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COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION
Fifty-fourth session
1-19 March 1999

OPINION

Communication No. 8/1996

Submitted by: B.M.S. (represented by counsel)

Alleged victim: The author

State party concerned: Australia

Date of communication: 19 July 1996 (initial submission)

Date of adoption of Committee's opinion: 12 March 1999

* Made public by decision of the Committee on the Elimination of Racial Discrimination.

ANNEX

OPINION OF THE COMMITTEE ON THE ELIMINATION
OF RACIAL DISCRIMINATION

- FIFTY-FOURTH SESSION -

concerning

Communication No. 8/1996

Submitted by: B. M. S. [represented by counsel]

Alleged victim: The author

State party concerned: Australia

Date of communication: 19 July 1996 (initial submission)

The Committee on the Elimination of Racial Discrimination, established under article 8 of the International Convention on the Elimination of All Forms of Racial Discrimination,

Meeting on 12 March 1999,

Having concluded its consideration of communication No. 8/1996, submitted to the Committee under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination,

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

Bearing in mind rule 95 of its rules of procedure requiring it to formulate its opinion on the communication before it,

Adopts the following:

OPINION

1. The author of the communication is B.M.S., an Australian citizen since 1992 of Indian origin and a medical doctor. He claims to be a victim of violations of the Convention by Australia. He is represented by counsel.

The facts as submitted by the author

2.1 The author graduated from Osmania University (India). He holds a diploma in Clinical Neurology (DCN) from the University of London. He has practised medicine in England, India, Ireland and the United States. For 10 years he has worked as a medical practitioner under temporary registration in Australian public hospitals.

2.2 The author states that doctors trained overseas who have sought medical registration in Australia have to undergo and pass an examination involving

two stages, a multiple choice examination (MCQ) and a clinical examination. The whole process is conducted by the Australian Medical Council (AMC), a non-governmental organization partly funded by the Government.

2.3 In 1992, the Australian Minister of Health imposed a quota on the number of doctors trained overseas who pass the first stage of this examination. As a result, doctors who were trained abroad and who are Australian residents and Australian citizens may not be registered precisely because they fall outside the quota. On the other hand, quota places may be allocated to persons without any immigration status in Australia.

2.4 Following the imposition of the quota system the author sat the MCQ examination on three occasions. He satisfied the minimum requirements but was always prevented, by the quota system, from proceeding to the clinical examination.

2.5 In March 1993, the author filed a formal discrimination complaint with the Australian Human Rights and Equal Opportunity Commission (HREOC) against the quota and the examination system. In August 1995, the Commission found the quota policy unlawful under the Australian Racial Discrimination Act, considering it “grossly unfair, resulting in unnecessary trauma, frustration and a deep sense of injustice”. As regards the examination system, the Commission held that the decision to require the author to sit for and pass examinations was not based on his national origin or on the consideration that he was a person not of Australian or New Zealand origin.

2.6 The Australian Government and the AMC appealed the decision of the HREOC. On 17 July 1996, the Federal Court of Australia ruled in their favour, finding that the quota and the examination system were reasonable.

2.7 The author did not appeal this decision to the High Court of Australia. According to counsel the appeal to the High Court is not an effective remedy within the meaning of article 14, paragraph 7 (a), of the Convention. On the one hand, there is no automatic right of appeal to the High Court, since the Court must first grant special leave to appeal. On the other hand, the High Court has consistently stated that a prima facie case of error will not of itself warrant the granting of an application for leave to appeal. There must be some special feature which warrants the attention of the Court, with its public role in developing and clarifying the law and in maintaining procedural regularity in the lower courts, outweighing the private rights of litigants.

2.8 Furthermore, the author did not have the means to pursue the appeal without being awarded legal aid, and a cost order would be imposed on him if the appeal was unsuccessful. In fact, on 28 October 1996 Legal Aid advised that it would not fund the author's appeal to the High Court.

