

## **INTERNATIONAL LAW AND PROCEDURAL SAFEGUARDS IN DEPORTATION PROCEEDINGS: *AHANI V. CANADA***

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### Article abstract

In *Ahani v. Canada*, the United Nations Human Rights Committee considered the procedural and institutional rights conferred by the *International Covenant on Civil and Political Rights* on aliens who face deportation on national security and other grounds. By “reading in” some of the due process protections reflected in article 14 of the Convention, the decision gave meaningful content to an alien’s article 13 right to submit reasons against his expulsion and to have his case reviewed by a competent authority. These include the right to sufficient notice of the case so that the alien can resist removal, accompanied by appropriate disclosure, and the right to reasons for the final removal decision. Unfortunately, the decision failed to determine whether article 14 applied directly to immigration decision-making, entitling aliens to a hearing before an independent and impartial tribunal. The author argues that the Committee should have addressed this question and found, in light of the *travaux préparatoires* of the Covenant, the Committee’s jurisprudence, and that of the European Court of Human Rights, that article 14 does apply to some immigration decision-making, including deportation proceedings.

## INTERNATIONAL LAW AND PROCEDURAL SAFEGUARDS IN DEPORTATION PROCEEDINGS: *AHANI V. CANADA*

*Par Gerald Heckman\**

Dans *Ahani c. Canada*, le Comité des droits de l'homme se penche sur la question des droits procéduraux des étrangers visés par des procédures d'expulsion pour des motifs de sécurité nationale. Le Comité reconnaît à l'article 13 du *Pacte international relatif aux droits civils et politiques* un contenu significatif en y incorporant certains éléments relatifs à un procès équitable faisant l'objet de l'article 14 : l'étranger menacé d'expulsion a le droit d'être informé des éléments matériels sur lesquels l'autorité administrative fonde sa décision de l'expulser, de contester ces éléments et d'obtenir les motifs justifiant cette décision. Cependant, le Comité s'est gardé de décider si le champ d'application de l'article 14 s'étendait aux décisions en matière d'immigration et garantissait aux étrangers le droit de se faire entendre par un tribunal indépendant et impartial. Selon l'auteur, le Comité se devait d'adresser cette question et, à la lumière des travaux préparatoires au Pacte ainsi que de sa jurisprudence et celle de la Cour européenne des droits de l'Homme, de décider que l'article 14 s'applique désormais aux décisions en matière d'immigration, y compris celles visant l'expulsion des étrangers.

In *Ahani v. Canada*, the United Nations Human Rights Committee considered the procedural and institutional rights conferred by the *International Covenant on Civil and Political Rights* on aliens who face deportation on national security and other grounds. By "reading in" some of the due process protections reflected in article 14 of the Convention, the decision gave meaningful content to an alien's article 13 right to submit reasons against his expulsion and to have his case reviewed by a competent authority. These include the right to sufficient notice of the case so that the alien can resist removal, accompanied by appropriate disclosure, and the right to reasons for the final removal decision. Unfortunately, the decision failed to determine whether article 14 applied directly to immigration decision-making, entitling aliens to a hearing before an independent and impartial tribunal. The author argues that the Committee should have addressed this question and found, in light of the *travaux préparatoires* of the Covenant, the Committee's jurisprudence, and that of the European Court of Human Rights, that article 14 does apply to some immigration decision-making, including deportation proceedings.

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## Introduction

The decision of the United Nations Human Rights Committee in *Ahani v. Canada*<sup>1</sup> marks the end of an extraordinary legal saga. Accepted by Canada as a refugee in 1992, Mansour Ahani was the following year designated as a suspected terrorist and assassin by Canadian authorities, who detained him and initiated deportation proceedings. Over the next nine years, Ahani exhausted every available recourse under Canadian law to avoid being returned to Iran, where he alleged he would be tortured and executed. Ahani petitioned the Human Rights Committee on January 10, 2002 but was deported by Canadian authorities on June 10, 2002 despite the Committee's request for interim measures of protection and before the Committee could deliver its views on his communication. In March 2004, the Committee determined that Canada had violated its obligations under the *International Covenant on Civil and Political Rights*<sup>2</sup> (the Covenant or the *ICCPR*) in failing to provide Ahani with timely judicial review of his detention and the appropriate procedural safeguards in the proceedings that led to his expulsion.

Like many other states, Canada periodically seeks to remove aliens that it deems a threat to national security following procedures that lack the procedural and institutional safeguards commonly offered in other decision-making contexts. The terrorist attacks of September 11, 2001 deepened fears in many states that terrorists could use immigration and refugee protection regimes to enter their territories and facilitate or perpetrate terrorist acts. As immigration and refugee policy became increasingly "securitized," States adopted measures that further undermined due process protections for aliens, in particular those facing removal on security grounds.<sup>3</sup>

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<sup>1</sup> Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 (2004) [*Ahani HRC*]. Established by the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976) [*ICCPR* or the "Covenant"], the Committee on Human Rights ["Committee" or "Human Rights Committee"] monitors the implementation of the *Covenant* in States Parties by reviewing their reports detailing efforts to comply with the *ICCPR*. Under the *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 ["*Optional Protocol*"] it may receive and consider communications from individuals alleging a breach of their *ICCPR* rights by States Parties to the *Optional Protocol*: see generally David Kretzmer, "The Human Rights Committee" in Anne F. Bayefsky, ed., *The UN Human Rights Treaty System in the 21<sup>st</sup> Century* (The Hague: Kluwer Law International, 2000) at 163. Canada is a signatory to the *ICCPR* and has accepted the jurisdiction of the Committee to examine individual communications.

<sup>2</sup> *ICCPR, Ibid.*

<sup>3</sup> In Canada, as in the United States, legislative efforts based on an "immigrant-as-security-threat leitmotif" preceded the September 11<sup>th</sup> attacks: see Audrey Macklin, "Borderline Security" in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essay on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 383 at 384. For a detailed review of the securitization of refugee policy from a Canadian perspective, see Sharryn Aiken, "Of Gods and Monsters: National Security and Canadian Refugee Policy" (2001) 14.2 R.Q.D.I. 1 [Aiken]. For a thorough discussion of the post-September 11<sup>th</sup> erosion of aliens' rights in the United States placed in historical context, see David Cole, *Enemy Aliens – Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: The New Press, 2003).

The Ahani case raised the question of whether international human rights law could supply an effective defense against this trend by guaranteeing aliens minimum due process safeguards in national security expulsions. Because the Committee's decision transcends the national security context, this article investigates its impact in defining the procedural protections afforded by the Covenant to aliens in the broader context of immigration decision-making. In particular, it examines whether the Committee should have recognized that aliens involved in immigration proceedings are entitled, under article 14(1) of the Covenant, to a fair hearing before an independent and impartial tribunal. It argues that the Ahani decision represents a missed opportunity for the Committee to pronounce itself clearly on this important question and to provide a degree of certainty, and perhaps, enhanced procedural and institutional protections to those aliens who seek to invoke their rights under the Covenant.

Part II of the article recounts the history of the deportation proceedings initiated by the Canadian Government against Ahani and his challenge to the legality and fairness of these proceedings, culminating in his communication to the Human Rights Committee. Part III describes the Committee's views on Ahani's communication, which are analyzed and criticized in Part IV. Emphasis is placed on the Committee's interpretation of article 13 of the Covenant, which prescribes minimum procedural protections for aliens in expulsion proceedings, and in particular, its refusal to decide whether article 14 even applies in the context of deportation proceedings against aliens. Following a discussion of the *travaux préparatoires* of the Covenant,<sup>4</sup> the Committee's own jurisprudence and that of the European Court of Human Rights, this article argues that some public law proceedings, including some immigration proceedings, *do* fall within the scope of article 14 and that a contextual interpretation of this provision may prevent the over-judicialization of immigration law feared by States Parties to the Covenant, including Canada.

## **I. Ahani v. Canada: a brief history of the proceedings**

### **A. Domestic proceedings**

Mansour Ahani, an Iranian citizen, arrived in Canada in 1991 and sought refugee status, claiming that his return to Iran would endanger his life. As a forced conscript in the foreign assassins' branch of the Iranian foreign ministry, he was familiar with Iranian covert operations and assassinations and Iran was aware of his "defection." Further, he had been imprisoned four years for refusing to participate in a raid against an Iranian dissident. The Immigration and Refugee Board recognized Ahani as a *Convention* refugee in 1992. The Canadian Security Intelligence Service (CSIS), which had monitored Ahani since his arrival in Canada, prepared an intelligence report, claiming that there were reasonable grounds to believe that Ahani worked for Iran's Ministry of Intelligence and Security (MOIS), which sponsored

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<sup>4</sup> Marc J. Bossuyt, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) [*Travaux préparatoires*].

assassinations and other terrorist activities worldwide, that MOIS had trained Ahani as an assassin and that he had traveled to Europe to help assassinate an Iranian dissident.<sup>5</sup> After receiving and reviewing the CSIS report, Canada's Solicitor General and Minister of Citizenship and Immigration (the Ministers) decided in June 1993 to issue a certificate under Section 40.1 of the *Immigration Act*<sup>6</sup> (the Act) to the effect that Ahani was inadmissible to Canada because there were reasonable grounds to believe that he was a terrorist or a member of a terrorist organization.<sup>7</sup>

This was the first of four steps set out in Sections 40.1 and 53 of the *Immigration Act* that would lead to Ahani's deportation to Iran on security grounds. Ahani was detained<sup>8</sup> pending a review of the reasonableness of the certificate, the second step in the removal proceedings.<sup>9</sup> Under the review procedure, a designated Federal Court judge examines, *in camera*, the intelligence reports and other evidence and information provided by the Ministers in support of the certificate's reasonableness. The judge may hear some of this evidence in the absence of the person named in the certificate or his counsel<sup>10</sup> if the judge is of the view that its disclosure would be injurious to national security or the safety of persons. However, the judge must provide the person named in the certificate a summary of the evidence to enable the person to be reasonably informed of the circumstances giving rise to the certificate<sup>11</sup> and a reasonable opportunity to be heard.<sup>12</sup> The judge's decision as to the reasonableness of the certificate is final and not subject to appeal;<sup>13</sup> it constitutes conclusive proof that the person named in the certificate is inadmissible and authorizes his continued detention pending removal,<sup>14</sup> subject to detention review 120 days after the issuance of a removal order.<sup>15</sup>

<sup>5</sup> *Re Ahani*, [1998] F.C.J. No. 507 at para. 12 (QL) [*Ahani 1998*].

<sup>6</sup> *Immigration Act*, R.S.C. 1985, c. I-2 [*Immigration Act or Act*].

<sup>7</sup> *Immigration Act*, *Ibid.* More precisely, the certificate alleged that Ahani was a member of an inadmissible class described in ss. 19(1)(e)(iii) and 19(1)(f)(ii) (reasonable grounds to believe he will or has engaged in terrorism), 19(1)(e)(iv)(C) and 19(1)(f)(iii)(B) (reasonable grounds to believe he is or was a member of an organization that there are reasonable grounds to believe will engage, is engaged or was engaged in terrorism) and ss. 19(1)(g) (reasonable grounds to believe that he will engage in acts of violence that would or might endanger the lives or safety of persons in Canada or likely to participate in the unlawful activities of an organization likely to engage in such acts). The *Immigration Act* has since been repealed and replaced with the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. The provisions governing the issuance and referral of security certificates are essentially the same, and are now found at ss. 76-77 of the new statute.

<sup>8</sup> *Ibid.*, s. 40.1(2)(b). See *IRPA*, *supra* note 7, ss. 82-84, which now govern the detention of aliens named in security certificates.

<sup>9</sup> *Immigration Act*, *Ibid.*, s. 40.1(4)(d). See also *IRPA*, *Ibid.*, ss. 78-81, which now govern the reasonableness determination.

<sup>10</sup> *Immigration Act*, *Ibid.*, s. 40.1(4)(a). See also *IRPA*, *Ibid.*, s. 78(e).

<sup>11</sup> *Immigration Act*, *Ibid.*, s. 40.1(4)(b). See also *IRPA*, *Ibid.*, s. 78(h).

<sup>12</sup> *Immigration Act*, *Ibid.*, s. 40.1(4)(c). See also *IRPA*, *Ibid.*, s. 78(i).

<sup>13</sup> *Immigration Act*, *Ibid.*, s. 40.1(6). See also *IRPA*, *Ibid.*, s. 80(3).

<sup>14</sup> *Immigration Act*, *Ibid.*, s. 40.1(7). See also *IRPA*, *Ibid.*, s. 81(a).

<sup>15</sup> *Immigration Act*, *Ibid.*, s. 40.1(8). If the person named in the certificate applies for a detention review, the designated judge may once more hear evidence from the Ministers *in camera*, some of it *ex parte*, and must provide a summary of this evidence to the detainee and provide him with a reasonable opportunity to be heard: s. 40.1(10). The designated judge may release the detainee if satisfied that the detainee would not be removed from Canada within a reasonable time and that release of the detainee would not be injurious to national security or to the safety of persons: s. 40.1(9).

In June 1993, a Federal Court judge examined the Ministers' evidence in Ahani's absence, provided him with a summary of the evidence and afforded him an opportunity to be heard.<sup>16</sup> Instead of participating in the reasonableness review, Ahani unsuccessfully challenged its constitutionality.<sup>17</sup> The review proceeding resumed once the appeals process concluded in July 1997. The designated judge ordered additional disclosure in December 1997, heard Ahani's submissions and decided in April 1998 that the Ministers' certificate was reasonable. In the judge's view, the government had established most, if not all, the facts sustaining its allegations against Ahani. Furthermore, the judge rejected Ahani's explanations for his actions, finding that they lacked credibility.<sup>18</sup>

Following the reasonableness review, Ahani underwent a deportation hearing before an immigration adjudicator, the third step in the deportation process. The adjudicator determined that Ahani should be deported, as there were, in his view, reasonable grounds to believe that Ahani was a member of a terrorist organization and that he had engaged or would engage in terrorism.<sup>19</sup> The Minister of Citizenship and Immigration (the Minister) then issued a removal order against Ahani and informed him that she intended to issue a danger opinion under section 53(1)(b) of the Act, the fourth and final step in the deportation process. This provision conferred the Minister a discretion to decide that a refugee, found to be inadmissible on the grounds of terrorism or membership in a terrorist organization, constitutes a danger to the security of Canada and can be removed to a country where his life or freedom would be threatened. The Act required no procedural safeguards in relation to the Minister's exercise of this power. Nevertheless, the Minister invited Ahani to submit arguments and evidence regarding the likelihood that he would be tortured if returned to Iran, but disclosed to him none of the evidence or recommendations that she received from her staff. Ahani unsuccessfully applied for judicial review of the Minister's decision to issue a danger opinion, arguing that the Act violated his right, under section 7 of the *Charter*, to life, liberty and security of the person and did not accord with the principles of fundamental justice because it allowed the Minister to deport individuals to countries where they faced a substantial risk of torture.<sup>20</sup> At the same time, he

<sup>16</sup> *Ahani 1998*, *supra* note 5 at para. 4.

<sup>17</sup> He alleged, among other things, that the *ex parte* hearings and lack of full disclosure violated s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*] and that detention without the possibility of pre-determination release was arbitrary and contrary to fundamental justice, breaching ss. 7 and 9 of the *Charter*. The Federal Court, Trial Division dismissed Ahani's challenge, finding that the provisions of the *Immigration Act* struck a reasonable balance between individual and state interests: *Ahani v. Canada*, [1995] F.C.J. No. 5 (T.D.), *aff'd* [1996] F.C.J. No. 937 (C.A.) (QL), leave to appeal dismissed [1996] S.C.C.A. No. 496 (QL). Under s. 7 of the *Charter*, "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Under s. 9, "everyone has the right not to be arbitrarily detained or imprisoned".

