



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2454/2014\*, \*\*

<i>Communication submitted by:</i>	S.G. (initially represented by counsel, Renu Mandhane)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	28 April 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 27 August 2014 (not issued in document form)
<i>Date of adoption of decision:</i>	26 July 2019
<i>Subject matter:</i>	Delays in granting the author's application for permanent residence in Canada; lack of access to an effective remedy
<i>Procedural issues:</i>	Inadmissibility as manifestly ill-founded; inadmissibility <i>ratione materiae</i> ; mootness; non-exhaustion of domestic remedies; level of substantiation of claims; incompatibility
<i>Substantive issues:</i>	Right to a remedy; right to a fair trial; right to privacy; freedom of expression; freedom of association; non-discrimination
<i>Articles of the Covenant:</i>	2 (3), 14 (1), 17 (2), 19 (2), 22 and 26
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is S.G., an Alevi Kurd born in Turkey on 14 September 1956, currently residing in Canada. The author claims that by falsely associating him with a terrorist organization (the Kurdistan Workers' Party (PKK)) and unreasonably delaying the consideration and granting of his application for permanent residence, Canada has violated his rights under articles 2 (3), 14 (1), 17 (2), 19 (2), 22 and 26 of the Covenant.

\* Adopted by the Committee at its 126th session (1–26 July 2019).

\*\* The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.



The author was initially represented by counsel, Renu Mandhane.<sup>1</sup> The Optional Protocol entered into force for Canada on 19 August 1976.

### **The facts as submitted by the author**

2.1 The author left Turkey in December 1990, fleeing persecution, arbitrary detention and torture by Turkish authorities due to his membership of a trade union and his Kurdish ethnicity. In 1981, he was detained for five months, during which he was tortured. He was arrested for a second time in 1990 and released after a few days. He entered Canada as a visitor on 8 April 1991, claiming protection as a refugee. In March 1993, he was granted refugee status and immediately applied to Citizenship and Immigration Canada for a permanent residence permit (then called “landed immigrant status”). Although his application was approved in July 1993 pending security screening, he was granted permanent resident status only on 7 September 2006.

2.2 Soon after his arrival in Canada, in August 1992, the author co-founded the Toronto Kurdish Community and Information Centre, which is a cultural organization helping Turkish Kurds to settle in Toronto. The author was active in establishing the Centre because he wanted to help foster a sense of community among Kurds arriving in Toronto, and also wished to expose the human rights violations of the Government of Turkey against Kurds.

2.3 In order for his application to be granted, the Canadian Security Intelligence Service conducted a security check and interviewed the author on 13 October 1994 to assess if he posed a risk to the State party’s public safety. He was asked whether he was a member of the PKK and was informed that his phone calls had been monitored. He was also told that the Canadian Security Intelligence Service would recommend that his application be granted if he agreed to provide names of PKK members in the Kurdish community in Toronto.<sup>2</sup>

2.4 In May 1997, the author decided to leave the leadership of the Toronto Kurdish Community and Information Centre and to cut off ties with it, as he believed that the Canadian Security Intelligence Service suspected it of being a front for the PKK. The author wished to demonstrate clearly to the Canadian Security Intelligence Service that he had no connection to the PKK. During the period from 1998 to 2006, the author, together with Mary Jo Leddy, the founder of a settlement agency for refugees in Toronto, made significant advocacy efforts to obtain a decision on his application for permanent residence, by sending letters to members of the provincial parliament, senators and provincial immigration ministers.

2.5 In August 1997 and March 1998, the author initiated formal proceedings with the Security Intelligence Review Committee to complain about the excessive delays in processing the security check necessary to finalize his application for permanent residence. On 3 April 2000, the Security Intelligence Review Committee issued a report concluding that the facts presented to it did not support the inference that the author was a member of the PKK and that the Canadian Security Intelligence Service should therefore advise the Citizenship and Immigration Department to grant him permanent resident status.

2.6 On 20 March 2001, the immigration officer of Citizenship and Immigration Canada decided to reject the author’s application for permanent residence on the basis that there were reasonable grounds to believe that the Toronto Kurdish Community and Information Centre supported the PKK and that due to his involvement in the Centre’s leadership there were also reasonable grounds to believe that he was a member of the PKK, an organization engaged in terrorist activities. The author sought a judicial review of that decision. On 12 November 2002, the Federal Court allowed the application and ruled that the immigration officer had failed to consider relevant evidence by ignoring the report of the Security

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<sup>1</sup> A power of attorney document, for counsel to act on the author’s behalf, is annexed to the initial communication. However, on 31 March 2016, Mr. Mandhane submitted that he no longer represented the author of the communication and that any correspondence on the matter should be addressed to remaining counsels Carmen Cheung, Andrew Brouwer and Kara Norrington.

<sup>2</sup> The file shows that the Canadian Security Intelligence Service reported the results of its investigation to immigration officials on 9 August 1995.

Intelligence Review Committee. It therefore remitted the matter for reconsideration to another immigration officer. However, the second immigration officer did not issue any decision from 2002 to 2005, despite having sought advice and guidance from several officials within different agencies.<sup>3</sup>

2.7 On 8 November 2005, the author filed a civil suit before the Federal Court for damages against the Attorney General, claiming that his application had not been processed in a timely fashion and that he continued to be investigated on security grounds notwithstanding the lack of evidence to support further investigation. The author claimed that such delay affected his constitutional rights, and therefore requested Charter<sup>4</sup> damages, based on violations of his rights under section 7 (security of person) and section 15 (equality). He also claimed damages on the grounds of extended separation from his family, travel restrictions, limitations on advancing his post-secondary education and obtaining employment, and restrictions on his freedom of expression. He further claimed damages for reasons of psychological distress, alienation from the Kurdish community, and humiliation due to his inability to fully integrate into Canadian society. On 28 February 2007, his case was stayed, pending a decision in a similar case,<sup>5</sup> *Haj Khalil v. Canada*, which involved another refugee whose application for permanent residence had been subject to unreasonable delay due to alleged security concerns. The Federal Court of Appeal dismissed Ms. Haj Khalil's claim on 6 March 2009. The Supreme Court of Canada then refused Ms. Haj Khalil's application for leave to appeal, on 14 April 2011. Consequently, the author decided to file a notice of discontinuance of his action.<sup>6</sup> As a result of these court rulings, the author considers that he cannot proceed with his lawsuit and that he is effectively barred from accessing an effective remedy for the violation of his rights.