2.9 In subsequent submissions counsel indicates that following HREOC's decision and notwithstanding that an appeal had been lodged, the AMC decided to abandon the quota. As a result all overseas-trained doctors (OTDs) who, like the author, have met the minimum requirements of the MCQ examination but have been prevented from doing so by the quota, are now allowed to undertake the clinical examination. The author has attempted the clinical examination

on several occasions. The examination has three components and it is necessary to pass all the components at the one sitting. The author has passed each component at least once but not all three at the same sitting.

2.10 The standard of the AMC examination is supposedly that of an Australian-trained medical student who is about to commence an intern year. Counsel states that it is objectively preposterous that a person of the author's experience, with 13 years working as a doctor and 8 years in the Australian health system, is not at least of the standard of a newly graduated medical student.

2.11 Studies on Australian medical graduates show serious deficiencies in clinical skills. For example, a University of Queensland study published in 1995 indicates that at the commencement of the intern year, medical staff did not consider all graduates competent even in history-taking and clinical-examination skills and most graduates were not considered competent in such areas as diagnosis, interpreting investigations, treatment procedures and emergency procedures. At the conclusion of the intern year, only 45 per cent of medical staff considered all interns competent at history-taking and only 36 per cent of medical staff considered all interns competent at physical examination. In view of such studies, it is clear that overseas-trained doctors are examined at a higher standard than Australian graduates. In the author's case, the fact that the AMC persistently fails him raises the additional question of whether he is being penalized for taking his case to the HREOC.

The complaint

3.1 Counsel claims that both the AMC examination system for overseas doctors as a whole and the quota itself are unlawful and constitute racial discrimination. In this respect the judgement of the Federal Court of Australia condones the discriminatory acts of the Australian Government and the AMC and thereby reduces the protection accorded to Australians under the Racial Discrimination Act. At the same time, it eliminates any chance of reform of this discriminatory legislation.

3.2 Counsel contends that the restrictions to practise their profession imposed on overseas-trained doctors before they can be registered aim at limiting the number of doctors to preserve the more lucrative areas of medical practice for domestically trained doctors.

State party's preliminary submission and author's comments thereon

4.1 In a submission dated 7 January 1997 the State party informs the Committee that in October 1995 the AMC decided to discontinue the quota system following the HREOC's conclusion that the system was racially discriminatory. That decision was taken in spite of the Federal Court's ruling that the quota system was reasonable and not racially discriminatory. As a result, the 281 candidates who had fallen outside the quota, including the author, were informed that they were eligible to undertake the clinical examinations.

4.2 The State party notes that the author has sat the AMC clinical examination and failed it three times. As a result of the HREOC's decision

in the author's case an independent observer appointed by the author was present during his first two attempts. Under the current AMC regulations, he may resit the clinical examination in the next two years, without having to resit the MCQ examination. Currently, there is no restriction, other than satisfactory performance, on the author's progress through the AMC examinations.

4.3 With respect to counsel's allegation that the Federal Court ordered the author to pay the legal costs of the AMC, the State party informs the Committee that in November 1996 the AMC agreed to discontinue pursuit of costs against the author. The Federal Court had made no order for costs in respect of the Commonwealth of Australia, which agreed to bear its own costs.

4.4 In the light of the above the State party considers the author's complaint to be moot.

5.1 In his comments, counsel informs the Committee that the author does not wish to withdraw his communication. He notes that although the quota system was discontinued it may be reintroduced at any time in the light of the Federal Court's ruling which overturned the HREOC's decision. According to counsel the State party authorities have indeed contemplated the possibility of reintroducing it.

5.2 Counsel reiterates that the discontinuation of the quota has not solved the problem of discrimination, since the AMC has simply increased the pass criteria to compensate for the absence of the restrictive effects of the quota. He further claims that although the author has been allowed to proceed to the clinical examination he was failed on each occasion, in circumstances which suggest that he is being penalized for having originally complained to the HREOC. He has lodged a further complaint with the Commission about this issue.

5.3 Furthermore, the fact that a discriminatory practice has been discontinued does not change its previous discriminatory nature or render void complaints concerning its application and operation when it was still in force. Consequently, it is argued that the author's rights were violated from 1992 to 1995, causing him a detriment which has not been redressed by the discontinuation of the quota system.