<sup>18</sup> *Ahani 1998*, *supra* note 5 at paras. 14-15.

<sup>19</sup> *Ahani v. Canada* (Minister of Citizenship and Immigration), [1999] F.C.J. No. 1020 at para. 5 (T.D.) (QL).

<sup>20</sup> *Ahani v. Canada* (Minister of Citizenship and Immigration), [2000] F.C.J. No. 53 (C.A.) (QL), *aff'g* [1999] F.C.J. No. 1020 (T.D.) (QL), *aff'd* [2002] 1 S.C.R. 72 [*Ahani SCC*]. Ahani also unsuccessfully pleaded that 'danger to the security of Canada' and 'terrorism', undefined in the *Act*, were

unsuccessfully applied for release from detention. The Federal Court refused to release Ahani because he could be removed within a reasonable time, as long as he did not make use of legal recourses that would delay removal and because he had failed to demonstrate that his release would not injure the safety of persons in Canada.<sup>21</sup>

Ahani's constitutional challenge to Section 53 of the *Immigration Act* was heard by the Supreme Court of Canada concurrently with the case of *Manickavasagam Suresh* (Suresh), a *Convention* refugee belonging to an association with alleged ties to the Liberation Tigers of Tamil Eelam, a terrorist organization. In *Suresh*, the Supreme Court determined that in granting the Minister an exceptional discretion to deport individuals to torture, the *Immigration Act* did not violate section 7 of the *Charter*, provided that the Minister balanced the degree of probability of prejudice to national security and the importance of the security interest at stake with the serious consequences of deportation to the deportee.<sup>22</sup> The Court reached this conclusion despite holding that international law, including the *International Covenant on Civil and Political Rights*<sup>23</sup> and the *Convention against Torture*,<sup>24</sup> both ratified by Canada, rejects deportation to torture, even where national security interests are at stake.<sup>25</sup>

The Court also established the framework within which the Minister is required to exercise her discretion to issue a danger opinion. First, the Minister's decision that a refugee constitutes a danger to the security of Canada is highly discretionary, fact-based, contextual and would be set aside by a reviewing court only if it were patently unreasonable "in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors."<sup>26</sup> Second, the Minister's decision on whether a refugee faced a substantial risk of torture on deportation is in large part a fact-driven inquiry involving issues,<sup>27</sup> largely outside the realm of expertise of reviewing courts, with a negligible legal dimension and would be set aside only if it were patently

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unconstitutionally vague and that the *Act's* deportation scheme violated his rights to free expression and association. The Supreme Court found that the term "terrorism" was "sufficiently certain to be workable, fair and constitutional": *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at para. 98 [*Suresh*].

<sup>21</sup> *Ahani v. Canada*, [1999] F.C.J. No. 310 at para. 23-24 (T.D.) (QL), aff'd [2000] F.C.J. No. 1114 (C.A.) (QL).

<sup>22</sup> *Suresh*, *supra* note 20 at para. 77.

<sup>23</sup> *ICCPR*, *supra* note 1.

<sup>24</sup> *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, Can. T.S. 1987 No. 36 [CAT].

<sup>25</sup> *Suresh*, *supra* note 20 at para. 75. For a critique of this aspect of the decision, see Gerald P. Heckman, "International Human Rights Law Norms and Discretionary Powers: Recent Developments" (2003) 16 C.J.A.L.P. 31 [Heckman, CJALP] and Gerald P. Heckman, "Securing Procedural Safeguards for Asylum Seekers in Canadian Law: An Expanding Role for International Human Rights Law?" (2003) 15 I.J.R.L. 212.

<sup>26</sup> *Suresh*, *supra* note 20 at para. 29.

<sup>27</sup> These included the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces (*Ibid.*, at para. 39).

unreasonable.<sup>28</sup> Finally, where a *Convention* refugee made out a *prima facie* case that there may be a substantial risk of torture or similar abuse upon deportation, section 7 of the *Charter* entitled the refugee to substantial procedural safeguards.<sup>29</sup> Suresh, who had met this evidentiary onus, was entitled to examine the materials upon which the Minister based her decision to deport- subject to claims of privilege-, to respond to the Minister's case and challenge her information regarding the threat he posed to national security, the risk of torture and the value of assurances from foreign governments that he would not be tortured, as well as to obtain written reasons from the Minister justifying her final decision.<sup>30</sup> Because the disclosure mandated by the *Charter* had not taken place, the Supreme Court remanded Suresh's case to the Minister for reconsideration in accordance with the required procedural safeguards. In contrast, the Court held that the Minister's conclusion that Ahani faced only a minimal risk of harm if returned to Iran was not patently unreasonable.<sup>31</sup> Because Ahani had not made out a *prima facie* case that he faced a substantial risk of torture in Iran, the Court found that he had not "cleared the evidentiary threshold"<sup>32</sup> required to access section 7 protections and was not entitled to the constitutional procedural safeguards identified in Suresh. Although Ahani had not been afforded the procedures found necessary in Suresh, the Court concluded that this did not prejudice him because he was fully informed of the Minister's case against him and given a full opportunity to respond.<sup>33</sup>

On January 10, 2002, a day before the Supreme Court dismissed his appeal, Ahani filed a communication with the United Nations Human Rights Committee, alleging that he was the victim of Canadian violations of several articles of the *ICCPR*.<sup>34</sup> On the following day, the Committee issued a request for interim measures of protection, asking Canada to refrain from deporting Ahani until it had considered his allegations that he faced a substantial risk of torture, other inhuman treatment or even death, upon deportation.<sup>35</sup> Ahani unsuccessfully sought an injunction from the Ontario Superior Court restraining his deportation, arguing that fundamental justice under section 7 of the *Charter* required that he be allowed to remain in Canada until the Committee had considered his communication.<sup>36</sup> A majority of the Ontario Court of Appeal upheld the lower court decision denying the injunction.<sup>37</sup> It held that the *ICCPR* and the petition procedure in the *Optional Protocol to the International Covenant on Civil and Political Rights*<sup>38</sup> (the *Optional Protocol* or the *Protocol*) were not legislatively incorporated into Canadian law and therefore could not be enforced in Canadian courts. Further, these international obligations were limited: Canada had

<sup>28</sup> *Suresh, Ibid.* at para. 39; *Ahani SCC, supra* note 20 at para. 17.

<sup>29</sup> *Suresh, Ibid.* at para. 127; *Ahani SCC, Ibid.* at para. 24.

<sup>30</sup> *Suresh, Ibid.* at paras. 122-127.

<sup>31</sup> It characterized the conclusion as "unassailable": *Ahani SCC, supra* note 20 at para. 19.

<sup>32</sup> *Ibid.* at para. 2.

<sup>33</sup> *Ibid.* at para. 26.

<sup>34</sup> *Ahani HRC, supra* note 1 at para. 1.1.

<sup>35</sup> *Ibid.* at para. 1.2.

<sup>36</sup> *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] O.J. No. 81 (Sup. Ct.) (QL).

<sup>37</sup> *Ahani v. Canada (Attorney General)* (2002), 58 O.R. (3d) 107 (C.A.) [*Ahani OCA*].

<sup>38</sup> *Optional Protocol, supra* note 1.



not committed itself to be bound by the final views of the Committee, nor to stay its domestic proceedings until the Committee delivered its views.<sup>39</sup> On June 10, 2002, Canada deported Ahani to Iran.<sup>40</sup>

## **B. Ahani's communication to the Human Rights Committee**

In his communication to the Human Rights Committee, Ahani complained that he had been detained arbitrarily, attacked the adequacy of the safeguards surrounding Canada's decision to expel him to Iran and alleged that his expulsion had put him at risk of torture and death.

### **1. ARBITRARY DETENTION**

Ahani claimed that from the outset of his detention in June 1993, he had only been eligible for a detention review 120 days after the removal order was issued against him in August 1998. In Ahani's view, this treatment, combined with his automatic detention upon the issuance of a ministerial certificate and the absence of regular detention reviews, violated article 9 of the *ICCPR*.<sup>41</sup> Canada responded that Ahani's detention was not arbitrary, since it was in furtherance of Canada's right, under the *Immigration Act*, to expel aliens identified as threats to national security.<sup>42</sup> Further, the Federal Court procedure to review the reasonableness of the security certificate was itself a statutory detention review. In view of Ahani's decision to challenge the constitutionality of the procedure and of his failure to take steps to expedite proceedings, Canada argued that he was responsible for his own lengthy detention.<sup>43</sup> Ahani challenged this claim, noting that even without a constitutional challenge, security certificate reasonableness hearings lasted many months and detention reviews became available only well after a year.<sup>44</sup>

### **2. ADEQUACY OF REMOVAL PROCEDURES**

Ahani claimed that the procedures that governed his removal from Canada were inadequate and violated several articles of the *ICCPR*. Firstly, he argued that Canada had breached his right under article 14(1) of the *ICCPR* to a fair and public

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<sup>39</sup> *Ahani OCA*, *supra* note 37 at paras. 31-33. For a critique of this decision, see Heckman, CJALP, *supra* note 25 at 55 *et seq.* See also Joanna Harrington, "Punting Terrorists, Assassins and Other Undesirables: Canada, the Human Rights Committee and Requests for Interim Measures of Protection" (2003) 48 McGill L. J. 55 [Harrington].

<sup>40</sup> *Ahani HRC*, *supra* note 1 at para. 1.2.

<sup>41</sup> *Ibid.* at para. 3.4. Article 9(1) provides, in part, that "no one shall be subject to arbitrary arrest or detention." Article 9(4) states that "anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

<sup>42</sup> *Ibid.* at paras. 4.9 and 7.3.

<sup>43</sup> *Ibid.* at paras. 4.8-4.12.

<sup>44</sup> *Ibid.* at para. 6.9.

hearing by a competent, independent and impartial tribunal in the determination of his rights in a suit at law. Ahani claimed that throughout the proceedings leading to his removal, the Minister of Citizenship and Immigration, an elected representative<sup>45</sup> and a member of the executive, was neither an independent nor an impartial decision-maker. The Minister could not be seen as impartial in deciding, at the end of the removal process, whether Ahani should be deported because she had initiated removal proceeding, -by issuing the certificate- defended her certificate's reasonableness and prosecuted against Ahani at the deportation inquiry.<sup>46</sup> Furthermore, the process was procedurally deficient because it provided Ahani insufficient notice of the case he had to meet to resist removal under Section 53, failed to require the Minister to disclose the submissions of her officials in favour of removal and failed to require the Minister to provide reasons for her final decision, making judicial review impossible<sup>47</sup>-the very flaws condemned by the Supreme Court in Suresh.<sup>48</sup> It was no answer to say that Ahani was not entitled to the more complete procedural safeguards required in Suresh because he had failed to establish a *prima facie* case of substantial risk of torture; in Ahani's view, the deficient procedures impeded his ability to do so.<sup>49</sup> Secondly, Ahani argued that his inability to appeal or to seek review of the designated judge's decision that the ministerial security certificate was reasonable or to attack the fairness of the reasonableness hearing, violated article 13 of the *ICCPR*. Under article 13, an alien lawfully present in Canada is entitled, absent compelling reasons of national security, "to submit reasons against his expulsion and have his case reviewed by, and be represented for the purpose before, the competent authority or person or persons especially designated by the competent authority."<sup>50</sup> Ahani claimed that a due process exception was not warranted because there was no evidence that he was a threat to Canada's national security.

In response, Canada argued that article 14(1) did not apply to deportation proceedings because these were public law proceedings that do not involve the determination of a criminal charge nor of rights and obligations in a suit at law. Canada argued that the Committee's jurisprudence did not support Ahani's claim that public law proceedings involve the determination of a suit at law and urged the Committee to adopt the approach of the European Court of Human Rights,<sup>51</sup> which had held that deportation proceedings fell outside the scope of article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>52</sup> (the *ECHR* or the *European Convention*), a provision Canada claimed was equivalent to article 14(1). Canada argued that in any event, the proceedings satisfied article 14(1) because they had provided Ahani, who was represented by

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<sup>45</sup> In Ahani's view, elected officials could be swayed by public and media pressure to decide a case in a manner not consistent with human rights principles.

<sup>46</sup> *Ahani HRC*, *supra* note 1 at para. 3.1.

<sup>47</sup> *Ibid.* at para. 3.2.

<sup>48</sup> *Ibid.* at para. 6.4.

<sup>49</sup> *Ibid.*

<sup>50</sup> *ICCPR*, *supra* note 1, s. 13.

<sup>51</sup> *Maouiia v. France* (2001), 33 E.H.R.R. 42 [*Maouiia*].

<sup>52</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*ECHR* or *European Convention*].

counsel, with a full opportunity to make his own views known and to make submissions. In Canada's view, fairness in deportation proceedings was expressly guaranteed by article 13 of the *ICCPR*, which should be narrowly construed as requiring simply that expulsion be carried out according to procedures laid down by law and that a decision to expel not be in bad faith or amount to an abuse of power.<sup>53</sup> The national security exception in article 13 did apply and the Committee should respect Canada's determination that Ahani's continued presence on its territory threatened Canadian national security, unless this assessment was shown to be arbitrary. Responding to Ahani's attack on the impartiality and independence of the Minister, Canada observed that the Minister's decision was subject to judicial review to ensure its legality and that all relevant factors and no irrelevant factors were considered. Because "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,"<sup>54</sup> Ahani had failed to show a violation of article 13.

### 3. RISK OF TORTURE AND EXECUTION IN IRAN

Ahani claimed that, contrary to the Minister's findings, he was at risk of torture at the hands of Iranian authorities and that his removal to Iran therefore breached article 7 of the *ICCPR*, which provides in part that "no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."<sup>55</sup> He further claimed that Canada's position – that it could expel individuals for reasons of national security even if they may be tortured – also violated article 7.<sup>56</sup> Finally, Ahani alleged that his removal to Iran could result in his execution in violation of article 6 of the *ICCPR*, which provides that "no one shall be deprived arbitrarily of his life."<sup>57</sup> In response, Canada relied on the findings of the Minister, with which the courts had not interfered, that Ahani lacked credibility and that the risk that Ahani would be harmed was minimal, in part because he did not fit the profile of dissidents and reformists who were persecuted by Iranian authorities.<sup>58</sup> It argued that Ahani had not substantiated a violation of articles 6 or 7.

## II. The Committee's Decision

On March 29, 2004, the Human Rights Committee adopted its views on Ahani's communication. The Committee agreed with some of Ahani's claims, finding Canada in violation of articles 9(4) and 13 (in conjunction with article 7) of the Covenant. In addition, it held that Canada had violated its obligations under the Optional Protocol.

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<sup>53</sup> *Ahani HRC*, *supra* note 1 at para. 4.13.

<sup>54</sup> *Ibid.* at para. 4.15.

<sup>55</sup> *ICCPR*, *supra* note 1, s. 7.

<sup>56</sup> *Ahani HRC*, *supra* note 1 at paras. 3.5-3.6.

<sup>57</sup> *Ibid.* at para. 3.7.

<sup>58</sup> *Ibid.* at paras. 4.3-4.6.

