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HUMAN RIGHTS COMMITTEE
Sixty-sixth session
12 - 30 July 1999

DECISIONS

Communication Nº 741/1997

Submitted by:	Michael Cziklin
Alleged victim:	The author
State party:	Canada
Date of communication:	17 April 1996
Documentation references:	Prior decisions - Committee's rule 91 decision, transmitted to the State party on 26 February 1997 (not issued in document form)
Date of present decision	27 July 1999

[ANNEX]

* Made public by decision of the Human Rights Committee.
Inad.741

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ANNEX*

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

concerning

Communication Nº 741/1997**

Submitted by:	Michael Cziklin
Alleged victim:	The author
State party:	Canada
Date of communication:	17 April 1996

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

Meeting on 27 July 1999

Adopts the following:

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*The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Abdallah Zakhia.

**Pursuant to rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

Decision on admissibility

1. The author of the communication is Mr. Michael Cziklin, a Canadian citizen. He claims to be a victim of a violation by Canada of article 26 of the Covenant.

The facts as submitted by the author

2.1 The author was employed as a trainman by Canadian Pacific Rail (CPR), a private railway corporation, from 1974 to 1976 and again on probationary employment from 1 November 1979 to 2 January 1980, when his employment was terminated on the ground that he had back and knee injuries and therefore did not meet the physical requirements.

2.2 Before taking up employment with CPR in 1974, he passed the physical examination without referring to the injuries to his right knee and back, respectively sustained in 1966 and in 1968. Prior to the probationary employment commencing in November 1979, the author was again tested by the CPR Examiner and approved for work as a trainman, after he advised the examiner of his knee injury but not about his back problems. After two weeks of service, the author experienced twitching in his mid-thigh and was sent to a doctor. This doctor noted that the author had a degenerative disk disease and that he could not do any heavy lifting. Subsequently, on 1 December 1979, the author was allowed back to work after two other specialists allegedly had offered opinions that his condition did not represent any danger to his work.

2.3 However, after a superintendent had reviewed the first doctor's report and the author's file, therein finding records of a claim set forward in 1977 by the author to the Worker's Compensation Board regarding the 1968 back injury, the author was taken off the job on 17 December 1979 and was notified that his probationary employment was terminated on 2 January 1980. During the ensuing year, the author requested CPR on several occasions to reconsider its position and to reinstate him as a trainman, invoking, inter alia, a new letter from the first doctor stating that there was nothing in his first report which would suggest that termination of employment was appropriate. CPR, however, maintained its position by stating that it would only consider rehiring the author if CPR's own examiner declared him fully fit.

2.4 On 21 July 1981, the author filed a complaint with the Canadian Human Rights Commission, alleging discrimination by CPR on the basis of physical handicap, contrary to paragraphs 7 and 10[1] of the Canadian Human Rights Act. On

[1]These provisions read as follows:

7. It is a discriminatory practice, directly or indirectly,
(a) to refuse to employ or continue to employ any individual, or
(b) in the course of employment, to differentiate adversely in relation to an employee,
on a prohibited ground of discrimination

10. It is a discriminatory practice for an employer or an employee organization
(a) to establish or pursue a policy or practice, or

9 September 1985, the investigator at the Canadian Human Rights Commission submitted his *Investigation Report* to the Commission, recommending that the complaint be dismissed as, in his opinion, CPR had established a *bona fide occupational requirement* within the meaning of paragraph 14(a) of the Canadian Human Rights Act. On 18 February 1986, the Commission decided to dismiss the complaint on the same ground. In its letter to the author, the Commission also informed the author that he did have the opportunity to apply for judicial review of its decision by the Federal Court, and suggested that a lawyer be consulted if he chose to seek such review.

2.5 The author did not apply for judicial review to the Federal Court of Appeal before the expiration of the deadline for filing a notice of appeal to the Court, but did file a notice of motion for an extension of time to file an application on 6 June 1986, some three months after the expiration of the deadline. On 26 June 1986, the motion was rejected by a judge of the Federal Court of Appeal[2].

The complaint

3. The author alleges to be a victim of a discrimination on the ground of physical handicap in violation of article 26 of the Covenant because of the termination of his employment by CPR in January 1980. The author claims that the decision of the Canadian Human Rights Commission was flawed as the author's inability to perform the required job duties were not substantiated. In this regard, the author argues that CPR did not avail itself of the option of having the author's medical condition reevaluated by an independent medical body, and that the Commission in its investigation failed to consult with the United Transportation Union or other bodies to verify the author's version of the job requirements. Furthermore, the author claims that it was the practice of CPR at the time to permit other persons who could not perform certain physically demanding tasks to remain employed and to leave such tasks for those able.