The Committee's admissibility decision and State party's comments thereon

6.1 During its fifty-first session the Committee examined the communication and noted that the main issues before it were: (a) whether the State party had failed to meet its obligation under article 5 (e) (i) to guarantee the author's right to work and free choice of employment; and (b) whether the order of costs against the author by the Federal Court violated the author's rights under article 5 (a) to equal treatment before the courts.

6.2 On 19 August 1997 the Committee adopted a decision by which it considered the communication admissible with respect to the claim relating to the discriminatory nature of both the AMC examination and its quota system. The Committee noted, inter alia, that the Federal Court's decision provided a legal basis for the reintroduction of the quota system at any time. The

Committee did not share the State party's reasoning that since the quota system had been discontinued, the author's complaint for the discrimination alleged to have taken place between 1992 and 1995 had become moot. In respect of the fact that the author did not appeal the Federal Court's decision to the High Court of Australia, the Committee considered that even if this possibility were still open to the author, and taking into account the length of the appeal process, the circumstances of the case justified the conclusion that the application of domestic remedies had been unreasonably prolonged.

6.3 The Committee declared the case inadmissible as to the author's complaint that he was discriminated against because the pass criteria had been raised, since that matter had been submitted to the HREOC and therefore domestic remedies had not been exhausted. It also considered the case inadmissible as to the author's claim that costs ordered by the Court against him constituted discrimination, in view of the State party's information that the AMC would not be pursuing further the costs imposed by the Court.

6.4 By letter dated 24 December 1997 the State party informed the Committee that its submission of 17 January 1997 contained a request for advice on whether the communication was ongoing. This request was made because the alleged victim had effectively received a remedy as a result of the Government's decision to lift the quota. This request did not constitute the State party's pleadings on admissibility and was not submitted under rule 92 of the Committee's rules of procedure. The submission clearly indicated that if the Committee decided to proceed with its consideration of the author's complaint the State party would like to be given the opportunity to make submissions on the admissibility and merits of the communication. The State party also indicated that it had never been advised that the author had declined to withdraw his complaint.

6.5 By letter dated 11 March 1998 the Committee informed the State party that rule 94, paragraph 6, of the Committee's rules of procedure provides for the possibility of reviewing an admissibility decision when the merits of a communication are examined. Accordingly, the Committee would revisit its earlier decision on admissibility upon receipt of relevant information from the State party.

State party's observations on admissibility and merits

7.1 The State party submits that the author's interpretation of the requirement imposed on overseas-trained doctors such as himself to sit written and clinical examinations to demonstrate competence is incorrect. The author is not subject to the system of examinations because of his (Indian) national origin, but because he has trained at an overseas institution. All OTDs, regardless of national origin, are required to sit the examinations. The objective of the examination process is to establish that medical practitioners trained in medical institutions not accredited formally by the AMC have the necessary medical knowledge and clinical competence for the practice of medicine with safety within the Australian community. Its standard is the level of attainment of medical knowledge and clinical skills corresponding to that required of newly qualified graduates of Australian medical schools who are about to commence intern training. The author has sat the MCQ examinations on a total of six occasions. His first three attempts

predated the introduction of the quota in 1992. On each occasion, he failed to reach the “pass mark”. After the introduction of the quota in 1992, the author sat the MCQ examination a further three times. Whilst succeeding in obtaining a “pass”, he did not come within the top 200 candidates passing the MCQ and so was unable to proceed to the clinical examination. When the quota was discontinued, the author was permitted to sit for the clinical examination in March 1996, August 1996, October 1996 and March 1997. On each occasion he failed to demonstrate sufficient proficiency in each of the subject areas to be granted registration. He currently is on the waiting list to sit the clinical examination again.