### A. Breach of the Optional Protocol

Canada, by deporting Ahani to Iran in the face of the Committee's request for interim measures that he not be removed until it had dealt with his allegation of irreparable harm to his Covenant rights, had breached its obligations under the Optional Protocol. Interim measures, the Committee noted, were essential to its role under the Protocol, flouting its authority to request interim measures, especially by irreversible measures such as execution or deportation to face torture or death in another country, "undermines the protection of *Covenant* rights through the *Optional Protocol*."<sup>59</sup> The Committee concluded that Canada was obliged to take appropriate steps to ensure that its requests for interim measures of protection were respected.<sup>60</sup>

### B. Arbitrary detention

The Committee decided that Ahani's detention based on a ministerial certificate and on national security grounds was not in itself arbitrary. However, article 9(4) of the *ICCPR* entitled Ahani to appropriate access to judicial review of his detention, "that is to say, review of the substantive justification of detention, as well as sufficiently frequent review."<sup>61</sup> The Committee accepted that a prompt hearing in Federal Court to determine the reasonableness of the security certificate qualified as "sufficient judicial review of the justification for detention"<sup>62</sup> required by that provision. The question was whether this judicial decision, arriving four years and ten months after Ahani's initial detention, had been made without delay. The Committee seemed prepared to find that much of this delay could be attributed to the author's decision to challenge the constitutionality of the reasonableness hearing. However, the nine-and-a-half months taken to complete this hearing after the resolution of the constitutional challenge was "too long in respect of the *Covenant* requirement of judicial determination of the lawfulness of detention without delay."<sup>63</sup> The Committee's conclusion on this point was not unanimous. Four members dissented on the grounds that the Committee had offered no justification for the violation of article 9(4) and that there was no evidence in the record supporting this conclusion.<sup>64</sup>

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<sup>59</sup> *Ibid.* at paras. 8.1-8.2.

<sup>60</sup> *Ibid.* at para. 12.

<sup>61</sup> *Ibid.* at para. 10.2.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* at para. 10.3.

<sup>64</sup> Dissents of Sir Nigel Rodley, Mr. Roman Wieruszewski, Mr. Ivan Shearer, and Mr. Nisuke Ando. Mr. Nisuke Ando noted, however, that nine-and-a-half months might well be a reasonable delay, given the steps required to ensure a fair hearing (e.g., disclosure, allowing Ahani to prepare his reply or prepare witnesses) and the need to closely scrutinize the evidentiary basis of the government's national security concerns.

### C. Adequacy of removal procedures

The Committee decided to break down the deportation process into two parts: the initial issuance of the certificate alleging that Ahani was inadmissible to Canada on security grounds, including the Federal Court's review of the security certificate's reasonableness (the reasonableness proceedings) and the Minister's decision to issue an opinion declaring Ahani a danger to Canadian security, opening the door to his removal to Iran (the expulsion proceedings). Without deciding whether the reasonableness proceedings fell within the scope of articles 13 or 14 of the *ICCPR*, the Committee held that Ahani had not shown that they violated these articles.<sup>65</sup> In support of this conclusion, it observed that during the reasonableness hearing, Ahani was given a summary reasonably informing him of the claims made against him, that the Federal Court was conscious of the heavy burden upon it to assure that Ahani be aware of the case against him and able to respond to it and that Ahani had been able to present his own case and cross-examine witnesses. The Committee found that "in the circumstances of national security involved," it was "not persuaded that this process was unfair to the author."<sup>66</sup> The Committee noted that it could not discern "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 [Ahani's] involvement in a terrorist organization."<sup>67</sup>

Having found that the reasonableness proceedings did not violate the Covenant, the Committee turned to the expulsion proceedings. It held that the Minister's decision to issue a danger opinion under Section 53 of the *Immigration Act* was "a decision leading to expulsion," falling within the scope of article 13 of the *ICCPR* because it was the final precondition to Ahani's deportation.<sup>68</sup> It declined to apply article 14 of the Covenant because "article 13 speaks directly to the situation in the present case and incorporates notions of due process also reflected in article 14 [...]."<sup>69</sup> The Committee decided that Canada had violated Ahani's rights under article 13 in conjunction with article 7 because the Minister had failed to provide him with the procedural safeguards judged by the Supreme Court of Canada in *Suresh* to be essential to a fair hearing. The Committee disagreed with Canada and with the Supreme Court's holding that Ahani was not entitled to the more substantial procedures guaranteed in *Suresh* because he had failed to establish a *prima facie* case that he faced a substantial risk of torture in Iran:

[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

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<sup>65</sup> *Ibid.* at para. 10.5.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.* at para. 10.8.

<sup>69</sup> *Ibid.* at para. 10.9.

contest a decision that included the reasons for the Minister's decision that he could be removed.<sup>70</sup>

The Committee noted that, because the right to be free from torture was “one of the highest values protected by the *Covenant*,”<sup>71</sup> article 13 required that the “closest scrutiny” be applied to the fairness of a procedure designed to determine whether an individual is at a substantial risk of torture. By failing to provide Ahani with the procedural protections deemed necessary in *Suresh* (*i.e.* to disclose the material upon which the Minister based her decision to deport, to allow Ahani the opportunity to challenge this information and to provide written reasons for the Minister's decision), Canada failed to 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 and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority.”<sup>72</sup> Surprisingly, the national security circumstances acknowledged by the Committee in its decision to uphold the reasonableness proceedings under articles 13 and 14,<sup>73</sup> could not save the expulsion proceedings:

Given that the domestic procedure allowed [Ahani] to provide [limited] reasons against his expulsion and to receive a degree of review of his case, it would be inappropriate [...] to accept that, in the proceedings before it, ‘compelling reasons of national security’ existed to exempt [...] Canada from its obligation under [article 13] to provide the procedural protections in question.<sup>74</sup>

#### **D. Risk of torture and execution in Iran**

Having determined that the process leading to Ahani's deportation violated article 13 because it was procedurally deficient, the Committee elected not to decide the extent of the risk of torture to Ahani prior to his deportation. More importantly, however, it disagreed with the Supreme Court's decision in *Suresh* that deportation to torture could be justified in exceptional circumstances, noting 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.”<sup>75</sup>

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<sup>70</sup> *Ibid.* at para. 10.7.

<sup>71</sup> *Ibid.* at para. 10.6.

<sup>72</sup> *Ibid.* at para. 10.8.

<sup>73</sup> *Ibid.* at para. 10.5.

<sup>74</sup> *Ibid.* at para. 10.8.

<sup>75</sup> *Ibid.* at para. 10.10.

### III. Analysis

The Human Rights Committee's decision in Ahani should give Canada pause in its efforts to remove suspected criminal or terrorist aliens to States where they are alleged to be at risk of harm. Canada should reassess its approach in light of the Committee's three main findings.

First, Canada was found to have breached its obligations under the Optional Protocol by deporting Ahani, in disregard of the Committee's request for interim measures of protection, namely, that his deportation be delayed until the Committee had an opportunity to consider his communication. The Committee implicitly rejected Canada's argument that interim measures requests were not authorized by the *Covenant* or *Optional Protocol*, were merely recommendatory and should give way to "other considerations" in the immigration context,<sup>76</sup> including the Canadian government's concern that Canada not become a safe haven for terrorists.<sup>77</sup> This aspect of the Committee's decision is on firm ground.<sup>78</sup> It is contrary to the *Protocol's* terms and to the principle that human rights instruments be interpreted to make their safeguards practical and effective to assert that Canada may act in such a manner as to prevent a person from submitting a communication or to prevent the Committee from fulfilling its mandate by fully considering the communication and delivering its views thereon to the author.<sup>79</sup> This would notably be the case where the author of a communication alleges that state action would result in irreparable harm to his *Covenant* rights, including torture or death.<sup>80</sup> Were this to occur, the petition

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<sup>76</sup> *Ibid.* at para. 5.3.

<sup>77</sup> *Ibid.* at para. 5.2. Canada's position that it is not bound by the Committee's requests for interim measures is longstanding, attracting criticism from the Committee in 1999: Committee on Human Rights, *Concluding Observations on Canada's Fourth Periodic Report*, 65th Sess., UN Doc. CCPR/C/79/Add. 105 (1999) at para. 14. Canada has on occasion refused to respect such requests by the United Nations Committee Against Torture, which also chastised Canada: Committee Against Torture, Communication No. 99/1997, *T.P.S. v. Canada*, UN Doc. CAT/C/24/D/99/1997(2000) at paras. 8.2-8.5 and 15.3.

<sup>78</sup> For a more detailed description of the Committee's position on the need to respect interim measures of protection, see Harrington, *supra* note 39 at 69-72. Harrington also notes that the binding nature of interim measures is supported by case law of the International Court of Justice interpreting its power under the *Statute of the International Court of Justice*, 26 June 1945, Can. T.S. 1945 No. 7, s. 41 (*Ibid.* at 72-76). The Judicial Committee of the Privy Council has held that the common law and the due process clauses in the constitutions of several Caribbean states entitled individuals there to complete the human rights petition procedure under international treaties and to have the views of international treaty bodies considered by state authorities (*Ibid.* at 77-81). Finally, state practice indicates substantial compliance with Committee requests for interim measures, supporting the claim that such requests have a customarily binding nature (*Ibid.* at 66).

<sup>79</sup> See Heckman, CJALP, *supra* note 25 at 60-63. See also Committee on Human Rights, Communication No. 869/1999, *Piandiong v. The Philippines*, UN Doc. CCPR/C/70/D/869/1999 (2000) at paras. 5.1-5.2.

<sup>80</sup> The Committee has held that the essential criterion for issuing a request for interim measures is the irreversibility of the consequences of state action "in the sense of the inability of the author to secure his rights, should there later be a finding of violation of the *Covenant* on the merits": Committee on Human Rights, Communication No. 583/1993, *Stewart v. Canada*, UN Doc. CCPR/C/58/D/538/1993 (1996) at para. 7.7. In a deportation case, "the Committee would require to know that an author would be able to return, should there be a finding in his favor on the merits" (*Ibid.*).

process under the *ICCPR* and the *Optional Protocol* would be nothing more than “a hollow sham or [...] cruel charade.”<sup>81</sup> Absent compelling evidence supporting its claim that it is necessary to defy interim measures requests in the immigration or national security contexts,<sup>82</sup> Canada must either accede to the Committee’s position or denounce the *Optional Protocol*. If it decides instead to ignore the Committee’s requests at its option, Canada will not only breach its international obligations, but undermine international respect for the Committee’s role under the *Protocol* and the *Covenant* as well.

Second, the Committee found that Ahani’s detention for nine-and-a-half months pending completion of Federal Court proceedings to determine the reasonableness of a ministerial security certificate was too long to qualify as “a judicial determination of the lawfulness of detention without delay”<sup>83</sup> and violated his right to be secure against arbitrary detention. It is very likely that the Committee was moved by the fact that Ahani remained for nine years in a short-term detention facility with no programmed activities or gainful occupation<sup>84</sup> in an effort to resist deportation by pursuing avenues of redress open to him under Canadian law. However, as noted by the dissenting members, the Committee provided no guidance on the factors relevant to deciding whether a delay is unacceptable. Would a longer delay be acceptable if the evidence regarding a detained non-citizen’s alleged terrorist activities or allegiances were particularly voluminous or complex? In such a situation, the designated Federal Court judge would likely require more time to examine the evidence to decide what could be disclosed to the detainee and how such information should be summarized to protect national security. The detainee and his counsel would require more time to sift through the disclosed documentation to prepare their case. Similarly, delays may be incurred if the designated judge orders that certain documents, declassified, owing to intervening events or the passage of time, be disclosed part-way into the hearing.<sup>85</sup> Should such delays, which are necessary to ensure the fairness of the hearing, be counted in assessing whether the delay results in a violation of article 9(4)? These questions are far from academic. As noted by Ahani’s counsel, reasonableness hearings in other cases resulted in detention reviews becoming available well after a year. The Committee should have explained

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<sup>81</sup> *Ahani OCA*, *supra* note 37 at para. 98 per Rosenberg J.A., dissenting, citing *Briggs v. Baptiste*, [2000] 2 A.C. 40 (J.C.P.C.) at para. 47.

<sup>82</sup> The dissenting opinion of Ontario Court of Appeal Justice Mark Rosenberg, who would have recognized Ahani’s right to seek an injunction preventing his removal until the Committee had presented its views on his communication, is apposite: “Canada is not harbouring terrorists or setting itself up as a haven for terrorists. The appellant has been in jail for over eight years. He seeks the views of a committee established in accordance with a United Nations covenant. If Canada is concerned that the *Optional Protocol* will be used as a vehicle to shield terrorists, it can denounce the *Protocol*. [...] [The] Committee is well positioned to balance the competing values in protecting *Convention* refugees and the international obligation to eradicate terrorism.” (*Ahani OCA*, *supra* note 37 at para. 101).

<sup>83</sup> *Ahani HRC*, *supra* note 1 at para. 10.4.

<sup>84</sup> The author initially complained that such detention, in and of itself, was cruel treatment violating Article 7 of the *ICCPR* (*Ahani HRC*, *supra* note 1 at para. 3.7). His counsel withdrew this claim since Ahani had not exhausted domestic remedies (*Ibid.* at para. 6.2).

<sup>85</sup> See, for example, *Re Charkaoui*, [2003] F.C.J. No. 1815 at paras. 14-16 (QL); *Re Charkaoui*, [2003] F.C.J. No. 1119 at para. 7 (QL).



the reasons for its decision: its views offer no standard against which the appropriateness of a prolonged detention without court review may be judged.<sup>86</sup>

Third, the Committee found that Canada violated article 13 when it removed Ahani, a *Convention* refugee, to his state of origin, based on its view that he faced a low risk of harm: a determination reached through a flawed and deficient procedure. The Committee's views on the adequacy of Canada's procedural safeguards are the focus of this article. How does Ahani change our understanding of the scope and content of the procedural rights guaranteed under the Covenant? On the one hand, the Committee read article 13 expansively to include "notions of due process [...] reflected in article 14."<sup>87</sup> On the other, it refused to decide whether article 14 even applies in the immigration context. These two facets of the Committee's treatment of procedural safeguards under the Covenant are discussed in turn.

#### A. The scope and content of Article 13 of the ICCPR

Article 13 provides that:

An alien lawfully in the territory of a State Party to the present *Covenant* may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.<sup>88</sup>

It applies to all aliens lawfully in the territory of the state, i.e. who have "entered a State territory in accordance with its legal system and/or are in possession of a valid residency permit,"<sup>89</sup> and who are subject to State procedures aimed at their obligatory departure. According to the Committee, determinations of the lawfulness of an alien's entry or stay in the state must also be made in accordance with article 13.<sup>90</sup> Manfred Nowak reports that discussions on article 13 in the *travaux préparatoires* of the Covenant focused on providing aliens with protections against

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<sup>86</sup> Some observers have criticized the Committee for its timid application of Article 9(4) in the face of delays ranging from several months to over a year (see Sarah Joseph *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2000) at 233, commenting on Committee on Human Rights, Communication No. 291/1998, *Torres v. Finland*, UN Doc. CCPR/C/38/D/291/1988 (1990) and Committee on Human Rights, Communication No. 759/1997, *A v. New Zealand*, UN Doc. CCPR/C/66/D/754/1997 (1999) [Joseph]). *Ahani* may mark a more aggressive stance by the Committee, one that should be justified by clearly articulated reasons.

<sup>87</sup> *Ahani HRC*, *supra* note 1 at para. 10.9.

<sup>88</sup> *ICCPR*, *supra* note 1, s. 13.

<sup>89</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (Kehl am Rhein: N.P. Engel, 1993) at 224 [Nowak]. See also Committee on Human Rights, *General Comment 15(27) on the position of aliens under the Covenant*, UNGAOR, 41<sup>st</sup> Sess., Supp. No. 40, UN Doc. A/41/40 (1986) 117 at para. 9 [General Comment].