2.8 Pending the Federal Court proceedings for damages, the author was granted permanent resident status on 7 September 2006, 13 years after his initial application. He alleges that it is only after having filed the civil suit that a decision was finally issued by the immigration officer.

2.9 The author argues that he has exhausted all available domestic remedies in Canada<sup>7</sup> and that he has not submitted a similar complaint before any other mechanism of international investigation or settlement.

### **The complaint**

3.1 The author submits that the State party's authorities deliberately failed to process his application for permanent residence in a timely fashion. He claims that he was deprived of the enjoyment of many rights in Canada due to a 13-year delay caused by officials in processing his application, filed in March 1993. He maintains that by causing such delay, Canada has violated his rights under articles 2 (3), 14 (1), 17 (2), 19 (2), 22 and 26 of the Covenant.

3.2 The author alleges a breach of article 26, as he was denied equal access to post-secondary education and the ability to reunite with his family, as a result of a

<sup>3</sup> The author attached as annexes extensive correspondence sent by Ms. Benson, notably to Citizenship and Immigration Canada and to border agencies, as well as her own notes to the file that she made during that period, which show that she had difficulty in reaching a decision, and yet was conscious of the delay in taking a decision.

<sup>4</sup> Canadian Charter of Rights and Freedoms.

<sup>5</sup> The author provided a copy of the memo from the Registry Officer of the Federal Court indicating that the case was stayed until a decision was reached in whichever of two other cases was determined first, as well as of excerpts from the database with the recorded entries regarding his case.

<sup>6</sup> The date is not indicated.

<sup>7</sup> The author has provided copies of relevant judgments. He adds that in *Haj Khalil v. Canada*, where both the factual background and the claims were very similar to those of the present case, the Federal Court ruled that Canada owed no duty of care to permanent residence applicants to process their applications in a timely fashion. The author submits that such precedent has foreclosed his ability to advance a claim of negligence in addition to his claims based on sections 7 and 15 of the Charter, since the court rejected the same Charter claims in Ms. Haj Khalil's case. The author further stresses that the substantial costs award of Can\$ 305,000 against the complainant in *Haj Khalil v. Canada* would expose him to an unacceptable level of liability, should he decide to proceed with his claim.

discriminatory regime that unjustifiably distinguished between persons with refugee status and permanent residents with respect to education and family reunification.<sup>8</sup> The author claims that, despite being admitted to McGill University and the University of Toronto, he was prevented from pursuing post-secondary education to qualify for employment in his profession as an engineer, since he was not eligible to apply for student loans, which were available to persons with permanent resident status.<sup>9</sup> Until 2002, he was unable to be issued with travel documents, which would have enabled him to see his family in third countries.

3.3 The author further asserts that Canada's disproportionate delay in processing his application for permanent residence and its hostile investigatory practices created an intimidating climate, which restricted the author's ability to engage in political expression and activity, thereby violating his freedom of expression guaranteed under article 19 (2) of the Covenant. The author explained that he arrived in Canada fleeing persecution on the basis of ethnicity and saw an opportunity in Canada to raise awareness about the plight of Alevi Kurds, including through the creation of the Toronto Kurdish Community and Information Centre. However, because of his perceived affiliation with the PKK, he feared that any expression of criticism of the Government of Turkey or continued association with the Centre would jeopardize his application. The author therefore considers that the actions of Canada isolated him from his community, interfered with his personal and political relationships and caused him to withdraw from his leadership position with the Centre, constituting a violation of his right to freedom of association under article 22.

3.4 The author argues that he was unable to seek redress for the violations and losses that he suffered as a result of the State party's negligent processing of his application, which was unreasonably delayed for 13 years, in violation of his fair trial rights under articles 2 (3) and 14 (1) of the Covenant.

3.5 The author claims that, despite being granted permanent residence, his honour and reputation were damaged as a result of being wrongly associated with the PKK and its terrorist activities, in contravention of article 17 of the Covenant.

3.6 Finally, the author requests personal compensation related to a loss of earnings for being prevented from accessing post-secondary education and working opportunities, as well as corresponding changes to the Canadian immigration system.

#### **State party's observations on admissibility and the merits**

4.1 On 28 May 2015, the State party submitted its observations on the admissibility and the merits of the communication, informing the Committee that the author had been granted permanent residence in Canada in 2006, and had become a Canadian citizen thereafter, and that his complaint pertained primarily to the delay in the processing of his application for permanent residence. It argues that the communication is inadmissible on account of non-substantiation of the author's claims and for being without merit.

4.2 The author's application for permanent residence had raised national security concerns, which required careful review by Canadian officials before a decision to grant permanent residence in Canada could appropriately be made. While the State party acknowledges that this process took some time, the author had always been able to work in Canada and had had access to education, health care and many other benefits and services. The author had also had access to the Canadian judicial system to raise allegations related to the processing of his application for permanent residence.

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<sup>8</sup> The author refers to E/1999/22-E/C.12/1998/26, in which the Committee on Economic, Social and Cultural Rights criticized this distinction when it considered "the plight of thousands of 'Convention refugees' in Canada, who cannot be given permanent resident status for a number of reasons ...". In particular, the Committee was concerned about the barring of Convention refugees from paying domestic tuition rates for post-secondary education. The Committee urged Canada to "develop and expand adequate programmes to address the financial obstacles to post-secondary education for low-income students, without any discrimination on the basis of citizenship status".