7.2 The State party submits that the scheme, in general and in its application to the author, does not represent a breach of Australia's obligations under article 5 (e) (i). The underlying basis of the author's complaint is that OTDs, particularly those who have “proven competence” through practice in Australian public hospitals, should be similarly placed to doctors trained in AMC-accredited schools. In the view of the Australian Government, however, graduates of overseas universities and those from Australian and New Zealand universities cannot be accepted as having equal medical competence without further investigation. Educational standards vary across the globe and the Australian Government is justified in taking account of this difference in devising schemes to test the comparability of standards. To accept the author's complaint would be to engage in a circular argument which prejudges the question of equivalence of standards, a matter which the Australian Government is entitled to question. The scheme in fact ensures equality of treatment.

7.3 Furthermore, the State party does not accept that working in Australian hospitals under temporary registration is necessarily sufficient proof of competence to justify the waiving of examination requirements. When working under temporary registration, overseas-trained doctors are subject to strict supervision and practice requirements and may not be exposed to the broad range of medical conditions which exist in the Australian community. Satisfactory performance under such restricted conditions does not equate with sufficient knowledge and competence over the range of areas of permitted practice under general registration.

7.4 The requirement that OTDs sit for and pass AMC examinations is not based on national origin. The distinction made is on the basis of the identity of the medical school, regardless of the national origin (or any other personal characteristic) of the candidate seeking registration. In practice, no matter the race or national origin of a candidate, that candidate must fulfil the same requirements: either graduation from an accredited medical school or the completion of AMC exams to demonstrate an equal level of competence to those who have successfully graduated from an accredited medical school. Thus, for instance, if a person of Indian national origin studied overseas, he/she would have to sit the AMC exams. If he/she studied in Australia, he/she would be entitled to proceed straight to an internship. Similarly, whether a person is of English national origin, Australian national origin, Indian national origin or any other national origin, the requirements remain constant.

7.5 Furthermore, despite the author's implication that the AMC has deliberately chosen not to accredit overseas medical schools for reasons

associated with racial discrimination, there is no evidence to suggest that the system was intended to, or in fact works to, the detriment of persons of a particular race or national origin. Contrary to the author's complaint, the system of AMC examinations does not carry any imputation regarding the attributes of individuals of particular national origins. In particular, the need to sit for such examinations does not imply that doctors trained overseas, whether or not they have been practising in Australia, are inferior because of their race, national or ethnic origin. Instead, it simply sends the message that all graduates of medical schools will be subject to the same standard of examination before being permitted to work unconditionally in Australia.

7.6 The HREOC was satisfied that the accreditation system was not based on race. The AMC's evidence, which the HREOC accepted, was that accreditation was undertaken on the basis of efficient use of resources. The AMC has considered it impractical to investigate for the accreditation process every university attended by applicants for registration. Given the wide range of countries from which immigrants to Australia come, there is concomitantly an extremely large number of universities all around the world from which OTDs have graduated. The AMC does not have the resources to undertake such an extensive accreditation, nor should it be expected to. The Australian Government supports the reasonableness of the allocation of the AMC's resources to accredit schools with which it has most familiarity and contact. It thus considers an examination to be an equitable system of adjudging standards of competence by persons, regardless of race or national origin. The accreditation of New Zealand medical schools, in particular, is explainable in terms of the mutual accreditation programme carried out by the Australian Medical Council and the Medical Council of New Zealand.

7.7 The State party does not accept the author's allegation that the system privileges Australian and New Zealand doctors and disadvantages doctors trained outside Australia and New Zealand. Even if (for the purposes of argument) such a benefit or disadvantage could be established, such an effect would not constitute discrimination on the basis of “national origin” or any other prescribed ground under the Convention. The group who are privileged under this scenario are those *trained* in Australian and New Zealand medical schools, rather than persons of particular national origin. Medical students in Australia do not share a single national origin. Similarly, those who are OTDs are not of a single national origin. Whilst the latter group are likely “not to be of Australian national origin”, the Australian Government does not accept that such a broad category of persons represents a “national origin” or racial classification for the purposes of article 5 (e) (i). For the purposes of article 5 (e) (i), it would be necessary to demonstrate discrimination on the basis of a person's particular national origin - in this case, the author's Indian national origin.