<sup>90</sup> *General Comment*, *Ibid.* at para. 9.

arbitrary expulsion.<sup>91</sup> In its *General Comment on the Position of Aliens under the Covenant*<sup>92</sup> (the *General Comment*), the Committee confirms the procedural focus of article 13:

Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those [expulsions] carried out ‘in pursuance of a decision reached in accordance with law,’ its purpose is clearly to prevent arbitrary expulsions.<sup>93</sup>

This means that States Parties must provide a fair procedure to aliens in expulsion proceedings, including procedural guarantees or safeguards.

Article 13 was modeled after article 32(2) of the *1951 Convention Relating to the Status of Refugees*<sup>94</sup> (the *1951 Convention*) which governs the expulsion of refugees on grounds of national security or public order. It provides that:

The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before the competent authority or a person or persons specially designated by the competent authority.<sup>95</sup>

Guy Goodwin-Gill observes that the reference to due process in article 32(2) of the *1951 Convention* leaves little doubt that the provision protects important procedural safeguards, such as the right of the refugee to know the case against him or her, to submit evidence to rebut that case and to obtain reasons for negative decisions.<sup>96</sup> He also suggests that due process requires that refugee claimants have the right to appeal against an adverse decision before an impartial tribunal, independent of the initial decision-making body.<sup>97</sup> The significant role of article 32(2) of the *1951 Convention* in the drafting history of article 13 of the Covenant

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<sup>91</sup> Nowak, *supra* note 89 at 223; *Travaux préparatoires*, *supra* note 4.

<sup>92</sup> *General Comment*, *supra* note 89.

<sup>93</sup> *Ibid.* at para. 10; see also Nowak, *supra* note 89 at 224.

<sup>94</sup> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6, s. 32 [*1951 Convention*].

<sup>95</sup> *Ibid.*, s. 32(2).

<sup>96</sup> Guy S. Goodwin-Gill, *The Refugee in International Law*, 2d ed. (Oxford: Clarendon Press, 1996) at 307 [Goodwin-Gill 1996].

<sup>97</sup> *Ibid.* See also United Nations High Commissioner for Refugees, Global Consultations on International Protection, 2nd Mtg., *Asylum Processes (Fair and Efficient Asylum Procedures)*, UN Doc. EC/GC/01/12 (2001) at para. 43: “A key procedural safeguard derived from general administrative law and essential to the concept of effective remedy, has become that the appeal be considered by an authority different from and independent of that making the initial decision.” This position is not universally accepted. Pieter Boeles claims that while the language of the *1951 Convention* provides little guidance as to the nature of the competent authority to which refugees can appeal the expulsion order, the *travaux préparatoires* indicate that the drafters did not intend to create the possibility of an appeal to a court or tribunal (Pieter Boeles, *Fair Immigration Proceedings in Europe* (The Hague: Martinus Nijhoff, 1995) at 80 [Boeles]).

indicates that they share the common purpose of safeguarding aliens' due process rights.

Article 13 gives aliens a "double protection."<sup>98</sup> First, the State's expulsion decisions must be reached "in accordance with law" or, on the Committee's reading of these words, in compliance with both the substantive and procedural requirements of the domestic law of the State.<sup>99</sup> The Committee further observes that, for expulsion decisions to be in accordance with law, the relevant domestic law must be compatible with the provisions of the *Covenant*.<sup>100</sup> Second, and most importantly in this context, absent compelling reasons of national security making such protections inappropriate, an alien must be allowed to submit the reasons against his expulsion and is entitled to have his case reviewed by a competent authority or its designates and to be represented for purposes of this review. According to Nowak, the right to "submit the reasons against his expulsion" was derived, without changing its substance, from the right to "submit evidence to clear himself" in article 32(2) of the *1951 Convention*.<sup>101</sup> Under both formulations, in order to defend himself against the expulsion-to clear himself, or submit his reasons against expulsion-, an alien must be provided with sufficient notice of the reasons underlying the State's decision to expel him, including disclosure of the substance of the evidence on which these reasons are based. Indeed, the Committee emphasized in its *General Comment* that the right to submit reasons against expulsion has to be effective: "an alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one."<sup>102</sup> The fact that article 13 expressly entitles aliens, who are typically unfamiliar with the language, legal institutions, and complex immigration laws of foreign states, to representation in expulsion proceedings clearly indicates that these procedural safeguards were designed to ensure the effectiveness of these proceedings. Implied in the right to representation is the right of the alien to designate his representative, including an attorney, at his own cost.<sup>103</sup> This analysis of article 13 confirms that aliens are expected, under the *Covenant*, to receive a hearing accompanied by basic procedural rights of notice, disclosure, representation and an opportunity to be heard. While article 13 does not expressly guarantee an oral hearing,<sup>104</sup> where expulsion is premised primarily on

<sup>98</sup> *Ibid.* at 118.

<sup>99</sup> Committee on Human Rights, Communication No. 58/1979, *Maroufidou v. Sweden*, UN Doc. CCPR/C/12/D/58/1979 (1981) at para. 9.3 [*Maroufidou v. Sweden*]. In Nowak's view, this implies that expulsion decisions must have a statutory basis (Nowak, *supra* note 89 at 227).

<sup>100</sup> *Maroufidou v. Sweden, Ibid.* at para. 9.3. Nowak suggests that the domestic law cannot discriminate contrary to Article 26 *ICCPR* (Nowak, *supra* note 89 at 226). In contrast, Joseph *et al.* claim that given its procedural focus, Article 13 may not prevent the adoption by a state of a "perverse substantive law," including one which discriminates on the basis of race (Joseph, *supra* note 86 at 268 and 271).

<sup>101</sup> Nowak, *supra* note 89 at 228.

<sup>102</sup> *General Comment, supra* note 89 at para. 10.

<sup>103</sup> Nowak, *supra* note 89 at 231; Boeles, *supra* note 97 at 151. For aliens who may not be familiar with the language or legal institutions of the state seeking to expel them, let alone its complex immigration laws, the right to representation is essential to an effective defense against expulsion. See Nowak, *supra* note 89 at 231, who states that "because an expulsion normally represents a serious interference in the life and basic rights sphere of the person concerned, and aliens are usually in particular need of legal counsel, the right to representation by a freely selected attorney is of fundamental importance".

<sup>104</sup> Nowak, *supra* note 89 at 228.

doubts regarding the alien's credibility, it is difficult to imagine how the alien could effectively defend himself against expulsion without appearing in person before the competent authority to dispel these doubts.

There is some uncertainty as to whether article 13 guarantees aliens one or two opportunities to be heard regarding their expulsion.<sup>105</sup> In one view of article 13, an alien is simply owed one hearing, at which the competent authority reviews its initial expulsion decision, made without the alien's input, this time affording the alien the opportunity to submit reasons against his expulsion.<sup>106</sup> Nowak argues that article 13 entitles an alien to an initial decision that takes into account his reasons against expulsion, pre-supposing an initial hearing, and a subsequent review of this initial decision before a "higher authority."<sup>107</sup> In any event, there appears to be broad agreement that the authority empowered to review the expulsion decision need not be a court, it may be an administrative authority.<sup>108</sup>

In light of this discussion, the Committee's conclusion in *Ahani* that Canada was required, under article 13, to provide Ahani with an opportunity to "submit reasons against his removal in the light of the administrative authorities' case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority"<sup>109</sup> seems perfectly sound. So is its observation that article 13 incorporates notions of due process from article 14 of the *Covenant*, which sets out the requirements of a fair hearing. Clearly, aliens cannot effectively defend themselves against expulsion in unfair hearings.

The Committee's decision not to accept Canada's argument that it should be exempted from the procedural requirements of Article 13 for national security reasons is also sound. First, national security exceptions to *Covenant* rights were intended to be narrowly defined, limited to protecting a state's territorial integrity and political independence against threats of force.<sup>110</sup> Moreover, while it is true that in past cases, the Committee has held that it would defer to sovereign states' evaluation of aliens' security ratings,<sup>111</sup> the specific facts of *Ahani* and in particular, the decision of the Supreme Court of Canada in *Suresh*, supported the Committee's more exacting approach. In *Suresh*, the Supreme Court decided that despite the Canadian

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<sup>105</sup> See Joseph, *supra* note 86 at 273.

<sup>106</sup> Boeles appears to hold this view, suggesting that "the simplest way to interpret Article 13 is that it does not imply any more than the minimum requirement of an administrative reconsideration of the expulsion decision by the authority competent to order expulsion" (Boeles, *supra* note 97 at 122).

<sup>107</sup> Nowak, *supra* note 89 at 229.

<sup>108</sup> *Ibid.* See also Boeles who observes that the travaux préparatoires indicate that the drafters intended to "leave up to the national legislation the question whether the competent authority should be a judicial or administrative body" (Boeles, *supra* note 97 at 122). See also Joseph, *supra* note 86 at 272.

<sup>109</sup> *Ahani HRC*, *supra* note 1 at para. 10.8.

<sup>110</sup> See Aiken, *supra* note 3 at 34-36. See also Alexandre C. Kiss, "Permissible Limitations on Rights" in Louis Henkin, ed., *The International Bill of Rights* (New York: Columbia University Press, 1981) at 297.

<sup>111</sup> Committee on Human Rights, Communication No. 236/1987, *V.M.R.B. v. Canada*, UN Doc. CCPR/C/33/D/236/1987 (1988) at para. 6.3 [*V.M.R.B.*]. See also Joseph, *supra* note 86 at 274, where this position is criticized as severely undermining the protections afforded aliens under Article 13.

Government's interest in protecting national security, Suresh was constitutionally entitled to disclosure of the material upon which the Minister would base her deportation decision, to an opportunity to challenge this information and to the reasons for her decision. The Committee decided that article 13 normally entitled aliens in Ahani's position to such procedural safeguards, without which they may not be able to make out the requisite risk of torture. How could the Canadian Government argue that national security required lower safeguards in Ahani's case when it was prepared, on the strength of the Suresh decision, to afford Suresh full procedural safeguards despite national security concerns? In sum, the Canadian Government failed to offer the Committee compelling reasons for denying Ahani the procedural safeguards it had afforded Suresh when national security concerns were present in both cases. It would have been inappropriate in such circumstances for the Committee to recognize a national security exemption to the procedures ordinarily required by article 13. The Committee did not second-guess Canada's assessment of the appropriate balance between national security and procedural safeguards for the individual; in the absence of compelling distinguishing factors, it simply adopted the balance prescribed by Canada's Supreme Court in Suresh.

#### **B. Applicability of Article 14 of the ICCPR to deportation proceedings**

The Committee declined to apply article 14 of the *ICCPR*, claiming that it would be inappropriate in terms of the scheme of the Covenant to apply that article's broader and more general provisions, since article 13 speaks directly to the situation in Ahani's case and incorporates already the notions of due process reflected in article 14. The Committee could legitimately defend its decision to not examine article 14 on grounds of judicial economy: a desire to decide the complaint on the narrowest possible grounds rather than to deal with all the issues squarely raised by the case and provide guidance to individuals and States Parties regarding their rights and obligations under the Covenant. However, it was not "inappropriate in terms of the scheme of the *Covenant*"<sup>112</sup> for the Committee to make a determination respecting the application of article 14. The safeguards provided in article 14 go beyond those in article 13: article 14 specifically guarantees the right to an independent and impartial tribunal, an aspect not expressly covered in article 13. Ahani specifically argued that the roles of the Minister of Citizenship and Immigration, in issuing security certificates, defending their reasonableness before the Federal Court and prosecuting aliens at deportation inquiries, meant that she could not be impartial in ultimately deciding whether to expel him. Further, the Minister's position as a member of the executive meant that she was not independent.<sup>113</sup> The Committee failed to address these aspects of Ahani's communication. It concluded that it did not need to determine whether the reasonableness proceedings fell within the scope of article 14 (as a determination of rights and obligations in a suit at law) because the author had not made out a violation of the requirements of that article. However, in determining

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<sup>112</sup> *Ahani HRC*, *supra* note 1 at para. 10.9.

<sup>113</sup> *Ahani HRC*, *supra* note 1 at para. 3.1.

whether the reasonableness hearing - the initial stage of the process - complied with the requirements of articles 13 and 14, the Committee did not determine whether the Federal Court's assessment of the reasonableness of the certificate issued by the Minister and the Solicitor General, two members of the executive, afforded Ahani a hearing before an independent tribunal.<sup>114</sup> Without addressing this question, the Committee could not properly conclude that Ahani had failed to make out a violation of the requirements of article 14. Similarly, it was open to the Committee and certainly not inappropriate to address whether the Minister, in deciding to expel Ahani at the final stage of the deportation process, afforded Ahani a hearing by an independent and impartial tribunal. The Committee chose not to do so and thus made no finding regarding the independence or impartiality of the Minister.

Time and again, the Committee has left open the question of whether immigration proceedings fall within the scope of article 14, or in other words, whether they involve the determination of rights and obligations in a suit at law.<sup>115</sup> For its part, Canada has consistently objected to the application of article 14 in the immigration context arguing, as in Ahani, that the provision does not apply to public law proceedings, including deportation proceedings.<sup>116</sup> In this respect, Canada urged the Committee to follow the jurisprudence of the European Court of Human Rights that article 6 of the *European Convention*, analogous to article 14 of the Covenant, does not apply to decisions regarding the entry, stay, and deportation of aliens.<sup>117</sup> Finally, Canada has argued that a procedure for the expulsion of aliens specifically

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<sup>114</sup> The Committee reviewed only the procedural fairness aspects of the proceeding (whether the author was aware of and able to respond to the case against him, concluding the process was not "unfair" to Ahani) and whether the Federal Court had acted arbitrarily or in bad faith or abused its power in reviewing the certificate's reasonableness. The availability of judicial review of an administrative decision does not guarantee compliance with the right to an independent tribunal. For an example under the *European Convention*, see *W. v. U.K.* (1987), 10 E.H.R.R. 29.

<sup>115</sup> See *V.M.R.B.*, *supra* note 111 at para. 6.3, where the Committee held that even if Article 14 did apply, the author had not raised any facts to substantiate his claim that the reviews of his immigration detention had not proceeded in a fair and impartial manner and violated Article 14. See also Committee on Human Rights, Communication No. 603/1994, *Badu v. Canada*, UN Doc. CCPR/C/60/D/603/1994 (1997) at para. 6.2 [*Badu v. Canada*], declared inadmissible for non-exhaustion of domestic remedies; Committee on Human Rights, Communication No. 604/1994, *Nartey v. Canada*, UN Doc. CCPR/C/60/D/604/1994 (1997) at para. 6.2 [*Nartey v. Canada*], declared inadmissible for non-exhaustion of domestic remedies; Committee on Human Rights, Communication No. 654/1995, *Adu v. Canada*, UN Doc. CCPR/C/60/D/654/1995 (1997) at para. 6.3 [*Adu v. Canada*], where the Committee found that because the author failed to substantiate a reasonable apprehension of bias depriving the Immigration and Refugee Board of impartiality, it was not necessary to determine whether refugee determination decisions decided the author's "rights and obligations in a suit at law." In Committee on Human Rights, Communication No. 560/1993, *A v. Australia*, UN Doc. CCPR/C/59/D/560/1993 (1997) at para. 9.7 [*A v. Australia*], the Committee declined to find whether refugee proceedings under Australia's *Migration Act* fell within the scope of Article 14(1).