<sup>9</sup> The author explained that he did not attempt to pursue his education after 2003, that is, once the law had changed and he became eligible to apply for student loans, as it seemed unrealistic to do so given that he had been in Canada for nearly 12 years and had not practised his profession nor undertaken any further formal education.

4.3 The State party claims that the communication is inadmissible on four grounds. Firstly, the communication is entirely moot. Given that the author was granted permanent residence more than eight years ago and is now a citizen, the conditions for the alleged violations of his rights have ceased to exist. It cannot be said that a live controversy persists in relation to the author's entitlement to a remedy for delay, in circumstances where the author failed to avail himself of the appropriate domestic remedial avenue to address the delay, namely an application for leave to appeal and for judicial review for an order of mandamus. The author's allegations in relation to the allegedly discriminatory exclusion of refugees from the Canada Student Loans Programme are also moot, as the programme was amended approximately 12 years ago with the aim of remedying the alleged inconsistency with the Covenant.

4.4 Secondly, the communication is wholly or partially inadmissible for non-exhaustion of domestic remedies. The author's allegations of violations of the Covenant both generally and in relation to article 14 (1) relate to the delay in the processing of his application for permanent residence. However, the author failed to pursue the domestic remedy that would have offered him reasonable prospects of redress in relation to the delay. The author also failed to raise the substance of his claims under articles 17 and 26 of the Covenant before the domestic authorities.

4.5 Thirdly, the communication is entirely inadmissible for incompatibility with the provisions of the Covenant. In essence, the author is claiming a right to residency that is not provided for in the Covenant. Consequently, his communication is incompatible *ratione materiae* and hence inadmissible. Alternatively, the author's allegations in relation to articles 14 (1) and 2 (3) are outside the scope of the Covenant. Article 14 (1) does not provide for a substantive right to make a claim. The author's allegations that Canada violated article 14 (1) by precluding a course of action for damages for delay are outside the scope of the Covenant and therefore inadmissible. Article 14 (1) is also not applicable, as the processing of the author's permanent residence application did not constitute the determination of his rights and obligations in a suit at law. The obligations of Canada under article 2 (3) to provide an effective remedy are not engaged, given the absence of any arguable violation of article 14 (1) or any other article of the Covenant.

4.6 Fourthly, the author has failed to substantiate his allegations even on a prima facie basis. In relation to articles 14 (1) and 2 (3), even if they were applicable, the *Haj Khalil v. Canada* decision did not serve to bar the author from accessing a court to seek redress associated with the processing of his application for permanent residence. Moreover, given that the author failed to pursue the appropriate domestic procedure to accelerate his application, the delay cannot be considered so unreasonable as to amount to a violation of article 14 (1). The author has entirely failed to substantiate how, as a result of the *Haj Khalil v. Canada* decision or otherwise, he was prevented from seeking redress for the alleged violations of his rights.

4.7 In relation to article 17, the author has failed to establish that Canadian officials unlawfully attacked his honour and reputation. Canadian law clearly empowers officials to conduct investigations where the consideration of a person's application for permanent residence is at issue. Even if the author had established that Canadian officials had questioned his acquaintances about his activities, which is not admitted, there is no suggestion that this was done for any purpose other than to determine his eligibility for permanent residence.

4.8 In relation to articles 19 (2) and 22, Canada never imposed any unlawful restrictions on the author's rights to freedom of expression or of association, and there is no suggestion that Canada acted with the intent to do so. The author has failed to produce any evidence that Canada delayed processing of his application for permanent residence with the intention of muzzling any political views or causing the author to disassociate himself from the Toronto Kurdish Community and Information Centre. The author may have subjectively felt that his ability to express his political views was limited. However, he was never prohibited by the State from expressing his political opinions, either personally or through the Centre, or threatened with any illegitimate consequences of such expression or association.

4.9 In relation to article 26, the author has not established that he was discriminated against within the meaning of the Covenant due to the exclusion of refugees from the Canada Student Loans Programme prior to 2003. He has not established that his ineligibility for such a loan prior to 2003 had the effect of nullifying or impairing his access to post-secondary education or to the workforce. In addition, the author has completely failed to substantiate his claim that he was denied equal access to travel documents while he was a refugee, in violation of his rights under article 26, together with article 17, of the Covenant. Canada has made travel documents available to refugees since 16 March 1970.

4.10 If the Committee considers the communication admissible in whole or in part, Canada submits on the basis of the same considerations and others that the communication is wholly without merit. The author's claims in relation to a lack of access to court, undue delay and violations of the right to an effective remedy are without merit. The *Haj Khalil v. Canada* decision did not serve to bar the author from accessing court and the author was not prevented by the State from seeking redress for the alleged violations of his rights under the Covenant.

4.11 In relation to the allegations of undue delay in particular, the State party submits that the delay in the present case cannot be considered so unreasonable as to amount to a violation of article 14 (1), taking into account the totality of the circumstances, including the complexity of the issues surrounding the author's application. In *Deisl v. Austria*, the Committee considered the following factors in assessing whether a delay was unreasonable: the length of each stage of the proceedings; the fact that the suspensive effect of the proceedings was beneficial to the authors' legal position; the fact that the authors did not avail themselves of possibilities to accelerate administrative proceedings; the considerable complexity of the matter; and the fact that during the time period in question, negative decisions had been set aside by administrative and judicial authorities.<sup>10</sup> In its Views, the Committee noted that "these factors outweigh any detrimental effects which the legal uncertainty during the protracted proceedings may have caused to the authors".<sup>11</sup> Based on the totality of the circumstances, the Committee considered that the nearly 12-year delay in legal proceedings in that case did not amount to a violation of article 14 (1). In the view of Canada, a consideration of these factors leads to the conclusion that there was no violation of article 14 (1) in the circumstances of the present case.