7.8 The current system of examinations is clearly based on objective and reasonable criteria. It is a legitimate policy objective for the Australian Government to seek to maintain high standards of medical care for its residents and to seek to assure itself of the standards of medical competence of those seeking to work in Australia on an unsupervised basis. Thus, it is reasonable for legislatures to institute a means of supplementary exams for those trained in universities with which it is not familiar to ensure that

their competence is at a comparable level to those trained within Australia and New Zealand. That the author would prefer an alternative method of evaluating competence does not detract from the reasonableness of the current system. It is within a State's discretion to take the view which has been adopted - that an examination is the best method to test for overall knowledge. The reasonableness of such a system is also demonstrated by the extent to which similar practices are adopted by other States parties to the Convention, such as the United Kingdom, Canada, the United States and New Zealand.

7.9 The need for doctors to demonstrate their competence could also be regarded as outside the realm of "discrimination" by reason of it being an inherent occupational requirement. Although the Convention does not explicitly mention such an exception, it would seem in keeping with the spirit of the Convention for the Committee to recognize that measures based on the inherent requirements of jobs do not represent discrimination, in a similar way to the recognition of the principle in article 1 (2) of the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation.

7.10 The State party submits that there has been no relevant impairment of the right to work or free choice of employment through the current scheme. The institution of regulatory schemes governing the prerequisites for admission to practise in a particular profession and applying equally to all does not infringe or impair an individual's right to work. Implicit in the author's complaint is that he should have the right to work as a doctor and the right to have his qualifications recognized by the health authorities in Australia without undergoing any form of external examination. In the Australian Government's view, such an argument misunderstands the nature of the internationally recognized right to work.

7.11 Under international law, the right to work does not confer a right to work in the position of one's choice. Instead, by recognizing the right to work, States parties undertake not to inhibit employment opportunities and to work towards the implementation of policies and measures aimed at ensuring there is work for those seeking it. In the current context the Australian Government is not impairing anyone's right to work. In fact, the relevant legislative schemes merely regulate the means of practising a particular profession.

7.12 The system of admission to unrestricted practice does not impair the right of anyone to free choice of employment, let alone persons of a particular national origin. Recognition of a right to free choice of employment is designed to prevent forced labour, not to guarantee an individual the right to the particular job he/she desires. In the present context, there is no servitude or forced labour regime which impairs the choice of employment of doctors of a particular national origin. Instead, there is a system of examinations which permits entry into unrestricted practice.

7.13 Similarly, whilst counsel has attempted to argue that the author is equally placed to Australian doctors in terms of competence and that his experience should be a sufficient demonstration of competence, the State party submits that there is no evidence that doctors of Indian national origin

should be treated differently to overseas-trained doctors of other national origins. Nor is there compelling evidence to suggest that the subjection of the author to the AMC examinations is unreasonable and evidence of racial discrimination. Despite counsel's reliance on the author's practice in public hospitals, the State party notes that at all relevant times, the author's practice has been circumscribed by strict supervision and limited practice requirements commensurate with his status as a conditional registrant. The State party would thus reject any implication that his work in Australia demonstrates sufficient competence to warrant automatic general registration.

7.14 The State party denies that the standard of the AMC examinations is higher than that expected of students at Australian and New Zealand medical schools. Steps have been taken to ensure the comparability of the examination system, including: (a) the appointment of a Board of Examiners with broad experience in teaching and examining undergraduates, and therefore familiar with the curricula of Australian university medical schools; (b) the use of a bank of approximately 3,000 MCQ questions mostly drawn from MCQ examination papers of the medical schools of Australian universities and questions specifically commissioned by the AMC from Australian medical schools; (c) the MCQ examination papers are marked by Educational Testing Centre at the University of New South Wales, a major national testing authority which also provides information in relation to the statistical reliability and validity of the questions. If data indicate that a particular question fails as a discriminator of performance, or if there is evidence to suggest that a question could be misleading, the Board of Examiners is able to delete that question from the examination; (d) instructing both the MCQ and clinical examiners to the effect that the examinations should be directed to establishing whether AMC candidates have the same level of medical knowledge and medical skills as new graduates.