<sup>116</sup> See *Ahani HRC*, *supra* note 1 at para. 4.16 and *V.M.R.B.*, *supra* note 111 at para. 4.6. See also *Badu v. Canada*, *Ibid.* at paras. 4.13-4.14 and *Nartey v. Canada*, *Ibid.* at paras. 4.13-4.14, where Canada also argued that even if proceedings before the IRB constituted a "suit at law," there were sufficient guarantees of independence, including the length of the terms of office and protections against removal of board members, to ensure that the IRB was an independent tribunal as well as sufficient legal guarantees to insure it was impartial. See also *Adu v. Canada*, *Ibid.* at paras. 4.14-4.15. Australia has made similar arguments: see *A v. Australia*, *Ibid.* at paras. 7.15-7.16.

<sup>117</sup> *Ahani HRC*, *supra* note 1 at para. 4.16.

envisioned by article 13 of the Covenant cannot be said to violate article 14.<sup>118</sup> Each of these claims regarding the scope of article 14 is examined in turn.

1. THE SCOPE OF ARTICLE 14(1) IN THE *TRAVAUX PRÉPARATOIRES*

Do deportation or refugee determination proceedings fall within the scope of article 14(1) of the *ICCPR*? Article 14(1) provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>119</sup>

The right to “a fair and public hearing by a competent, independent and impartial tribunal established by law” in article 14(1) applies only to the determination of a criminal charge and to the determination of a person’s rights and obligations in a suit at law. Based only on this wording, it is unclear whether article 14(1) applies to proceedings of an administrative nature. The *travaux préparatoires* of the Covenant reveal that there was some debate among drafting committee delegates about the proper scope of article 14(1) in relation to non-criminal matters. Earlier drafts of article 14(1) entitled individuals to a fair hearing before an independent and impartial tribunal in the determination of “any of his civil rights or obligations.”<sup>120</sup> Eleanor Roosevelt, representing the United States, expressed concern that administrative officers, not courts, determined many civil rights obligations like those connected with military service and taxation.<sup>121</sup> To avoid requiring court proceedings for such administrative matters, she suggested changing the wording to require fair hearing guarantees in the determination of a civil suit. Soerenson, representing Denmark, suggested that the proposed article apply only to cases between individuals, not between individuals and the State. This would tend to exclude actions “taken by administrative organs in their exercise of discretionary powers” conferred by law.<sup>122</sup> Professor René Cassin, an academic assisting the drafting committee, disagreed with this approach. He considered that the word *civil* inappropriately excluded fiscal, administrative and military matters from the article’s protection, even though they

<sup>118</sup> *V.M.R.B.*, *supra* note 111 at para. 4.6.

<sup>119</sup> *ICCPR*, *supra* note 1, s. 14(1).

<sup>120</sup> David S. Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (The Hague: Kluwer Law International, 2001) at 46 and 48 [Weissbrodt].

<sup>121</sup> Pieter van Dijk observes that the civil rights and obligations mentioned by Ms. Roosevelt were not of a private law character, and concludes that “civil” was meant to include all non-penal or non-criminal matters rather than solely private law matters (Pieter van Dijk, “The interpretation of civil rights and obligations” by the European Court of Human Rights – One more step to take” in Franz Matscher & Herbert Petzold, eds., *Protecting Human Rights: The European Dimension – Studies in Honour of Gérard Wiarda*, 2d ed. (Köln: Carl Heymanns Verlag, 1990) at 137 [van Dijk 1990]).

<sup>122</sup> Weissbrodt, *supra* note 120 at 51.

were subject to final review by the courts.<sup>123</sup> Representatives from Egypt, Lebanon and Guatemala also opposed the American amendment because it would possibly exclude these issues as well as some commercial and labour matters.<sup>124</sup> Roosevelt suggested a compromise solution that qualified the term *rights and obligations* with the phrase *in a suit at law* and removed the restrictive adjective *civil*. This formulation was intended to emphasize that “appealing to a tribunal was an act of a judicial nature.”<sup>125</sup> Interestingly, representatives from the Philippines and Uruguay later argued that the phrase *in a suit at law* should be removed because it was too closely associated with civil proceedings between individuals. Limiting fair hearing protections to such cases would frustrate, the representatives suggested, the main purpose of the provision to provide individuals safeguards against State action.<sup>126</sup> Roosevelt and Soerenson, who had earlier argued for a narrower scope, disputed this interpretation and claimed that the formulation *in a suit at law* covered cases between individuals and the State.<sup>127</sup> Other representatives pointed out that the scope of article 14(1) should not differ from that of article 10 of the *Universal Declaration on Human Rights*<sup>128</sup> (the *UDHR* or the *Universal Declaration*), which provides for “a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations,”<sup>129</sup> a formulation that does not qualify rights and obligations. David Weissbrodt agrees that the Covenant was drafted to elaborate on provisions of the *UDHR* and that the drafting of the *Universal Declaration* should be considered when tracing that of the *Covenant*.<sup>130</sup> Pieter van Dijk recounts that while the English version of article 10 of the UDHR spoke only of rights and obligations, an early French text spoke of *droits et obligations en matière civile*. Some delegates to the drafting committee expressed concern that *en matière civile* would unduly restrict the scope of article 10, but were reassured by delegates from civilian countries (France, Belgium and Chile) that this formulation was only meant to indicate rights and obligations in non-criminal matters and did not exclude public law disputes; in other words, the English and French versions had identical meanings.<sup>131</sup> Van Dijk notes that

nevertheless, a proposal to delete these words in the French text was adopted in the Third Committee of the General Assembly, thus emphasizing the intent of the drafters to avoid any restriction which would exclude – *a priori* – rights other than private ones.<sup>132</sup>

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<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.* at 55.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [*UDHR* or *Declaration*].

<sup>129</sup> *Ibid.*, s. 10.

<sup>130</sup> Weissbrodt, *supra* note 120 at 35.

<sup>131</sup> Van Dijk 1990, *supra* note 121 at 136.

<sup>132</sup> *Ibid.*



The following conclusions may be drawn in light of the *travaux préparatoires*. First, the final wording of article 14(1) was not intended by the drafters to limit the fair hearing guarantee to civil matters between private individuals. The consensus appeared to be that article 14(1) extends to disputes between individuals and the State. As van Dijk states:

One cannot draw any other conclusion than that it was not the intention of the drafters to restrict the scope of article 14 of the *Covenant*, apart from determinations of a criminal-law character to determinations of rights and obligations of a private-law character. [...] On the contrary, [...] proposals whose wording might have entailed the risk of such a restriction, were criticized for that reason and rejected or amended.<sup>133</sup>

Second, the term *in a suit at law* was apparently intended to remove some matters from the scope of article 14(1). After reviewing the record of the drafting committees, Weissbrodt concludes that the article “may not apply to administrative proceedings in the first instance as to subject matters unrelated to human-rights concerns, such as taxation.”<sup>134</sup>

In light of this discussion, the safeguards in article 14(1) resemble the concept of the common law duty of procedural fairness in Canadian administrative law. Whether a decision maker owes a duty of procedural fairness to an individual affected by a particular decision depends on where the decision falls on a decision-making spectrum. A duty of procedural fairness undoubtedly applies to decisions that have a significant impact on substantial individual interests and involve fundamental human rights of life, liberty and security of the person, like decisions in criminal proceedings.<sup>135</sup> Determinations of criminal charges are, of course, expressly covered by article 14(1). At the bottom end of the decision-making spectrum, decisions of a legislative character, taken by reference to broad policy considerations and affecting many constituencies, like the setting of tariffs or rates of taxation, do not attract the duty of fairness in Canadian administrative law.<sup>136</sup> Such decision-making was excluded from the scope of article 14(1) through the addition of Eleanor Roosevelt’s *in a suit at law*. One can read the *travaux préparatoires*, as Weissbrodt does,

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<sup>133</sup> *Ibid.* at 137.

<sup>134</sup> Weissbrodt, *supra* note 120 at 51.

<sup>135</sup> See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 23 [*Baker*] where the Supreme Court confirmed that a decision with a significant impact on the interests of an individual will usually attract a duty of procedural fairness on the part of the decision maker.

<sup>136</sup> See *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735 at 754, where the Supreme Court refused to attach a duty of fairness to the decision of the federal cabinet to deny an appeal from a decision of the Canadian Radio-television and Telecommunications Commission fixing telephone rates for millions of Canadian telephone subscribers of Bell Canada because the fixing of rates for a public utility was “legislative action in its purest form.” See also *Indian Head School Division v. Knight*, [1990] 1 S.C.R. 653 at 670: “Decisions of a legislative and general nature can be distinguished in this respect from acts of a more administrative and specific nature which do not entail a duty to act fairly.” Finally, see *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] 2 F.C. 247 (C.A.), where the Federal Court of Appeal described the setting of import quotas as a legislative or policy matter, in which courts did not normally interfere.

indicating that article 14(1) was designed to extend to administrative hearings that engage individual fundamental rights or interests that are closer to the top of the decision-making spectrum, even if they are less substantial than those at stake in criminal proceedings.<sup>137</sup> The suggestion in the *travaux préparatoires* that the phrase *in a suit at law* was added to emphasize that proceedings subject to article 14(1) would be of a judicial nature is reminiscent of the doctrinal efforts of Canadian courts to determine the threshold for the application of the common law duty of procedural fairness and in particular their distinction between judicial or quasi-judicial decisions and administrative decisions.<sup>138</sup> The test applied by Canadian judges for determining whether a particular decision-maker must observe the duty of fairness no longer focuses exclusively on the judicial or quasi-judicial nature of the decision. However, it does consider the nature of the decision and that of the decision-maker, the function of the tribunal and the determinations that allow for the making of a decision. The test holds that the more closely these factors resemble judicial decision-making (characterized, for example, by the application of clear legal standards or criteria to the precise circumstances of an individual), the more likely it is that the duty of fairness will require procedural protections closer to a traditional trial model.<sup>139</sup>

## 2. THE SCOPE OF ARTICLE 14(1) IN THE COMMITTEE'S JURISPRUDENCE

In *Y.L. v. Canada*,<sup>140</sup> the Human Rights Committee appeared to confirm that article 14(1) applies to administrative proceedings. The author of the communication, a former soldier discharged from the armed forces, applied to the Canadian Pension Commission for a disability pension on several occasions and was turned down. He appealed these decisions to the Pension Review Board, which confirmed the rulings and dismissed his appeal. The author claimed that he had not been granted a fair and public hearing in violation of article 14(1). Canada replied that the communication was outside the scope of the *ICCPR* and thus inadmissible because proceedings before the Pension Review Board were not a suit at law. In support of this claim, Canada argued that the relationship between the author, a member of the armed forces, and the state was a matter of public law and did not concern *civil rights and obligations*, an expression taken from the French version of article 14(1), which refers to “*contestations sur ses droits et obligations de caractère civil*.”<sup>141</sup> While the English text appears to focus on the forum or proceeding in which the rights and obligations are determined (*i.e.* suit at law) as the relevant characteristic, the French text seems to focus on the private law nature of the rights and obligations to be

<sup>137</sup> On the concept in Canadian administrative law of a “threshold” between administrative and specific decisions and legislative and general decisions below which decision makers owe no duty of procedural fairness, see David. J. Mullan, *Administrative Law: Cases, Text and Materials*, 5th ed. (Toronto: Emond Montgomery, 2003) at 99 *et seq.* [Mullan 2003].

<sup>138</sup> *Ibid.* at 100-102.

<sup>139</sup> *Baker*, *supra* note 135 at para. 23.

<sup>140</sup> Committee on Human Rights, Communication No. 112/1981, *Y.L. v. Canada*, UNGAOR, 41<sup>st</sup> Sess., Supp. No. 40, UN Doc. A/41/40 (1986) at 145 [Y.L.].

<sup>141</sup> *ICCPR*, *supra* note 1, s. 14(1).

determined. Noting this difference, the Human Rights Committee sought to interpret article 14(1) in a manner that reconciled the English and French language texts:

[T]he concept of a 'suit at law' or its equivalent in the other language texts is based on the nature of the right in question rather than on the status of one of the parties (governmental, parastatal or autonomous statutory entities), or else on the particular forum in which individual legal systems may provide that the right in question is to be adjudicated upon, especially in common law systems where there is no inherent difference between public law and private law and where the courts normally exercise control over the proceedings either at first instance or on appeal specifically provided by statute or else by way of judicial review. In this regard, each communication must be examined in light of its particular features.<sup>142</sup>

The Committee therefore examined the right to a fair hearing in relation to the author's pension claim and noted that it was clear

that the Canadian legal system subjects the proceedings in [the various administrative bodies before which the author pursued his pension claim] to judicial supervision and control, because the *Federal Court Act* does provide the possibility of judicial review in unsuccessful claims of this nature.<sup>143</sup>

It concluded that the first instance hearing before the Pension Review Board coupled with the availability of judicial review of the Board's decision appeared to comply with article 14(1):

It has not been claimed by the author that this remedy would not have complied with the guarantees provided in article [14(1)] [...] Nor has he claimed that this remedy would not have availed in correcting whatever deficiencies may have marked the hearing of his case before the lower jurisdictions, including any grievance that he may have had regarding the denial of access to his medical file.

[T]herefore, it would appear that the Canadian legal system does contain provisions in the *Federal Court Act* to ensure to the author the right to a fair hearing in the situation. Consequently, his basic allegations do not reveal the possibility of any breach of the *Covenant*.<sup>144</sup>

In *Ahani*, Canada advanced a different interpretation of the Committee's views in *Y.L.* It claimed that, given the availability of judicial review in that case, the

<sup>142</sup> *Y.L.*, *supra* note 140 at para. 9.2.

<sup>143</sup> *Ibid.* at para. 9.4.

<sup>144</sup> *Ibid.* at paras. 9.4-9.5. A minority of members dissented from the Committee's finding that Article 14 applied to the proceedings for two reasons. First, the right in question, based on the relationship between a soldier and the Crown as opposed to an ordinary employment contract, was of a public rather than private nature. Second, the forum provided to adjudicate the question - the Pension Review Board - was an administrative body "functioning within the executive branch of the Government of Canada, lacking the quality of a court" (*Ibid.* at para. 3 (App)).

Committee did not decide whether proceedings before the Pension Review Board were a suit at law. While it is true that the Committee did not expressly state in its views that it had found that the pension proceeding was a suit at law, Canada's reading of the decision is dubious for at least five reasons. First, the Committee's decision in *Y.L.* contains none of the disclaimers commonly found in other Committee views that expressly state, for example, that "in the circumstances, the Committee need not decide whether or not the decision [...] was a determination of [the author's] rights and obligations in a suit at law."<sup>145</sup> Second, far from avoiding the question of whether a proceeding before the Pension Board was a suit at law, the Committee explicitly noted in its views that it had asked Canada for additional information to help it determine that very point.<sup>146</sup> Third, the Committee did not simply conclude that the availability of judicial review satisfied the requirements of article 14(1) without pronouncing itself on the scope of that provision. Instead, the Committee looked into the meaning of *suit at law* in some depth. Finding that the concept of *suit at law* is based on the nature of the right in question, the Committee attributed a pivotal importance to the question whether the author's claim was of a kind subject to judicial supervision and control.<sup>147</sup> It found that claims of the nature of pension were subject to judicial review and again emphasized the importance of determining the question whether the author's claim "was of a kind subject to judicial supervision and control."<sup>148</sup> Finally, it concluded that the author's right to a fair hearing before the Pension Board could have been secured by having the Federal Court quash the Board's initial decision on judicial review and order it to decide the claim afresh, in a fair hearing. Fourth, the three dissenting Committee members evidently believed that the Committee had found that article 14(1) applied to the Pension Board proceedings, since their dissent focused on establishing that the ex-soldier's pension claim did not come within the scope of article 14(1). Fifth, many academic observers, commenting on the *Y.L.* decision, have concluded that the Committee recognized that the Pension Board's proceedings concerned the determination of rights and obligations in a suit at law. David Weissbrodt, former special Rapporteur to the United Nations Subcommission on the Promotion and Protection of Human Rights Regarding the Rights of Noncitizens, has written that "the Committee found an action is a suit at law in two circumstances: (1) if the forum where the particular question is adjudicated is one where courts normally exercise control over the proceedings; or (2) where the right in question is subject to judicial control or judicial review."<sup>149</sup> Stephen Bailey, while recognizing that the Committee's decision "is obscurely reasoned and difficult to analyze," concludes that "on the facts of *Y.L.*, the Committee majority seems to

<sup>145</sup> *Adu v. Canada*, *supra* note 115 at para. 6.3. See also *Ahani HRC*, *supra* note 1 at para. 10.5.