4.12 The State party points out firstly that the author failed to avail himself of the appropriate procedure to accelerate the processing of his application for permanent residence: if he was concerned about the delay, he should have filed an application for leave to appeal and for judicial review for an order of mandamus to compel a decision. Secondly, the State party submits that the author's file was considered to be complex, particularly at the time that he applied for permanent residence approximately 22 years ago, when counter-terrorism was a relatively new issue for Citizenship and Immigration Canada;<sup>12</sup> a shift to an increased focus on counter-terrorism took place in the 1990s. It also notes that in the months and years following 11 September 2001 there was an increased focus on national security, which led to new departmental processes and guidelines. During the period in question, the initial negative decision on the author's application for permanent residence was set aside by the Federal Court and the matter was sent back to Citizenship and Immigration Canada for a fresh determination. The State party submits that in light of the totality of the circumstances, even if article 14 (1) were applicable in the present case, which is denied, the processing of the author's application for permanent residence was not delayed in such a way that it would amount to a violation of article 14 (1) of the Covenant.

4.13 The State party also claims that the author has failed to establish a violation of article 17 of the Covenant, as he has not provided any evidence, in the form of affidavits or otherwise, to support his assertion that members of his community had been questioned about his activities. Moreover, the author has not alleged any act on the part of Canadian

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<sup>10</sup> *Deisl and Deisl v. Austria* (CCPR/C/81/D/1060/2002), para. 11.6. See also *Lederbauer v. Austria* (CCPR/C/90/D/1454/2006), para. 8.1.

<sup>11</sup> *Deisl and Deisl v. Austria*, para. 11.6.

<sup>12</sup> *Haj Khalil v. Canada* (2007 FC 923), para. 89.

officials that would have amounted to an unlawful attack on his honour or reputation. Even if Canadian Security Intelligence Service agents had interviewed members of the Kurdish community in Canada about the author's activities, which Canada does not admit, such actions would have been entirely consistent with domestic law. As set out above, Canadian officials are, in accordance with the law, entitled to pursue investigations, including interviews, to determine a person's eligibility for permanent residence. In addition, the law authorizes the Canadian Security Intelligence Service to investigate "activities that may on reasonable grounds be suspected of constituting threats to the national security".

4.14 As stated above in regard to articles 19 and 22, the State party maintains that the author has failed to substantiate his allegations that the actions of Canadian officials restricted his rights to freedom of expression and freedom of association. The author was never prohibited from expressing his political opinions, nor was he threatened with any illegitimate consequences of such expression or association. If, however, the Committee should consider that the actions of the Government of Canada constituted a restriction on the author's freedom of expression or freedom of association, the State party submits that any limitation on the author's fundamental freedoms that may have resulted from the process of determining his eligibility for permanent resident status is in accordance with articles 19 (3) and 22 (1) of the Covenant. That is, any restriction was prescribed by law and necessary in the interests of national security and/or public safety. As set out above, Canadian immigration authorities were obliged by law to determine whether or not the author was inadmissible to Canada. The Canadian Security Intelligence Service was authorized by law to conduct investigations to advise the Government on security matters relevant to the exercise of authority under the Immigration Act, as well as to investigate activities that may be suspected of constituting security threats to Canada. In April 2000, the Security Intelligence Review Committee issued the report on its investigation, finding that there was "certainly enough supportive activity" (on the part of the author) "to attract the initial attention of the Service".<sup>13</sup> In September 2000, the immigration officer received new information that indicated that in 1997, PKK fundraising for surface-to-air missiles had taken place at the Toronto Kurdish Community and Information Centre. The author was the president of the Centre in 1993 and 1994, and a member of its executive in 1996 and 1997. It is also worth noting that the PKK was listed as a terrorist organization in Canada in 2002, and has remained a listed organization ever since. Canada maintains that national security and/or public safety requires that it properly screen applicants for security concerns prior to granting them permanent residence.

4.15 Finally, the State party relies on its submission as regards the non-substantiation of the author's allegations in respect of article 26 to argue that the author's claims in relation to unequal access to the Canada Student Loans Programme and to travel documents are without merit. The author's ineligibility to receive a loan under the Canada Student Loans Programme while he was a refugee and prior to 2003 did not have the effect of nullifying or impairing his access to post-secondary education or to the Canadian workforce. The author was issued with numerous work permits during the time before he became a permanent resident. Canada also reiterates that the allegations in relation to the Canada Student Loans Programme are moot, given that the programme was amended approximately 12 years ago to include refugees. In addition, the author was not denied access to travel documents while he was a refugee. Canada has made travel documents available to refugees since 16 March 1970.

4.16 In conclusion, even if the author had established a violation of his rights under the Covenant, which is denied, the State party submits that the relief sought is largely inappropriate since it amounts to a broad challenge to the immigration system of Canada, which is beyond the competence of the Committee.

#### **Author's comments on the State party's observations on admissibility and the merits**

5.1 On 2 October 2015, the author reiterated the arguments presented in his original communication of 31 March 2014 and his additional submission of 9 June 2014.

<sup>13</sup> Author's initial communication, exhibit K (Security Intelligence Review Committee report), p. 27.

5.2 As regards factual issues, the author emphasizes that he has not been found to be a member of a terrorist organization. Both the Security Intelligence Review Committee in April 2000 and the Citizenship and Immigration Canada officer who ultimately granted him permanent residence in September 2006 found that he was not a member of a terrorist organization. The functional definition of “membership” employed by the Canadian Security Intelligence Service compared to that of Citizenship and Immigration Canada cannot be so different as to justify an additional six years of investigation.