7.15 The past practice of adjustment of raw scores in the MCQ examination does not reflect any racial discrimination, or a racially discriminatory quota. Such adjustment was designed as a method of standardization to prevent unrepresentative results based on the particular examination.

7.16 Other than his particular complaints about his failure to pass the examinations, the author has not advanced any objective evidence to support the non-comparability of the examination standards. The only study produced by the author's counsel merely comments on perceptions of deficiencies in the standard of first year interns, rather than the comparability of the forms of examination to which OTDs and AMC-accredited medical students are subject.

7.17 Quite apart from the nature of the examinations in themselves, the author has failed to make a case that any disparity in standards of the MCQ examinations and standards at AMC-accredited universities has the purpose or effect of discriminating against persons of a particular national origin. When the figures of national origin and success rates in the MCQ are compared, there is no evidence of discrimination against persons of a particular national origin. In particular, there is no evidence that persons of Indian national origin are less likely than persons of other national origin to pass the examination. The State party provides a table of results in the 1994 exams (the last year in which the quota applied), showing that Indian students' success rates in the AMC exams are proportionate to their entry

levels in the examinations. Whilst Indian doctors comprised 16.48 per cent of doctors attempting the MCQ examination in 1994, they represented 16.83 per cent of those successfully passing the MCQ examination.

7.18 The author alleges that during the period of the operation of the quota system between July 1992 and October 1995, the exclusion of OTDs such as himself from the AMC clinical examination on the basis of his quota ranking constituted racial discrimination and was a denial of his right to equal enjoyment of the right to work and free choice of employment under article 5 (e) (i).

7.19 When the Australian Health Ministers' Conference (AHMC) resolved to introduce the quota on OTDs in early 1992, the OTDs in the process of undergoing the AMC examinations numbered approximately 4,500, almost four times the number of doctors expected to graduate from Australian medical schools. In the face of such a large number of OTDs seeking to practise in Australia and mindful of the national workforce supply target (set at one doctor per 500 persons), the AHMC adopted a National Medical Workforce Strategy comprising a number of initiatives. One of them was the introduction of a quota on the numbers of OTDs who would be allowed to sit the clinical examination, having passed the MCQ examination. Thus, the AHMC requested the AMC to set a cap of 200 on the number of candidates proceeding annually to the clinical examinations. The request was made on the basis of: (a) the number of doctors needed to service the Australian community to requisite standards; (b) the cost of the provision of medical services under an open-ended funding commitment and the impact on that cost of a more than optimum number of doctors; (c) the geographic distribution of doctors; and (d) the degree to which the supply of doctors is sufficient to meet the needs of particular community groups and particular specialities.

7.20 The quota was not racially discriminatory in any form. Firstly, it applied to all OTDs regardless of national origin, with persons of a variety of national origins, including Australians, being subject to the requirement. Nor is there any evidence that the quota disproportionately affected persons of Indian national origin. In evidence before the Federal Court, for example, the proportion of doctors of Indian birth gaining entry to the quota was in fact marginally higher than the percentage of doctors of Indian birth attempting the MCQ examination. Furthermore, the quota on doctors trained overseas was complemented by the pre-existing de facto quota on students seeking entry to Australian medical schools.

7.21 Secondly, even if the quota could be considered to have benefited those who have attended Australian and New Zealand medical schools, such persons are not characterized by a national origin. Instead, they would be likely to share citizenship, a factor outside the realm of the Convention.

7.22 Thirdly, even if (for the purposes of argument) the Committee was of the view that the quota represented a distinction on the basis of national origin, the State party would submit that the quota was a reasonable measure, proportionate to meeting the State's legitimate interest in controlling the number of health-care providers and hence was not an arbitrary distinction. Such a purpose is not inconsistent with the Convention and would only infringe the Convention if such policies, designed to deal with the supply of medical

professionals, disguised racial discrimination. Whilst the details of the quota were subject to some criticism by the HREOC (in that it did not provide for a waiting list, but required OTDs not initially successful in coming within the annual quota to undergo the examination again), such a factor does not make the quota unreasonable or discriminatory.