<sup>146</sup> *Y.L.*, *supra* note 140 at para. 5. The Committee sought information on, among other things, whether the relationship between a soldier and the state was governed by civil law or public law rights and obligations, whether the employment of civil servants in Canada was governed by a statutory (public law) or contractual (private law) regime, whether there was a distinction in Canadian law between persons employed by private employers under a labour contract and government employees and information regarding the judicial review of pension board decisions before the Federal Court of Appeal.

<sup>147</sup> *Ibid.* at para. 9.4.

<sup>148</sup> *Ibid.*

<sup>149</sup> Weissbrodt, *supra* note 120 at 139.

have regarded the claim as a 'suit at law' with sufficient protection for the purposes of article 14(1) provided by the right to seek judicial review."<sup>150</sup> David John Harris suggests that the majority of the Committee may have intended a two-part test to determine whether article 14 applies to a given dispute:

First, it looks to the 'nature of the right,' with the determination of private law rights being within article 14, but not the determination of public law rights (i.e., rights that an individual has in his relations with the state). Secondly, if a case does not involve the determination of a private law right, it will, nonetheless, involve a 'suit at law' if, in the legal system concerned, it can be determined on the merits before a court of law or the executive decision determining the public law right in question is subject to judicial review.<sup>151</sup>

Dominick McGoldrick shares this view and observes that the critical factor in the Committee's decision that article 14(1) applied in *Y.L.* "appears to be that the claim was of a kind subject to judicial supervision and control."<sup>152</sup> Sarah Joseph notes that the majority's views "certainly hinted" that the Pension Board's proceedings concerned a suit at law, "focused on the nature of the right and whether the claim was of a kind subject to judicial supervision and control" and were preferable to the dissenting opinion which threatened to dilute article 14(1) protection by focusing on perverse domestic classifications of a claim.<sup>153</sup> For these reasons, the better view is that, contrary to Canada's claim, the Committee did decide in *Y.L.* that some public law proceedings involve the determination of rights and obligations in a suit at law.

The Committee did not apply its broad interpretation of suit at law in its subsequent decision in *V.M.R.B. v. Canada*.<sup>154</sup> The author had been made subject to an exclusion order on the grounds that, during his last stay in Canada, he had engaged in or instigated the subversion by force of a foreign government. He attempted to re-enter Canada and claim refugee status. He was detained by immigration authorities while investigations were made to determine whether he posed a danger to national security. His detention was reviewed and extended in a series of weekly hearings before an immigration adjudicator. After over a month of detention, an adjudicator ordered that he be deported. At a later hearing, another adjudicator ordered that he be released but upheld the deportation order. The author claimed that his detention reviews were not fair or impartial nor violated article 14(1). Despite the fact that the adjudicators' detention review decisions could be judicially reviewed by the Federal Court, the Human Rights Committee did not decide whether immigration hearings

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<sup>150</sup> Stephen Bailey, "Rights in the Administration of Justice" in David J. Harris & Sarah Joseph, eds., *The International Covenant on Civil and Political Rights and United Kingdom Law*, (Oxford: Clarendon Press, 1995) at 212.

<sup>151</sup> David J. Harris, *Cases and Materials on International Law*, 5th ed. (London: Sweet & Maxwell, 1998) at 672 [Harris].

<sup>152</sup> Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1991) at 416. See also Boeles, *supra* note 97 at 137.

<sup>153</sup> Joseph, *supra* note 86 at 281.

<sup>154</sup> *V.M.R.B.*, *supra* note 111.

and deportation proceedings were subject to article 14. It left that question open and held that assuming that article 14 applied, the provision had not been infringed because “[the author] was given ample opportunity, in formal proceedings, including oral hearings with witness testimony, both before the Adjudicator and before the Canadian courts, to present his case for sojourn in Canada.”<sup>155</sup>

The Committee has since held that article 14(1) applies to proceedings involving governments as parties. In *Casanovas v. France*, the Committee determined that proceedings filed by the author before the Administrative Tribunal of Nancy concerning his dismissal from employment constituted the determination of rights and obligations in a suit at law.<sup>156</sup> In contrast, the Committee determined that procedures initiated by a non-commissioned police officer to be promoted within the Polish police force did not constitute the determination of rights and obligations in a suit at law.<sup>157</sup> The Committee focused on the nature of the officer’s claim and observed that, unlike Casanovas, he had not been dismissed, nor had he unsuccessfully applied for a vacant post.<sup>158</sup> Similarly, in *Kazantzis v. Cyprus*<sup>159</sup> the Committee found that the selection and appointment of judges by Cyprus’ Supreme Council of Judicature was not a determination of rights and obligations in a suit at law. Contrary to Casanovas, which concerned removal of the petitioner from public employment, Kazantzis concerned the denial of an application for employment in the judiciary by a body exercising a non-judicial task.<sup>160</sup>

Like the drafting committee discussions in the *travaux préparatoires*, which suggest that the phrase *suit at law* was added to emphasize that proceedings subject to article 14(1) would be of a judicial nature, the Committee’s jurisprudence on the scope of article 14(1), and in particular its reference to non-judicial and judicial tasks, is reminiscent of the doctrinal efforts of Canadian courts to determine the threshold for the application of the common law duty of procedural fairness and in particular their distinction between administrative decisions and judicial or quasi-judicial decisions.<sup>161</sup> The Committee’s recent decisions, in particular its focus on whether the impugned decision is of a judicial nature, can be reconciled with the Committee’s decision in *Y.L.* In *Y.L.*, the Committee was essentially preoccupied with the

<sup>155</sup> *Ibid.* at para. 6.3.

<sup>156</sup> Committee on Human Rights, Communication No. 441/1990, *Casanovas v. France*, UN Doc. CCPR/C/51/D/441/1990 (1994) at paras. 5.2 and 7.4. It held that fair hearings had to be expeditious, but that the delay between the author’s filing of his claim and the tribunal’s final decision was not long enough to violate Article 14(1). In Communication No.454/1991, *Pons v. Spain*, UN Doc. CCPR/C/55/D/454/1991 (1995) at para. 9.6, the Committee determined that the proceedings to determine a civil servant’s entitlement to unemployment benefits had not infringed his article 14 right to a fair hearing. Although it did not expressly address the point, the Committee presumably assumed that such proceedings involved the determination of rights and obligations in a suit at law: Harris, *supra* note 151 at 672, note 20.

<sup>157</sup> Committee on Human Rights, Communication No. 837/1998, *Kolanowski v. Poland*, UN Doc. CCPR/C/78/D/837/1998 (2003).

<sup>158</sup> *Ibid.* at para. 6.4.

<sup>159</sup> Committee on Human Rights, Communication No. 972/2001, *Kazantzis v. Cyprus*, UN Doc. CCPR/C/78/D/972/2001 (2003) at para. 6.5.

<sup>160</sup> *Ibid.* at para. 6.5.

<sup>161</sup> See Mullan 2003, *supra* note 137 at 100-102.

following question: was the author's claim the kind of claim over which courts would normally exercise control and supervision to ensure it was decided fairly? In *Kazantzis*, the Committee found that the author's application for a judicial appointment did not entail decision-making of a judicial nature. Courts would not normally recognize that the author was owed a duty of fairness for the determination of this kind of claim and would not enforce such a duty. Accordingly, under the test set out in *Y.L.*, claims of this nature were not within the scope of article 14(1). In sum, to ask whether article 14(1) applies to the determination of an individual's claim is to ask whether a duty of fairness is owed to the claimant. As the Committee held in *Y.L.*, the answer to that question depends, as it does at common law, on the nature of the claim.<sup>162</sup> Do the determinations that must be made to reach a decision resemble judicial decision-making rather than legislative or broad, policy-based decision-making? Does the determination of the author's claim have an important impact on his life? Where these questions are answered in the affirmative, the claim, as the Committee specifies in *Y.L.*, is of a kind that is normally subject to judicial supervision and control to ensure its fair determination. This kind of claim falls within the scope of article 14(1). It should come as no surprise that the factors used to determine whether a claim falls within the scope of article 14(1) resemble those used by Canadian courts to decide whether its determination is subject to a duty of procedural fairness: common law courts have been pondering for centuries in what circumstances to apply the guarantee of a fair hearing.<sup>163</sup>

3. THE SCOPE OF ARTICLE 14(1) OF THE *ICCPR* BY ANALOGY TO ARTICLE 6(1) OF THE *EUROPEAN CONVENTION*

Canada argued in *Ahani* that the Committee should adopt a more restrictive view of article 14 based on the jurisprudence of the European Court of Human Rights on the scope of article 6 of the *European Convention*. Textually analogous to article 14(1) of the *ICCPR*, article 6(1) of the *ECHR* states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.<sup>164</sup>

The Committee has recently hinted that it is prepared to equate article 14(1) of the *ICCPR* with article 6(1) of the *ECHR* in cases where it has given effect to reservations of European parties to the *Optional Protocol* that deny the Committee competence to consider communications regarding matters previously examined

<sup>162</sup> See in particular, *Baker*, *supra* note 135 at paras. 23-25.

<sup>163</sup> See David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 156-158, discussing *Cooper v. Board of Works for Wandsworth District* (1863), 143 E.R. 414 (C.P.) and *Dr. Bentley's Case* (1723), 1 Str. 557, 93 E.R. 698 (K.B.).

<sup>164</sup> *ECHR*, *supra* note 52, s. 6(1). The French-language versions of both provisions extend the right to a fair hearing to proceedings deciding "contestations sur ses droits et obligations de caractère civil".

under the *European Convention*.<sup>165</sup> In *Kollar v. Austria*,<sup>166</sup> a medical doctor complained that disciplinary proceedings held by his employer violated article 14(1) because the chair of the discipline committee was biased. The European Court had already rejected as inadmissible a claim filed by Kollar under article 6(1) of the *ECHR*, finding that the disciplinary proceedings were not conducted by a body exercising public power, but were internal to Kollar's workplace. Kollar's claim thus disclosed no appearance of a violation of his rights under the *European Convention*. The Committee decided to give effect to Austria's reservation to the *Optional Protocol*, which precluded the Committee from considering claims previously examined by the European Commission Court:

[D]espite certain differences in the interpretation of [article 6(1) *ECHR*], and [article 14(1) *ICCPR*] by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State Party's reservation, the Committee considers itself precluded from reviewing the findings of the European Court on the applicability of [article 6(1) *ECHR*] by substituting its jurisprudence under [article 14(1) of the *ICCPR*].<sup>167</sup>

The Committee's approach in *Kollar* differs markedly from that adopted previously in *Casanovas*, which involved an equivalent French reservation to the *Optional Protocol*. In that case, France had argued that the Committee should declare inadmissible Casanovas' claim that the administrative process reviewing his dismissal from the civil service did not meet the requirements of article 14(1), since Casanovas had already submitted an unsuccessful claim to the European Commission. The latter had declared Casanovas' complaint inadmissible because it found that article 6(1) of the *ECHR* did not apply to procedures governing the dismissal of civil servants. France argued that, based on the similarities in the language of article 14(1) of the *ICCPR* and article 6(1) of the *ECHR*, the Committee should follow the reasoning of the European Commission and decide that article 14(1) did not apply, since Casanovas' claim did not involve his "rights and obligations in a suit at law."<sup>168</sup> The Committee rejected France's argument and decided to consider Casanovas' communication because,

since the rights of the *European Convention* differed in substance and with regard to their implementation procedures from the rights set forth in the *Covenant*, a matter that had been declared inadmissible *ratione materiae* had not, in the meaning of the reservation, been 'considered' in such a way that the Committee was precluded from examining it.<sup>169</sup>

<sup>165</sup> On the subject of such reservations to the *Optional Protocol*, see generally Joseph, *supra* note 86 at 69-73.

<sup>166</sup> Committee on Human Rights, Communication No. 989/2001, *Kollar v. Austria*, UN Doc. CCPR/C/78/D/989/2001 (2003).

<sup>167</sup> *Ibid.* at para. 8.6.

<sup>168</sup> *Casanovas*, *supra* note 156 at 4.2-4.3.

<sup>169</sup> *Ibid.* at para. 5.1.



While there may be sound reasons to give effect to State Parties' reservations to the Optional Protocol, the Committee should not premise its decision to do so on an alleged similarity or convergence between the provisions of the applicable human rights instruments, but simply on the fact that the same matter – the same claim concerning the same individual – has been examined by the European Court. In sum, the Committee should interpret the terms of the *Covenant*, not defer to the European Court's interpretation of provisions of the *European Convention*. Subsequent developments showed that the Committee's approach in *Casanovas* and its decision to set forth its own interpretation of the scope of article 14(1), broader than that set by the European Commission for article 6(1), was judicious. The European Court recently revised its construction of article 6(1), and, consistent with the Committee's decision in *Casanovas*, broadened its scope to include certain proceedings relating to the dismissal of public servants.<sup>170</sup>

The European Court's jurisprudence under article 6(1) may provide evidence of the scope and content of the right to a fair and public hearing before an independent and impartial tribunal in States with highly developed systems of administrative justice. Recognizing the prominent place in democratic societies of the right to a fair administration of justice expressed in article 6(1), the European Court has held that the provision should be given a purposive rather than a restrictive interpretation.<sup>171</sup> However, as in the case of article 14(1) of the *ICCPR*, the extent to which article 6(1) applies to public law disputes is a contentious question. Generally, the European Court has found that article 6(1) applies outside the criminal context, where the impugned proceedings involve a dispute (contestation) over a right or obligation, the impugned proceedings lead to a determination of the right or obligation and the right or obligation in issue is of a civil nature.<sup>172</sup>

The Court must decide whether there is a dispute over a right which can be said on arguable grounds to be recognized under domestic law. The concepts of *right* and *obligation* have an autonomous meaning under the *European Convention*.<sup>173</sup> Accordingly, while the European Court takes into account whether the national legal system classifies an interest or privilege as a right, it is not bound by this determination, but must also consider the substantive content and effects of the

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<sup>170</sup> In *Pellegrin v. France* (2001), 31 E.H.R.R. 26, the European Court decided that disputes between public servants and governments would be excluded from the scope of Article 6(1) only where they were raised by public servants "whose duties typified the specific activities of the public service so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the state or other public authorities" or, in other words, "who wield a portion of the state's sovereign power" (*Ibid.* at paras. 66-67). *Pellegrin* broadened the scope of Article 6(1), which now protects cleaners, nurses, teachers and other public servants whose jobs are similar if not identical to private-sector counterparts (Clare Ovey & Robin White, *Jacobs and White, The European Convention on Human Rights*, 3d ed. (Oxford: Oxford University Press, 2002) at 150).

<sup>171</sup> *Delcourt* (1970), 1 E.H.R.R. 355 at 366-367, para. 25.

<sup>172</sup> Pieter van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (The Hague: Kluwer Law International, 1998) at 394-406 [van Dijk 1998].