5.3 The author reiterates that his submission is admissible as it relates to live issues insofar as there has never been a remedy for the violation of his rights due to the negligent processing of his permanent residence application for 13 years. The communication is not about a right to permanent residence or citizenship, but about the duties of government officials when making decisions fundamental to citizenship and personal status, and the remedies available to those who allege that the Government acted negligently in making these fundamental decisions. The fact that the author was granted permanent residence in 2006, 13 years after filing his initial application and more than 15 years after first arriving in Canada as a refugee, does not take away the violations he suffered, and nor have these grievances ever been remedied. The Committee has found that an author may still be entitled to compensation for violation of his or her rights, even after the rights violation itself no longer exists.<sup>14</sup>

5.4 In addition, the author submits that his communication cannot be considered as moot, since in each of the cases referred to by the State party<sup>15</sup> the author’s communication was found to be inadmissible, not because the violation had occurred in the past, but because the alleged violation had already been remedied or because the potential for a hypothetical future violation to occur had been eliminated. The author’s situation is distinguishable because, despite being granted permanent resident status and ultimately citizenship, the violation of his rights in relation to the processing of his application has never been remedied. Notwithstanding the author’s experience and the harm suffered, the State party has not taken any steps to ensure that others are not subjected to the same excessive delays in processing as experienced by the author. He also submits that the Canadian Security Intelligence Service remains empowered to conduct independent immigration security checks that are not binding on Citizenship and Immigration Canada as regards the admissibility decisions of the latter, and that there is a real possibility of similar violations occurring in the future. His claims relating to article 26 of the Covenant are not moot either, since despite progressive changes to the law which were enacted in 2003, he was unable to access student loans and was not eligible to pay domestic tuition fees between 1996 and 2003.

5.5 Furthermore, the author maintains that he exhausted all available and effective remedies in relation to the delay, including those under the administrative law, under civil tort law and under the Canadian constitutional Charter of Rights and Freedoms. The substance of his communication to the Committee has been raised through his claims before Canadian courts for civil damages for negligent delay in processing his application for permanent residence. The author did not apply for leave to seek mandamus between 2002 and 2005 for four different reasons, one of which was that he legitimately expected, following the positive judicial review decision in 2002, that Citizenship and Immigration Canada would act quickly to resolve his application. Therefore, the author holds that the absence of exhaustion of mandamus cannot be considered as a reason for mootness or inadmissibility.

5.6 In this regard, the author asserts that the exhaustion requirement cannot be interpreted as to prejudice the author’s ability to make strategic and tactical decisions regarding pursuit of an effective domestic remedy for alleged rights violations, especially where the client is indigent and counsels are working on a pro bono basis. If the Committee

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<sup>14</sup> See, for example, *A v. Australia* (CCPR/C/59/D/560/1993), para. 11.

<sup>15</sup> See, for example, *A.P.L.-v.d.M. v. Netherlands* (CCPR/C/48/D/478/1991), paras. 6.3 and 7 (a); *J.H.W. v. Netherlands* (CCPR/C/48/D/501/1992), paras. 5.2 and 6 (a); *Dranichnikov v. Australia* (CCPR/C/88/D/1291/2004), para. 6.3; *Isaeva v. Uzbekistan* (CCPR/C/95/D/1163/2003), para. 9.3; and *González v. Guyana* (CCPR/C/98/D/1246/2004), para. 13.3.



finds that the author should have applied for mandamus between 2002 and 2005, his failure to do so is not relevant to a determination of whether or not he has exhausted domestic remedies, as the heart of the author's claim relates to delay. Even if mandamus were granted to compel a responsible officer to render a decision between 2002 and 2005, the excessive delay in the processing of his claim up until that point would still have entitled him to seek relief from the Committee. Moreover, the author claims to have raised the substance of his claims under articles 17 and 26 of the Covenant in domestic courts to the extent possible under Canadian law. In line with the Committee's jurisprudence, the author was merely required to raise the substance of the rights contained in the Covenant in the domestic proceeding and not to invoke the specific articles of the Covenant.<sup>16</sup>

5.7 The author claims that the communication falls within the scope of the Covenant, reiterating that he is not claiming a right to residency and that he does not argue that such a right exists under the Covenant. Had the State party processed the author's application for permanent residence in a timely manner, even if the decision had been negative, the violations alleged in his communication would not have materialized. He submits that article 14 (1) is not merely procedural but rather confers substantive rights, arguing that in certain circumstances the failure of a State party to establish a competent court to determine rights and obligations may amount to a violation of article 14 (1).<sup>17</sup> Being granted permanent resident status in Canada is essential to the full attainment of the rights to education, work and free movement, and as such the author submits that the substantive rights conferred in article 14 (1) are engaged. Contrary to the submissions by Canada, the author maintains that the decision in *Haj Khalil v. Canada* was an effective bar both to his claims of negligence and to the Charter claims, engaging articles 14 (1) and 2 (3) of the Covenant.<sup>18</sup> There was a real possibility that a court hearing a claim for Charter damages would have forced the author to pay significant costs if he was unsuccessful in this novel claim. This deterred the author from pursuing any of his Charter claims, including under section 2 (freedom of expression and of association) and section 15 (equality). The author points out that the Committee has held that the concept of a "suit at law" is based on the nature of the right in question, rather than on the status of one of the parties or on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon. Rather, each communication must be examined in the light of its particular features.<sup>19</sup> Although the processing of applications for permanent residence is an administrative procedure, it is nonetheless a "suit at law" as permanent residence is a precondition to the full attainment of a host of civil and political rights in Canada. Given the fundamental nature of the rights in question and the fact that the author's application for permanent residence was subject to judicial supervision and control in the form of judicial review, the communication is analogous to *Czernin v. Czech Republic*,<sup>20</sup> and is not incompatible with the provisions of the Covenant. On the other hand, the communications cited by the State party are not directly relevant to the question of whether an application for permanent residence is a "suit at law", since those cases deal with article 13, namely, proceedings related to an author's right to receive protection in the State party's territory.<sup>21</sup>

5.8 Furthermore, without disputing the accessory character of article 2 (3), the author strongly opposes the State party's argument that the right to an effective remedy is not engaged because there has not been any violation of a substantive Covenant right. The author relies upon his original and subsequent submissions, alleging a violation of articles 14, 17, 19, 22 and 26 and seeking remedies.