(b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment,
that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.

[2]With regard to the author's notice of motion for an extension of time to file for judicial review of 6 June 1986, the State party explains that a judge of the Federal Court of Appeal was empowered to entertain such motions and grant an extension of time. An extension would be granted where there was material to satisfy the Court that there was some justification for not having brought the application within the 10-days period, and there was an arguable case for setting aside the order in question. In the author's case, the Federal Court of Appeal dismissed the motion "on the ground that the material on file [did] not disclose any reasonable ground for challenging the validity of the decision that the applicant wishes to attack."

The State party's observations on admissibility and the author's comments thereon

4.1 In its submission of 17 December 1997, the State party argues several grounds of inadmissibility. Firstly, the State party submits that the communication should be held inadmissible because of the undue delay in bringing it before the Committee. The State party notes that the communication relates to factual events that occurred between 1966 and 1980, that the final domestic decision was passed on 26 June 1986 and that the communication only was submitted almost 10 years later, on 17 April 1996.

4.2 The State party adduces two reasons why the delay should lead to inadmissibility. Firstly, it is argued that the delay can create a problem in ascertaining the facts. In the present case, the State party notes that the author makes certain factual allegations about incidents said to have happened in the 1970s which would require verification (e.g. regarding the author's employment with CPR from 1974-1976, his claim to the Workmen's Compensation Board in 1977 and the complete medical report requested by CPR on 17 December 1979). The State party explains that it will not make any detailed submissions on the facts at the admissibility stage, but is concerned that if the communication were to proceed to the merits stage, it would be difficult to establish a satisfactory factual record so long after the events in question. It is submitted that this would prejudice the State party and affect the assessment by the Committee of the merits of the communication. Secondly, the State party argues that although the language of article 26 of the Covenant remains the same as when the events relating to this communication occurred, fundamental developments[3] have taken place both domestically and internationally since then in relation to the equality rights of persons with disabilities which may affect the interpretation and application of article 26 in matters affecting them. In this regard, the State party also mentions that these developments may affect the position the State party would regard as appropriate to put forward in litigation involving persons with disabilities.

4.3 The State party argues that, even though the Optional Protocol does not contain an express time limit, a communication can be held inadmissible on the ground of undue delay, either pursuant to article 3 as an abuse of the right of submission, or on the basis of the interpretive powers of the Committee regarding its role under the Optional Protocol. With regard to article 3, the State party argues that when the circumstances are such that the ability of a State party to exonerate itself is prejudiced because of the unreasonable delay of the complaint, the communication ought to be inadmissible as an abuse of the right to submission, given that there was no impediment in making a timely submission to the Human Rights Committee. The State party makes reference to the

[3]The State party gives several examples: the adoption of the Convention on the Rights of the Child in 1989 as the first international convention expressly to include disability as a prohibited ground of discrimination; Section 15 of the Canadian Charter of Rights and Freedoms of April 1985; the Supreme Court of Canada's judgment in Eaton v. Brant County Board of Education of 1997; Bill S-5, an Act to amend the Canada Evidence Act, the Criminal Code, the Canadian Human Rights Act and other Acts in respect of persons with disabilities.

Committee's finding in Communication No. 72/1980, K.L. v. Denmark, and submits that, as in that case, the fact that the author took domestic actions (see para.4.6 below) at the same time that he was pursuing his case before the Committee and that he has not adequately substantiated his claims are additional relevant factors when considering this issue.

4.4 As an alternative basis for declaring the communication inadmissible because of undue delay, the State party notes that the Committee on occasion[4] has held that, implicit in its role under the Optional Protocol, is the power of performing certain functions necessary to that role but that are not explicitly conferred on it by the Optional Protocol or the Covenant. The State party submits that such an approach should be taken here, thus enabling the Committee to find unduly delayed communications inadmissible.

4.5 The State party submits that the communication should be held inadmissible also under article 5, paragraph 2(b), of the Optional Protocol for non-exhaustion of domestic remedies. In this regard, the State party argues that a judicial review of the decision of the Canadian Human Rights Commission by the Federal Court of Appeal would have been an effective and available remedy as the Federal Court is empowered to set aside a decision of the Commission where the Federal Court finds that the Commission's decision was based "on an erroneous finding of fact that it made in a perverse or capricious manner or without regard of the material before it[5]." There, it is submitted, the author could have argued, as he has argued in the present communication, that the decision of the Commission was flawed because it was not substantiated by the evidence nor based upon sufficient investigation. If the author had been successful in his arguments, the Federal Court would have remitted the matter back to the Commission for further investigation into his allegations of unlawful discrimination. It is submitted that the author failed to avail himself of this domestic remedy by his own inaction, as he did not apply for judicial review in a timely fashion.