<sup>173</sup> *Kaplan*, Report of 17 July 1980, (1981) D.R. 21 at 5(24).

interest or privilege and the object and purpose of the *ECHR*.<sup>174</sup> An entitlement or right expressly provided for by statute is clearly recognized under domestic law.<sup>175</sup> The statutory conferral on state authorities of a broad discretion to confer a benefit or issue a license does not necessarily negate the existence of a right, even where the applicant cannot claim entitlement to a specific outcome. For example, in a case concerning a property owner's attempt to challenge a building committee's refusal to exempt him from the criteria governing the issuance of a building permit, the European Court decided that a dispute over a right could arise where the applicant could arguably claim that the state authority had exercised its statutory discretion in a manner contrary to generally recognized legal and administrative principles.<sup>176</sup> The European Court has held that the word *contestation* should not be construed technically, but must be of a genuine and serious nature. The dispute may relate to the actual existence of a right, to its scope or to the manner in which the right may be exercised and may concern questions of both fact and law.<sup>177</sup>

The impugned proceedings must lead to a determination of the civil right or obligation. While the link between the outcome of the proceedings and the impact on the exercise of the right may not be tenuous or remote, the impugned proceedings need not be designed for the specific purpose of restricting or defining an individual's civil right. Rather, the outcome of the impugned proceedings must be decisive for, affect or relate to the determination or exercise of a civil right.<sup>178</sup> For example, disciplinary proceedings against a doctor, although designed primarily to protect patients and promote public confidence in the medical profession, had a sufficient impact on the right of the doctor to practice his profession that it effectively determined this civil right.<sup>179</sup>

The general entitlement to a fair and public hearing, within a reasonable time, by an independent and impartial tribunal is limited to cases involving the determination of individuals' civil rights and obligations or of criminal charges against them. The French language version of the text states that article 6(1) applies to proceedings to decide *contestations sur ses droits et obligations de caractère civil*.<sup>180</sup> This terminology is identical to that in article 14(1) of the *ICCPR*, even though the English language versions of the two conventions differ. The European Court has not comprehensively defined the meaning of *civil right* or *obligation*, opting instead to develop the concept in a piecemeal fashion. Some observers have charged that this approach produces case law that lacks clarity and certainty.<sup>181</sup> The major point of

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<sup>174</sup> *Ibid.*

<sup>175</sup> *Tinnelly & Sons Ltd v. United Kingdom* (1998), 27 E.H.R.R. 249 at para. 61 [*Tinnelly*].

<sup>176</sup> *Skärby v. Sweden* (1990), 13 E.H.R.R. 90 at para. 28 [*Skärby*]. But see *Masson and van Zon v. Netherlands* (1995), 22 E.H.R.R. 491 and *Leutscher v. Netherlands* (1996), 24 E.H.R.R. 181 where the Court decided there was no "right" to compensation for loss of liberty while in unlawful detention under the Dutch Criminal Code of Procedure, because it conferred on Dutch courts a discretion to grant such compensation on equitable grounds. See also van Dijk, *supra* note 172 at 395.

<sup>177</sup> *Bentham v. Netherlands* (1986), 8 E.H.R.R. 1 [*Bentham*].

<sup>178</sup> Van Dijk 1998, *supra* note 172 at 397.

<sup>179</sup> *Le Compte, Van Leuven and De Meyere v. Belgium* (1981), 4 E.H.R.R. 1 at paras. 47-48 [*Le Compte*].

<sup>180</sup> *ECHR*, *supra* note 52, s. 6(1).

<sup>181</sup> Van Dijk 1998, *supra* note 172 at 404.

contention is whether civil right should be equated with private right, limiting the application of article 6(1) to proceedings meant to determine rights of a private nature, such as individual property rights or rights arising in tort or contract law. There are strong arguments, based on the *travaux préparatoires* and drafting history of articles 14(1) and 6(1), that this was not the intention of the drafters of either provision,<sup>182</sup> and that the term *civil rights* was intended to cover the determination of all legal rights that were not of a criminal nature.<sup>183</sup> However, the European Court has “created the impression that it started from the assumption that ‘civil’ meant ‘private’, and that it employed these terms as synonyms.”<sup>184</sup> The Court has developed four principles in relation to the question of whether a right or obligation can be characterized as civil.<sup>185</sup> First, the concept of *civil right or obligation* has its own meaning in *European Convention* law and cannot be interpreted solely by reference to whether the domestic law of the respondent State classifies a right as private instead of public. Second, article 6(1) does not only cover private-law disputes in the traditional sense, i.e. disputes between individuals, excluding disputes between individuals and the State acting in its sovereign capacity. Third, the character of the legislation which governs the matter to be determined and the nature of the authority which has jurisdiction in the matter, either ordinary court or administrative body, are of little consequence in determining whether the right or obligation is civil in character. Fourth, whether a right is to be regarded as civil must be determined by reference to its substantive content and effects.

Applying these principles on a case by case basis, the European Court has extended the application of article 6(1) beyond disputes concerning traditional private rights to cases involving proceedings with a strong public flavour but whose outcomes impact on private rights. For example, the Court applied article 6(1) to proceedings regarding the withdrawal of a liquor permit despite Sweden’s claim that the regulation of alcohol distribution and consumption through permits was an important part of Swedish social policy and fell within an essential field of public law.<sup>186</sup> The permit conferred civil rights because it was essential for the applicant to carry on its business activities as a restaurant and its revocation impacted on a private commercial activity based on the contractual relationship between the permit-holder and its customers.<sup>187</sup> Similarly, article 6(1) has been found to govern zoning decisions that subjected the future use by a property-holder of his property to government pre-authorization<sup>188</sup> as well as decisions of professional disciplinary tribunals to restrict or eliminate individuals’ rights to exercise professions.<sup>189</sup> A dispute regarding a person’s entitlement to sickness insurance under social security

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<sup>182</sup> *Ibid.* at 392-394. See also van Dijk 1990, *supra* note 121.

<sup>183</sup> This view is set out convincingly in the dissenting opinion of Judge Loucaides in *Maaouia*, *supra* note 51 at O-IV3-8 [*Maaouia*].

<sup>184</sup> Van Dijk 1998, *supra* note 172 at 404.

<sup>185</sup> *Bentham*, *supra* note 177 at para. 34.

<sup>186</sup> *Tre Traktörer Aktiebolag v. Sweden* (1989), 13 E.H.R.R. 309 at 320, at para. 42.

<sup>187</sup> *Ibid.* at para. 43.

<sup>188</sup> *Oerlemans v. Netherlands* (1991), 15 E.H.R.R. 561.

<sup>189</sup> *Le Compte*, *supra* note 179.

legislation was also found to concern a civil right.<sup>190</sup> In that case, the comprehensive statutory scheme regulating health insurance, the compulsory nature of health insurance and the state's large role in the scheme gave the applicant's claim a strong public flavour. However, the scheme had private law features, including its resemblance to private insurance schemes, the connection between the availability of benefits and the applicant's employment under a private law contract and, most importantly, the personal, economic and individual nature of the right, of crucial importance to a person who by reason of illness has no other source of income. Taken cumulatively, these private law features "confer[red] on the asserted entitlement the character of a civil right [...]"<sup>191</sup> In *Salesi v. Italy*,<sup>192</sup> the Court went further, applying article 6(1) to a claim of entitlement to welfare allowances. It did not avert to any similarities between Italy's statutory welfare assistance program and private schemes, but relied almost exclusively on the fact that Salesi suffered an interference with her means of subsistence and was claiming an individual economic right flowing from specific rules laid down in a statute giving effect to the Constitution.<sup>193</sup> The Court recently confirmed that complaints of discrimination in hiring or tendering processes brought under human rights codes involve the determination of civil rights.<sup>194</sup>

In light of the foregoing discussion, Canada cannot credibly claim that article 14(1), if interpreted consistently with the European Court's jurisprudence under article 6(1), does not apply to a variety of public law proceedings. However, Canada correctly argues that the European Court does not consider deportation proceedings to fall within the scope of article 6(1). A majority of the Court, following the consistent case law of the defunct European Commission on Human Rights,<sup>195</sup> recently

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<sup>190</sup> *Feldbrugge v. Netherlands* (1986), 8 E.H.R.R. 425.

<sup>191</sup> *Ibid.* at para. 40.

<sup>192</sup> *Salesi v. Italy* (1993), 26 E.H.R.R. 187 [*Salesi*].

<sup>193</sup> The Court also noted that the Italian statute provided that disputes over the right in question came within the jurisdiction of the ordinary courts: *Salesi, Ibid.* at para. 19. See also *Schuler-Zraggen v. Switzerland* (1993), 16 E.H.R.R. 405 at para. 46, where the court applied the same reasoning to an applicant's entitlement to a disability pension, which it found to be an individual economic right flowing from specific rules laid down in a federal statute. As in Canadian administrative law, the significance of the decision's impact on the individual's fundamental interests or rights seems central to the European Court's decision to apply Article 6(1).

<sup>194</sup> *Tinnelly, supra* note 175; *Devlin v. United Kingdom* (2002), 34 E.H.R.R. 1029. The European Court observed, at par. 61, that the human rights code "guaranteed persons a right not to be discriminated against in the job market including [...] when bidding for a public works contract [...]" Moreover, the Fair Employment tribunal was empowered to assess the applicants' losses and order damages for loss of profits. The clearly defined statutory right not to be discriminated against, "having regard to the context in which it applied and to its pecuniary nature" could be classified as a "civil right".

<sup>195</sup> Before the European Commission recently merged with the European Court (see *Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 11 May 1994, Eur. T.S. 155, 33 I.L.M. 960 (1994), 15 H.R.L.J. 86 (1994)), it acted as a gatekeeper, assessing the merits of complaints and deciding which complaints to refer to the Court for determination. In its view, deportation proceedings were of an "administrative order" involving discretionary acts by public authorities and did not involve the determination of civil rights under Article 6(1): see *Agee v. U.K.* (1976), 7 D.R. 164 at para. 28 (deportation of an alien for reasons of national security); *X. v. U.K.* (1977), 9 D.R. 224 at 226 (termination of a residence permit for reasons of national security); *Uppal v. U.K.* (1979), 17 D.R. 149 at 157 (deportation of overstayers whose children had a right to remain in the U.K.); and *P. v. U.K.* (1987), 54 D.R. 211 at 212 (proceedings involving a refugee claimant).

determined that decisions regarding the entry, stay and deportation of aliens do not concern the determination of their civil rights or obligations or of a criminal charge against them under article 6(1).<sup>196</sup> The majority held that a separate protocol to the *ECHR*,<sup>197</sup> adopted by the Council of Europe twenty-four years after the ratification of the *European Convention* to provide minimal procedural administrative safeguards to aliens in expulsion proceedings, established that the State Parties to the *Convention* had not intended such proceedings to be covered by article 6(1), because the protocol was adopted precisely to fill the gap resulting from the lack of article 6(1) guarantees.<sup>198</sup> It further ruled that proceedings for the rescission of exclusion orders did not concern the determination of aliens' civil rights, even though exclusion orders significantly affected their private and family lives and prospects for employment.<sup>199</sup>

In a strong dissenting opinion, Judges Loucaides and Traja roundly criticized the majority judgment. Firstly, its interpretation of the concept of civil rights and obligations was unduly narrow and at odds with the purposive interpretation of treaties required by the *Vienna Convention*<sup>200</sup> and the drafting history of article 6(1).<sup>201</sup> In the dissenting judges' view, civil right could be read as covering all legal rights that were not of a criminal nature,<sup>202</sup> an interpretation that should be preferred because it enhances individual rights, in line with the object and purpose of the *European Convention*.<sup>203</sup> It was inconceivable that a convention, which according to its preamble was intended to implement the rule of law, could provide for the fair administration of justice in respect of rights between individuals but fail to do so in respect of rights and obligations "vis-à-vis the administration where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State."<sup>204</sup> The dissenting judges observed that the majority's narrow view of the meaning of civil rights had forced the Court to adopt artificial distinctions in order to extend the protection of article 6 to cover proceedings that did not involve private law, such as claims for pensions, social security and social assistance.<sup>205</sup> Secondly, the dissenting judges argued that the procedural protections for the expulsion of aliens set out in Protocol 7 intended to govern proceedings before competent administrative authorities; they did not purport to restrict any judicial guarantees that aliens already enjoyed under article 6(1), but may well be

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<sup>196</sup> *Maaouia*, *supra* note 51 at paras. 38 and 40.

<sup>197</sup> *Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms*, 22 November 1984, Eur. T.S. 117.

<sup>198</sup> In support of this proposition, the Court referred to "an explanatory report" on Protocol 7. The report, after referring to the European Commission's case law denying the application of Article 6 to deportation proceedings, noted that the protocol "did not affect this interpretation of Article 6" (*Maaouia*, *supra* note 51 at paras. 35-37).

<sup>199</sup> *Ibid.* at paras. 38 and 39. It also held that exclusion orders did not concern the determination of criminal charge.

<sup>200</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980).

<sup>201</sup> Van Dijk 1990, *supra* note 121; *Maaouia*, *supra* note 51 at paras. O-IV4 - O-IV11.

<sup>202</sup> *Maaouia*, *Ibid.* at para. O-IV7.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.* at para. O-IV7.

<sup>205</sup> *Ibid.* at para. O-IV6.

supplementary to these guarantees.<sup>206</sup> In other words, the decision of the Council of Europe to require States to put in place an administrative authority governed by minimal procedural guarantees could not be taken, without express language, to restrict or remove an alien's right to a fair hearing under article 6(1). To accept the majority's view meant that a protocol entered into after the *European Convention*, and meant to form part of the *Convention*, could effectively qualify or abolish the human rights previously safeguarded in the main body of the *Convention*. As the dissenting judges put it: "Protocols add to the rights of the individual. They do not restrict or abolish them."<sup>207</sup>

The dissent in Maaouia advances powerful reasons against excluding immigration proceedings from the scope of article 6(1) based on a narrow interpretation of the term *civil rights*.<sup>208</sup> These apply with even greater force to article 14(1) because the drafters of the *Covenant* expressly dropped the adjective *civil* from the English language version to include *public law proceedings* within the scope of the provision. Such an interpretation would also be consistent with the provisions of other regional human rights instruments.<sup>209</sup>

#### 4. THE INTERACTION OF ARTICLES 14(1) AND 13 OF THE *ICCPR*

What of the argument, by analogy to the role of Protocol 7 of the *ECHR* in the Maaouia decision, that article 13 of the *ICCPR* is a complete code governing immigration proceedings and that, as such, it excludes the application of the more general article 14(1)? Article 13 is not a complete code. It applies only to decisions pursuant to which an alien lawfully present in a State Party is expelled.<sup>210</sup> Accordingly, proceedings to determine the status of an alien which do not themselves lead to his expulsion are not subject to article 13. However, such proceedings would, in some cases, be determinative of the alien's ability to exercise civil rights. Refugee determination proceedings are a good example. Under international law, an individual is a refugee as soon as she meets the criteria set out in the *1951 Convention*.<sup>211</sup> In practice, however, she may exercise the rights and enjoy the benefits that attach to

<sup>206</sup> *Ibid.* at O-IV15 – O-IV17.

<sup>207</sup> *Ibid.* at para. O-IV14.

<sup>208</sup> Commentators have criticized the majority judgment for similar reasons (Hanneke Steenbergen, Pieter Boeles & Christa Wijnakker, "Case Reports of the European Court of Human Rights" (2001) 3 *Eur. J. Migr. & L.* 97 at 101).