5.9 As for the merits, the author claims that the 13-year delay in processing his application for permanent residence was patently unreasonable in the circumstances and amounted to a violation of article 14 (1). The Committee has made it clear in its

<sup>16</sup> See, for example, *B.D.B. v. Netherlands* (CCPR/C/35/D/273/1989), para. 6.3; and *Van Alphen v. Netherlands* (communication No. 305/1988), para. 5.5.

<sup>17</sup> See, for example, *Mahuika v. New Zealand* (CCPR/C/55/D/547/1993), para. 9.11.

<sup>18</sup> See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 11.

<sup>19</sup> See, for example, *Y.L. v. Canada* (CCPR/C/27/D/112/1981), para. 9.2.

<sup>20</sup> *Czernin v. Czech Republic* (CCPR/C/83/D/823/1998), para. 7.5.

<sup>21</sup> See, for example, *Kaur v. Canada* (CCPR/C/94/D/1455/2006), para. 7.5.

jurisprudence that “an important aspect of the fairness of a hearing is its expeditiousness” and that “delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing enshrined in paragraph 1” of article 14.<sup>22</sup> In *Lederbauer v. Austria*, the Committee stated that “whether a delay is unreasonable must be assessed in the light of the circumstances of each case, taking into account, inter alia, the complexity of the case, the conduct of the parties, the manner in which the case was dealt with by the administrative and judicial authorities, and any detrimental effects that the delay may have had on the legal position of the complainant.”<sup>23</sup> In this regard, the author submits that neither the fact that counter-terrorism was a relatively new area for Citizenship and Immigration Canada when he applied for permanent residence, nor the increased focus on national security after 11 September 2001, justifies the inordinate delay in the processing of his application. Moreover, any complexities in his case relating to the question of security risk were resolved when the Security Intelligence Review Committee found conclusively that the author had not been a member of a terrorist organization. His application for permanent residence was nevertheless delayed for another six years and he was forced to seek judicial review after a subsequent negative determination.

5.10 With regard to the State party’s submission that the author did not file for mandamus and that this renders the delay reasonable, the author refers to the Committee’s observations in *Perterer v. Austria* that non-fulfilment of the State party’s obligations under article 14 (1) is not excused by the author’s failure to lodge a complaint about undue delay of proceedings as the delay was attributable to procedural errors of the State party.<sup>24</sup> Furthermore, the delay that resulted from the author’s application for judicial review after the initial negative decision cannot be attributed to him, particularly when it was unreasonable for the immigration officer to conclude that the author was a member of a terrorist group without considering the Security Intelligence Review Committee decision.

5.11 As regards article 17, the author submits that the State party has not adduced any evidence to refute the author’s sworn affidavit stating that the Canadian Security Intelligence Service repeatedly asked other members of the Kurdish community about him, that the investigation undertaken by the Canadian Security Intelligence Service had the effect of damaging the author’s honour and reputation within the Kurdish Canadian community, and that the investigation exerted a significant psychological toll on the author. Even if the author’s full contact details were not made public, the investigation undertaken by the Canadian Security Intelligence Service had the effect of branding the author as a security risk, and caused irreparable damage to his honour and reputation within the Kurdish Canadian community, in violation of article 17 of the Covenant.

5.12 The author also maintains that restrictions on his rights under articles 19 and 22 of the Covenant were not justified. While the investigation of the author may have been a legitimate State objective, the undue delay of 13 years in completing that investigation, including after the Security Intelligence Review Committee’s findings, was disproportionate to that aim.<sup>25</sup> This created a climate of fear where the author worried that any expression critical of the Government of Turkey or engagement with the Kurdish community would be construed as support for the PKK. The State party has not provided any specific evidence to establish why restrictions on the author’s freedom of expression or of association were necessary to avert a danger to national security, or how the actions of the immigration authorities were proportionate to that threat.<sup>26</sup> In the absence of such information, the State party cannot suggest that these restrictions were in accordance with articles 19 (3) or 22 (1).

5.13 Finally, the author reiterates that he was discriminated against in his access to post-secondary education due to his immigration status. As a Convention refugee (the

<sup>22</sup> See the Committee’s general comment No. 32, para. 27.

<sup>23</sup> See para. 8.1.

<sup>24</sup> *Perterer v. Austria* (CCPR/C/81/D/1015/2001), para. 10.7.

<sup>25</sup> See the Committee’s general comment No. 34 (2011) on the freedoms of opinion and expression, para. 34.

<sup>26</sup> *Ibid.*, para. 35. See also *Lee v. Republic of Korea* (CCPR/C/84/D/1119/2002), para. 7.2.

Convention relating to the Status of Refugees, of 1951) without permanent resident status, he could not have obtained travel documents to visit his family. In Canada, issuing travel documents to refugees is the prerogative of the Crown and, as such, is discretionary. It was well understood in the refugee community at that time that refugees without permanent resident status could not obtain travel documents and that applying would be futile.

5.14 In conclusion, the author reiterates his request for adequate remedy,<sup>27</sup> pointing out that the purpose of the Covenant “would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant”, including necessary changes to laws and practices.<sup>28</sup>

#### **State party’s supplementary submission on admissibility and the merits**

6.1 On 29 March 2016, the State party responded to the author’s second set of comments, while clarifying the domestic law and certain factual matters, and reiterating its initial submission of 28 May 2015 on the admissibility and the merits of the communication.