4.6 The State party also states that the decision of the Federal Court of 26 June 1986 was a "final or other judgment of the Federal Court of Appeal" within the meaning of section 31(3) of the Federal Court Act which thus could have been appealed to the Supreme Court of Canada. In this regard, the State party explains that on 8 August 1996, ten years after the decisions of the Canadian Human Rights Commission and the Federal Court of Appeal, and after the submission of the present communication, the author wrote to the Federal Court of Appeal requesting an order setting aside the former decisions. On 26 August 1996, the Court dismissed this application on the ground that it had no jurisdiction to hear it. Then on 27 January 1997, the federal Department of

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[4]As an example, the State party mentions that the majority of the Committee members in a general debate in 1983 concluded that the Committee might on an exceptional basis reconsider its views on the merits, although there were no express provisions to this effect in the Optional Protocol; Report of the Human Rights Committee, 1983, pp 93-94, para. 391-396.

[5]Federal Court Act, R.S.C. 1970, section 28(1)(c).

Justice received a copy of documents signed by the author dated 21 January 1997 apparently seeking an extension of time to apply for leave to appeal to the Supreme Court of Canada from the denial of the Federal Court of Appeal of an extension of time to apply for judicial review of the decision of the Canadian Human Rights Commission in 1986. The State Party states that these documents have not, however, been officially served on the Attorney General of Canada, nor have they been registered in the Supreme Court of Canada.

4.7 The State party also submits that the communication is inadmissible under article 1 of the Optional Protocol because it does not allege a violation of the Covenant by Canada, but rather appears to be directed against the conduct of a private entity, Canadian Pacific Railways, as the author alleges that he was the victim of discrimination on the ground of disability by this private corporation, the capital stock of which is owned by private parties. The State party states that CPR is not a part or agent of the Government of Canada or of any other components of the Canadian State, such as a provincial or territorial government, and submits that the actions of CPR cannot be attributed to Canada or engage the responsibility of the Government of Canada under the Covenant.

4.8 If, in the alternative, the author regards his complaint as against the Canadian Human Rights Commission for what he describes as its "flawed" decision in his case, then the State party submits that a disagreement with the decision of a domestic tribunal in a private dispute is not sufficient to engage the jurisdiction of the Human Rights Committee. In this regard, the State party notes that the author has not alleged a violation of his rights under article 14 of the Covenant by the Canadian Human Rights Commission, nor adduced facts that would suggest such a violation.

4.9 Finally, the State party submits that the author's claim of a violation of article 26 of the Covenant should be held inadmissible under article 2 of the Optional Protocol for lack of substantiation. The State party argues that the Investigation Report to the Canadian Human Rights Commission gives a detailed statement of the facts and concludes that because of his knee and back problems the author had a physical handicap which gave rise to a safety hazard in his probationary employment as a trainman, and that it was not feasible to make reasonable accommodation for his handicap. On this basis, the investigator concluded that a *bona fide occupational requirement* had been established within the meaning of section 14(a) of the Canadian Human Rights Act. After reviewing the report, the Canadian Human Rights Commission reached the same conclusion. Assuming that these conclusion were accurate, the State party submits that a *prima facie* violation of article 26 has not been disclosed.

5. In his comments on the State party's submission, the author argues that the State party failed to mention new and compelling evidence which came to light in 1997 and 1998, evidence which should have been available to the Canadian Human Rights Commission during the period of investigation, i.e. 1981-86. The author implies that the evidence in question, three statements from the United Transportation Union, one statement from the former investigator of the Canadian Human Rights Commission and records from the Workers' Compensation Board, shows that other individuals suffering similar injuries were accommodated for with knee or back braces and/or were allowed to work with imposed restrictions. The author submits that this clearly establishes a violation of sections 7 and 10 of the Human Rights Act.

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

6.2 The author has alleged to be a victim of a violation of article 26 of the Covenant on what appears to be two different grounds; 1) that CPR could have provided reasonable accommodation for his physical injuries and that the lack of such accommodation constitutes discrimination on the ground of physical handicap, and 2) that the Canadian Human Rights Commission, mistakenly, considered him to suffer a physical condition which justified CPR's decision to dismiss as a trainman.

6.3 The Committee notes, however, as explained by the State party, that the author has not taken the necessary steps to appeal the Federal Court of Appeal's decision of 26 June 1986 to the Supreme Court of Canada. The Committee finds that this was an available and effective remedy and that the communication therefore is inadmissible under article 5, paragraph 2(b), of the Optional Protocol, for non-exhaustion of domestic remedies. Consequently, the Committee need not address the other arguments set forth by the State party against the admissibility of the communication.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible;

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

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