<sup>209</sup> Article XVIII of the *American Declaration of the Rights and Duties of Man*, 2 May 1948, OAS Res. XXX, 43 A.J.I.L. 133 makes no distinction between "civil" or private and "public" law rights but simply provides that "every person may resort to the courts to ensure respect for his legal rights." While it does not specify a right to a fair hearing before an independent and impartial tribunal, resort to a court would likely provide such guarantees. Similarly, Article 8(1) of the *American Convention on Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, 65 A.J.I.L. 679 extends the right to a hearing to "the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." On their face, both provisions are broad enough to extend the fair hearing guarantees to refugee determination or removal proceedings.

<sup>210</sup> *Ahani* HRC, *supra* note 1 at para. 10.5.

<sup>211</sup> As Goodwin-Gill notes, "the recognition of refugee status in international law is essentially declaratory in nature" (Goodwin-Gill 1996, *supra* note 96 at 141).

refugee status described in Chapters II-IV of the *1951 Convention* only when her refugee status is recognized presumably in a refugee determination proceeding.<sup>212</sup> Chapter II of the *1951 Convention*, entitled Juridical Status, requires the refugees' surrogate State to recognize, among others, property and commercial rights and family law rights long recognized by the European Court as falling within the category of *civil law* rights for purposes of the application of article 6(1).<sup>213</sup> Similarly, the guarantees set out in Chapter III of the *1951 Convention* regarding the rights of refugees to engage in wage-earning employment and, in particular, to practice a profession, have also been accepted by the European Court as rights of a civil law nature.<sup>214</sup> Chapter IV of the *1951 Convention* entitled Welfare provides, among other things, that the surrogate State must accord to refugees lawfully staying in its territory the same treatment as it accords its own nationals in respect of public relief, assistance<sup>215</sup> and social security.<sup>216</sup> Claims to such benefits have also been recognized by the European Court as falling within the scope of article 6(1).

The ability of a refugee to exercise any of the rights or enjoy any of the benefits conferred under the *1951 Convention* and which have been recognized by the European Court as having a civil law character depends on recognition of her status. Therefore, refugee determination proceedings are directly decisive for the question whether a civil law right can be exercised. By analogy to the approach followed by the European Court under article 6(1) in contexts other than immigration, these proceedings should be found to fall within the scope of article 14(1) of the *ICCPR*, the Maaouia decision notwithstanding. At the very least, it would be contrary to the purposive interpretation of human rights treaties to conclude, absent express language, that article 13 precludes the application of article 14(1) to refugee determination or expulsion proceedings. It is possible and preferable to interpret article 13 as requiring that the authority competent to order an alien's expulsion at least offer the alien a procedurally fair administrative reconsideration of its expulsion decision. This requirement should not be taken, without express language, to remove the State's obligation to also provide for a fair hearing before an independent and impartial tribunal, either through a subsequent hearing before an administrative body or through judicial review.

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<sup>212</sup> *1951 Convention*, *supra* note 94, ss. 12-24.

<sup>213</sup> More precisely, these include: (a) rights previously acquired by the refugee and dependent on personal status (e.g., rights attached to marriage) if these rights would have been recognized by the surrogate state had she not become a refugee (*1951 Convention*, *supra* note 95, s. 12; (b) rights to acquire, lease or otherwise contract in respect of movable and immovable property (*Ibid.*, s. 13); and (c) intellectual property rights (*Ibid.*, s. 14).

<sup>214</sup> *Kraska v. Switzerland* (1993), 18 E.H.R.R. 188.

<sup>215</sup> *1951 Convention*, *supra* note 94, s. 23.

<sup>216</sup> Defined as "legal provisions in respect of employment injury, occupational diseases, maternity sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme (*Ibid.*, s. 24(1)(b)).

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One might ask why the Canadian Government strongly resists the application of article 14(1) in proceedings to remove aliens to states where they may face serious harm, especially since the Suresh decision holds that in such circumstances, fundamental justice under section 7 of the *Charter*, requires a hearing that complies, at the very least, with the rules of procedural fairness. The answer may lie in the fact that the Supreme Court failed, in Suresh, to address the argument that fundamental justice required that the decision to expel Suresh be rendered by an impartial and independent tribunal.<sup>217</sup> Canada may be concerned that if article 14(1) were found to apply, it would require that proceedings to expel individuals like Suresh or Ahani meet the requirements of independence and impartiality. Moreover, Canada may be concerned that article 14(1) could apply to immigration proceedings other than those involving the expulsion of aliens in circumstances not yet recognized by Canadian courts as engaging their rights under section 7,<sup>218</sup> and ultimately require that all decision-makers under the *Immigration Act* who determine the rights and obligations of non-citizens be independent and impartial. In sum, Canada may fear that the application of article 14(1) to this area of public law, including the highly discretionary humanitarian and compassionate decisions carried out by officials on behalf of the Minister of Citizenship and Immigration,<sup>219</sup> may over-judicialize immigration decision-making, rendering it slow and unwieldy and defeating the State's interest in effectively and efficiently controlling its borders through swift removal of those aliens who are not entitled to remain in Canada.

These concerns may be legitimate, but such has not been the experience of the English courts<sup>220</sup> in interpreting the requirements of article 6(1) of the *European*

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<sup>217</sup> The trial judge summarily dismissed this argument, holding that the *Immigration Act* did not require an independent, impartial tribunal and neither did fundamental justice. In his words, "Parliament wanted the opinion of the Minister, not of a judge" (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 865 (T.D.) at para. 38 (QL). The Federal Court of Appeal also dismissed Suresh's claim that he was entitled to an impartial tribunal. It held that the Minister's overlapping functions were authorized by the *Act*, but failed to address the point that statutory authorization is no defense to a claim that the *Act* violated s. 7 of the *Charter* (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 (C.A.) at para. 52).

<sup>218</sup> These would include, for example, the removal of overstayers to their country of origin where this significantly interferes with their family lives. See Lorne Waldman, *Immigration Law and Practice*, looseleaf (Toronto: Butterworths, 1992) who argues, at paras. 2.72.10-2.72.14, that deportation involving the forced separation of a child from his or her parent should be found to engage s. 7. In *Baker*, *supra* note 135, a case involving such circumstances, the Supreme Court declined to decide whether s. 7 of the *Charter* was engaged, preferring to decide the case on administrative law grounds.

<sup>219</sup> Under s. 114(2) of the *Immigration Act*, individuals could seek an exemption, on humanitarian and compassionate grounds, from the obligation to apply for permanent residence from outside Canada. See *Baker*, *supra* note 135. For the current version of this provision, see *IRPA*, *supra* note 7, s. 25.

<sup>220</sup> The enactment of the *Human Rights Act 1998*, 1998, c. 42 provided English courts with an opportunity to clarify this area of law. Since 2000, ss. 6 and 4 of the *Act* prohibit local authorities from acting in contravention of the *European Convention* and give courts the power to declare laws to be incompatible with the *Convention*. In doing so, courts are bound to take into account European Court decisions insofar as they are relevant.



*Convention* in light of the jurisprudence of the European Court.<sup>221</sup> While immigration decision-making in Europe is largely immunized from article 6(1) challenges by the Maaouia decision, many individuals and companies have challenged administrative decisions before the courts in other contexts, arguing that the decision-makers involved lacked the independence and impartiality guaranteed by article 6(1). In response to these challenges, English courts have adopted an approach to the interpretation of article 6(1) that upholds the traditional structure of administrative decision-making and judicial review in the United Kingdom.

The House of Lords recently upheld as consistent with article 6(1) first instance decisions by non-independent decision-makers that were subject to ordinary judicial review by English courts.<sup>222</sup> It determined that the precise content of the guarantee of independence and impartiality depends on the context in which the impugned decision-making is carried out. In particular, it examined three factors: the subject matter of the decision appealed from, the manner in which the decision was arrived at, and the content of the dispute. Of these, the subject matter and the content of the dispute are particularly important. Under the subject matter rubric, decisions touching upon certain basic rights, including rights to liberty engaged by criminal law, private rights and rights guaranteed by provisions of the *European Convention* other than article 6 (e.g. the right to respect for private and family life in article 8), are at one end of a spectrum or hierarchy, requiring higher standards of independence and impartiality.<sup>223</sup> Decisions touching upon the allocation of resources, including statutory entitlements to public welfare, are at the other end of the spectrum and command lower standards of independence and impartiality.<sup>224</sup> Under the content of the dispute rubric, disputes focusing on determinations of fact demand higher standards of independence and impartiality, while disputes focusing on the interpretation or application of policy or on the weight accorded to certain factors in the exercise of a discretionary power require lower standards of independence or impartiality.<sup>225</sup>

While a more extensive discussion of these developments falls outside the scope of this article, and without endorsing particular conclusions of the House of Lords, notably, that decisions on an individual's entitlement to public housing should command a low standard of independence, it is sufficient to observe that a flexible contextual approach to assessing the content of the norms of independence and impartiality guaranteed by article 14(1) of the *ICCPR*<sup>226</sup> could avoid the over-

<sup>221</sup> Notably, the European Court's decision in *Bryan v. U.K.* (1995), 21 E.H.R.R. 342.

<sup>222</sup> See in particular *R. (on the application of Alconbury Developments Ltd.) v. Secretary of State for the Environment, Transport, and the Regions*, [2001] H.R.L.R. 45 [Alconbury]. See also *Begum v. Tower Hamlets LBC*, [2003] H.R.L.R. 16 [Begum].

<sup>223</sup> Rights engaged by "true" criminal law require the highest standards of independence: in proceedings where such rights are at stake, even first instance decision makers must fulfill the requirements of independence and impartiality regardless of the existence of an adequate review. See *De Cubber v. Belgium* (1985), 7 E.H.R.R. 236.

<sup>224</sup> *Begum*, *supra* note 222 at paras. 42-46 and 50.

<sup>225</sup> *Alconbury*, *supra* note 222 at paras. 128-129; *Begum*, *Ibid.* at para. 56.

<sup>226</sup> For an approach not unlike that adopted by Canadian courts interpreting the right to an independent and impartial tribunal under s. 11(d) of the *Charter*, which guarantees the right to a fair and public

judicialization of administrative decision-making, a concern that loomed large in the House of Lords' interpretation of article 6(1) of the *European Convention*.<sup>227</sup>

In *Ahani v. Canada*, the UN Human Rights Committee gave meaningful content to an alien's article 13 right to submit reasons against his expulsion and have his case reviewed by a competent authority by "reading in" some of the due process protections reflected in article 14. However, a review of the Committee's article 14 jurisprudence, including its views in *Ahani*, makes plain the pressing need for the Committee to clearly set out the standards and criteria governing the application of article 14(1) to public law proceedings in general and immigration proceedings in particular. Drawing on the *travaux préparatoires* to the Covenant, the Committee's jurisprudence, the interpretation of article 6(1) of the *ECHR* by the European Court, and principles of Canadian administrative law, this article has formulated some promising lines of inquiry that could assist the Committee to fulfill this task. A continued reluctance on the Committee's part to address these issues can only sow confusion and uncertainty among States Parties and individuals seeking to enforce their rights under the *Covenant*.

## Postscript

On August 25, 2005, shortly before this article was sent to press, the Supreme Court of Canada allowed an appeal in the case of *Adil Charkaoui v. Minister of Citizenship and Immigration and Solicitor General of Canada*,<sup>228</sup> in which the appellant, Adil Charkaoui, claims that the security certificate reasonableness review proceedings in the *Immigration and Refugee Protection Act* breach section 7 of the *Charter* and article 14 of the *ICCPR*. In a decision delivered on December 10, 2004, the Federal Court of Appeal upheld the constitutionality of the reasonableness proceedings, finding that they complied with the principles of fundamental justice under section 7 of the *Charter*.<sup>229</sup> The Court also dismissed Charkaoui's claim under article 14 of the *ICCPR*, for three reasons. First, it observed that the Human Rights Committee had, in *Ahani*, "confirmed the compliance" of the reasonableness proceedings with the provisions of the *ICCPR*.<sup>230</sup> Second, it noted that the European Court of Human Rights, in *Maaouia*, had determined that article 6 of the *ECHR* did not even apply to exclusion orders.<sup>231</sup> Third, it decided that Canada's *Charter* was

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hearing by an independent and impartial tribunal in criminal and penal matters, see *Alex Couture Inc. v. Canada (Attorney-General)* (1991), 83 D.L.R. (4th) 577 (Que. C.A.).

<sup>227</sup> Citing the U.S. Supreme Court's decision in *Matthews v. Eldridge*, 424 U.S. 319 at 347 (1976), Lord Hoffman observed that the judicialization of dispute procedures was appropriate in the realm of criminal law and private rights but that Parliament was justified on grounds of efficient administration in providing fewer procedural and institutional safeguards in designing a statutory scheme for regulation or social welfare (*Begum*, *supra* note 222 at paras. 43-46). Therefore, Article 6(1) did not require reviewing courts to apply a more intensive approach to review of fact going beyond conventional principles of judicial review.

<sup>228</sup> *Re Charkaoui*, [2005] C.S.C.R. No. 66 (QL).

<sup>229</sup> *Re Charkaoui*, [2004] F.C.J. No. 2060 (C.A.) (QL).

<sup>230</sup> *Ibid.*, at para. 140.

<sup>231</sup> *Ibid.*, at para. 143.

“not outdone” by the *UDHR*, *ICCPR*, or *ECHR* “in terms of equality before the courts and tribunals, procedural fairness, judicial independence and the impartiality of the courts,” and that it conferred rights and guarantees that were “for all practical purposes identical.”<sup>232</sup> Finally, given its finding that the reasonableness proceedings complied with the *Charter*, it held that the “same [could] be said, therefore, in relation to the three international instruments.”<sup>233</sup> As argued in this article, the Federal Court of Appeal’s first and second reasons are highly contestable. On one hand, the Committee’s views in *Ahani* do not consider whether the reasonableness proceedings afforded Ahani a hearing before an independent tribunal guaranteed by article 14 of the *ICCPR*. On the other hand, there are powerful reasons not to rely on the European Court’s *Maaouia* decision to exclude immigration proceedings from the scope of article 14. Most importantly, the logic underlying the Federal Court of Appeal’s third reason is entirely inconsistent with the approach to the role of international law in *Charter* interpretation urged by the Supreme Court of Canada in its *Suresh* decision. In this case, Canada’s highest court held that the principles of fundamental justice expressed in section 7 of the *Charter* could not be considered in isolation from the international norms that they reflect.<sup>234</sup> Thus, in *Suresh*, the Supreme Court’s interpretation of fundamental justice was informed both by the relevant Canadian jurisprudence and by a serious examination of conventional and customary international norms prohibiting torture.<sup>235</sup> To remain faithful to this approach, the Federal Court of Appeal should have conducted an equally serious review of the scope and content of article 14 of the *ICCPR*, then taken it into account in determining whether the reasonableness proceedings complied with fundamental justice under section 7 of the *Charter*. Instead, it treated the Canadian perspective as determinative and simply presumed that international human rights law could not possibly offer greater procedural and institutional safeguards than “our *Charter*.”<sup>236</sup>

In hearing the appeal in the *Charkaoui* case, the Supreme Court of Canada should, at the very least, firmly reject the Federal Court of Appeal’s view of the role of international law in *Charter* interpretation and undertake a sophisticated examination of the scope and content of the international norms at play in *Charkaoui*, including those expressed in article 14 of the *ICCPR*.

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<sup>232</sup> *Ibid.*, at para. 142.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Suresh*, *supra* note 20 at para. 59.

<sup>235</sup> *Ibid.*, at paras. 61-75.

<sup>236</sup> *Re Charkaoui*, *supra* note 229 at para. 142.