6.2 The State party maintains that the present communication is inadmissible on the following grounds. First, the communication is moot. In essence, the communication pertains to the processing of the author’s application for permanent residence. The author was granted permanent residence more than eight years ago and is now a citizen. He could have accessed the domestic court system for a remedy to address delay in the processing of his application, but chose not to do so. Second, the communication is inadmissible for non-exhaustion of domestic remedies. The author decided not to pursue the domestic remedy that could have addressed the issue of delays, and he also failed to raise the substance of his claims under articles 17 and 26 in a domestic forum. Third, the communication is inadmissible for incompatibility with the scope of the Covenant, since the author is in essence claiming a right to residence that is not provided for. Moreover, articles 14 (1) and 2 (3) are not engaged. Finally, the communication is inadmissible for non-substantiation. The author has failed to substantiate any of his allegations, on even a prima facie basis. Should the communication be considered admissible, Canada submits that the communication is without merit. The author has failed to establish any violation of the Covenant.

6.3 Moreover, the author failed to pursue any domestic remedy to address administrative delay in the processing of his application for permanent residence. The author asserts that he pursued three domestic remedies: (a) an application for leave to appeal and for judicial review of the decision not to grant him permanent residence, filed in the Federal Court in April 2001; (b) a complaint to the Security Intelligence Review Committee in October 1997 about the conduct of the Canadian Security Intelligence Service; and (c) a civil action for damages, commenced in the Federal Court in November 2005.

6.4 The State party further claims that the domestic procedures pursued by the author were not remedial avenues to address delay in the processing of his application for permanent residence, in that none of the processes could have served to require the Government to make a decision on that application. The author’s application for leave to appeal and for judicial review did not in any way relate to the delay, but rather asked the Federal Court to review the validity of the March 2001 decision which denied his application for permanent residence. As described in the original submission of Canada, by a decision of 12 November 2002, the Federal Court set the administrative decision aside and remitted the matter for reconsideration by a different decision maker.<sup>29</sup>

6.5 In addition, although in his complaint to the Security Intelligence Review Committee the author complained about the duration of his Canadian Security Intelligence Service security screening, and in his civil action he sought damages for delay, neither of these procedures could have resulted in an outcome compelling a resolution of the delay in

<sup>27</sup> See the Committee’s general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 16.

<sup>28</sup> Ibid., para. 17.

<sup>29</sup> Submission of Canada on the admissibility and the merits of the author’s communication, dated 28 May 2015, paras. 59–60.

the processing of his application for permanent residence. As explained in the original submission of Canada, the Security Intelligence Review Committee is an independent review body that has jurisdiction to investigate complaints made in respect of the Canadian Security Intelligence Service. Security Intelligence Review Committee recommendations are intended to be advisory only; they are not binding on the Canadian Security Intelligence Service or other departments involved.<sup>30</sup> The Security Intelligence Review Committee did not have the authority to compel completion of the author's security screening or to compel a decision on his application for permanent residence. Furthermore, the Federal Court, in the context of the author's civil action, could not have required Canadian officials to complete the processing of the author's application for permanent residence. Under Canadian law, a civil action for damages is substantively different from an application for judicial review, and the available remedies differ. The author's statement that he had been "cleared by the Security Intelligence Review Committee" should be disregarded by the Committee.

6.6 The State party also submits that a civil action for damages is a private remedy, designed primarily to rectify wrongs of the private law with financial compensation or other relief. A civil action is generally a more protracted process, which allows claimants to engage in pretrial discovery to determine the nature and extent of their losses. A court deciding a civil action can order the Government to pay damages, but it does not have the jurisdiction to quash administrative decisions or to order the Government to render a decision under federal legislation.

6.7 In contrast, judicial review serves the public purpose of ensuring good governance. It is directed at the legality, reasonableness and fairness of the procedures employed and actions taken by government decision makers. Judicial review is intended to be a quick and summary process to quash invalid government decisions, or to require the Government to act or to prohibit it from acting. One of the remedies available on a judicial review is an order for mandamus, which can compel a resolution to administrative delay in that the Government may be ordered to make a decision within a specified time frame. The Supreme Court of Canada has explained that "judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about".

6.8 The State party concludes that the author failed to pursue the one remedy that could have resulted in an order compelling the Government to make a decision on his application for permanent residence, namely an application for leave to appeal and for judicial review for an order of mandamus. He failed to seek the sole remedy that would have directly addressed administrative delay, despite being represented by counsel. Since the author's complaint to the Committee related to delay in the processing of his application for permanent residence, the failure to pursue the domestic remedy that is intended to address administrative delay cannot be discounted or excused on the basis that this was a "strategic and tactical decision".<sup>31</sup> Finally, the State party maintains that the author's communication is inadmissible due to mootness. It cannot be held that a live controversy persists in relation to the author's entitlement to a remedy for delay, in circumstances where the author could have accessed the domestic court system for a remedy to address the delay but failed to do so.<sup>32</sup> The State party requests that the Committee consider the communication to be inadmissible, or in the alternative without merit.

## **Issues and proceedings before the Committee**

### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

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<sup>30</sup> Ibid., paras. 42 and 50.

<sup>31</sup> Author's comments of 2 October 2015, para. 18.

<sup>32</sup> Submission of Canada on the admissibility and the merits, paras. 88–92.

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

7.3 The Committee notes the State party's objections to the admissibility of the communication on the grounds that the author's claims are moot given that he was granted permanent residence in 2006 and is now a citizen, and given that the conditions for the alleged violations of his rights have ceased to exist, including due to the fact that all refugees have had access to the Canada Student Loans Programme since 2003. The Committee also notes the author's claim that his allegations relate to live issues insofar as the fact of being granted permanent residence does not take away the violations he suffered, and nor have the violations of his rights due to the negligent processing of his permanent residence application for 13 years ever been remedied. The Committee further notes, however, that neither the changes made to refugees' access to education nor regularization of the author's status could retroactively remedy the harm he may have suffered between 1993 and 2003,<sup>33</sup> and between 1993 and 2006,<sup>34</sup> due to limited access to a range of rights, benefits and services.<sup>35</sup> The Committee recalls its jurisprudence that an author may be entitled to compensation for violation of his rights, even after the rights violation itself no longer exists.<sup>36</sup> Accordingly, the Committee considers that the author's allegations were not moot, and do not contravene article 3 of the Optional Protocol.

