissenting)

We do not agree with the Committee's finding of a violation of article 9, paragraph 4. The Committee seems to accept, albeit in language implying some uncertainty, that the first four years of the author's detention did not involve a violation of article 9, paragraph 4, since it was the author's choice not to avail himself of the 'reasonableness' hearing procedure pending the constitutional challenge (paragraph 10.4 above). The Committee accepts that the 'reasonableness' hearing meets the requirements of article 9, paragraph 4. Accordingly, its finding of a violation is based on the narrow ground that the 'reasonableness' hearing lasted nine and a half months and that of itself involved a violation of the right to a judicial determination of the lawfulness of the detention without delay. It offers no explanation of why that period violated the provision. Nor is there anything on the record it could have relied on. There is no evidence that the proceedings were unduly prolonged or, if they were, which party bears the responsibility. In the absence of such information or any other explanation of the Committee's reasoning, we cannot join in its conclusion.

[*Signed*] Nigel Rodley
[*Signed*] Roman Wieruszewski
[*Signed*] Ivan Shearer

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