7.4 Moreover, the Committee observes that the State party has objected to the admissibility of the communication generally and in relation to articles 14 (1) and 2 (3) of the Covenant, under article 5 (2) (b) of the Optional Protocol, as the author could have accessed the domestic court system but failed to avail himself of the appropriate domestic remedy to address the delay in the processing of his application for permanent residence, namely an application for leave to appeal and for judicial review for an order of mandamus. The Committee notes the author's objection to inadmissibility, while also noting his admission that he did not apply for leave to seek mandamus between 2002 and 2005 for four different reasons, one of which was that he legitimately expected, following the positive judicial review decision in 2002, that Citizenship and Immigration Canada would act quickly to resolve his application (see para. 5.5 above). The author also discontinued his civil suit before the Federal Court for damages in light of the decision in *Haj Khalil v. Canada*. The Committee recalls its jurisprudence according to which the author must exhaust, for the purpose of article 5 (2) (b) of the Optional Protocol, all judicial or administrative remedies insofar as such remedies offer a reasonable prospect of redress and are de facto available to the author.<sup>37</sup> The author does not explain why such remedy to address administrative delay would not have been effective in his case, despite being represented by counsel.<sup>38</sup> Accordingly, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have not been met in regard to alleged violations of articles 14 (1) and 2 (3) of the Covenant. In light of the above, the Committee will not consider whether the author's allegations in this regard lack sufficient substantiation or are incompatible with the Covenant.

7.5 As regards article 17, the Committee notes the State party's submission that the author has failed to establish that Canadian officials unlawfully attacked his honour and reputation, given that the authorities lawfully investigated the author's activities due to his perceived affiliation with the PKK and his involvement in the Toronto Kurdish Community and Information Centre. The State party has argued that his activities raised national security concerns, pointing out that the PKK has remained a listed organization, even after

<sup>33</sup> As regards lack of access to education by the author.

<sup>34</sup> As regards alleged violations of other of the author's rights.

<sup>35</sup> *Dranichnikov v. Australia*, para. 6.3; *A.P.L.-v.d.M. v. Netherlands*, para. 6.3; and *Toussaint v. Canada* (CCPR/C/123/D/2348/2014), para. 10.5.

<sup>36</sup> See, for example, *A v. Australia*, para. 11; and *Wilson v. Philippines* (CCPR/C/79/D/868/1999), para. 6.3.

<sup>37</sup> See, for example, *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2; *P.L. v. Germany* (CCPR/C/79/D/1003/2001), para. 6.5; *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4; and *Singh et al. v. Canada* (CCPR/C/125/D/2948/2017), para. 6.4.

<sup>38</sup> See the Committee's general comment No. 32, paras. 9 and 27.

2002, and that such investigation was done for the sole purpose of determining the author's eligibility for permanent residence. The Committee also notes the author's argument that he has not been found to be a member of a terrorist organization, and that such determination included several stages of contradictory decisions and hence took an unreasonable length of time. The Committee considers that the author has not sufficiently substantiated in what way the investigations undertaken caused irreparable damage to his honour and reputation within the Kurdish Canadian community. Consequently, this part of the communication is declared inadmissible for lack of substantiation, pursuant to article 2 of the Optional Protocol.

7.6 In relation to articles 19 (2) and 22, the Committee notes that the author refrained from expressing himself freely on the political situation in his country of origin and withdrew from the Toronto Kurdish Community and Information Centre on account of his perceived affiliation with the PKK, since he feared that any criticism of the Government of Turkey or continued association with the Centre would jeopardize his application. The Committee also notes the State party's argument that the author's rights to freedom of expression and of association have not suffered from any unlawful restrictions and that there was no suggestion that the State party had intended to do so. Given that the author decided of his own volition to limit his activities and the expression of his opinions, the Committee considers that he has failed to sufficiently substantiate his claim that he would have been prohibited by the State party from expressing his political opinions, or would have faced any illegitimate consequences of such expression or association. Accordingly, this part of the communication is declared inadmissible, pursuant to article 2 of the Optional Protocol.

7.7 As regards article 26, the Committee notes the author's allegations that despite being admitted to McGill University and the University of Toronto he was prevented from pursuing post-secondary education to qualify for employment in his profession as an engineer since he was not eligible to apply for student loans which were available to persons with permanent resident status, and that he was unable to be issued with travel documents until 2002 when he was found not to present security risks. The Committee also notes the State party's arguments that the author's allegations are unsubstantiated since his ineligibility to receive a Canada Student Loans Programme while he was a refugee, prior to 2003 when the law changed, did not have the effect of nullifying or impairing his access to post-secondary education or to the Canadian workforce as he was issued with numerous work permits during the time before he became a permanent resident, and that he was not denied access to travel documents while he was a refugee. Recalling its general comment No. 18 (1989) on non-discrimination<sup>39</sup> and the jurisprudence that not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination,<sup>40</sup> the Committee considers that it has not been sufficiently substantiated that the author's differential treatment based on residence status was not objective, reasonable and in pursuit of a legitimate aim. Consequently, these claims are inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

- (a) That the communication is inadmissible under articles 2 and 5 (2) (b) of the Optional Protocol;
- (b) That the present decision shall be transmitted to the State party and the author.

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<sup>39</sup> See paras. 7 and 13.

<sup>40</sup> See, for example, *Broeks v. Netherlands* (CCPR/C/29/D/172/1984), para. 13; *Zwaan-de Vries v. Netherlands* (CCPR/C/29/D/182/1984), para. 13; *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3; and *Toussaint v. Canada*, para. 11.7.