7.23 As the State party has previously noted, the quota is no longer in existence and the author has been permitted to sit for the clinical examination on several occasions. He has thus been afforded a remedy, if any was required. The State party's view remains that the subject matter is moot.

7.24 The State party further considers that the author's complaint concerning the application of the quota to all OTDs regardless of citizenship status does not fall within the terms of the Convention. Under article 1 (2) of the Convention States parties are not prohibited from discriminating on the basis of citizenship. Conversely, the imposition of a system which does not take account of citizenship cannot be the basis of complaint under the Convention.

7.25 Furthermore, the State party denies that the judgement of the Federal Court has the effect of reducing the protection accorded to Australians under the Racial Discrimination Act 1975. The issues raised by the author under this allegation relate primarily to the interpretation of domestic legislation which should not be the subject of separate investigation by the Committee. The Racial Discrimination Act 1975 remains an appropriate and effective means of eradicating racial discrimination.

7.26 Finally, the State party notes the author's allegations that Australia continues to act in violation of article 5 (e) (i) on the grounds that the AMC has raised the pass criteria for the clinical examination to compensate for the discontinuation of the quota system. The author alleges that his failure to pass the clinical examination is evidence of this practice and of the fact that he is being victimized for lodging his original complaint with the HREOC in 1995. The State party contends that this complaint continues to be subject to the investigation of the HREOC and thus remains an inappropriate subject for the Committee's examination.

Counsel's comments

8.1 In his response to the State party's observations counsel indicates that unlike other countries where both local graduates and overseas-trained doctors are assessed by sitting exactly the same national licensing examination, in Australia there is a differential system with one regime for overseas-trained doctors and another for Australian graduates. The Australian graduate is assessed by his/her university on the basis of what he/she has been taught. It is primarily an exercise in curriculum recall rather that an assessment of essential medical knowledge and clinical competence. The Australian Medical Council's own witnesses in the author's case before the HREOC have conceded that in undergraduate assessment the aim is to try and pass the student. Indeed, pass rates for final-year medical students in Australian universities are close to 100 per cent. On the contrary, the AMC MCQ examination purports to assess whether a doctor possesses sufficient knowledge for safe practice. In 1995 the Australian Medical Council conducted a trial in which its 1994 MCQ paper was submitted to final-year medical students at Monash University and

Sydney University. The results of the trial clearly reveal that a higher assessment standard is applied to OTDs than to Australian graduates and that the quota served to disadvantage overseas doctors when compared to local graduates.

8.2 As regards the AMC clinical examination, the differential nature of the system is even more manifest. The author has attempted the AMC clinical examination on four occasions. On each occasion he has been failed. He lodged a further complaint with the HREOC, which has not issued a decision yet. In the course of the hearing, the true nature of the AMC clinical examination system has been revealed. It has been exposed as a chaotic, unstructured and unreliable assessment tool which, in form and content, departs markedly from the system used to assess students in Australian universities. Moreover, the AMC's own internal working parties have emphasized the inadequacies of its examination system and the need to improve its reliability and validity.

8.3 Counsel provides a table showing pass rates in the AMC clinical examination by country of birth during the period 1995 to 1997. The pass rate for persons born in India is 45.9 per cent, for those born in the Middle East 43.6 per cent and for those born in Asia 43.5 per cent. For those born in the United States or Canada the pass rate is 55.6 per cent, for Western Europe 62.5 per cent, for the United Kingdom and Ireland 77.1 per cent and for South Africa 81.1 per cent. Counsel wonders whether these differential pass rates are merely a reflection of the quality of medical education in the countries in question or whether conscious or unconscious perceptions of racial “compatibility” play a part. It is well established that many people make conscious or unconscious judgements about a person's competence on the basis of race and colour and if an examination system has a format that gives free rein to any prejudices that may exist, then it is not competence alone which determines the result. Counsel also quotes a number of reports and statements by Australian institutions indicating that the country needs more trained doctors and that the system of accreditation of overseas-trained doctors is unfair and discriminatory.

8.4 With respect to the quota system, counsel argues that the quota was a quantitative control designed to shut out a number of overseas-trained doctors not because they were trained overseas but because they were from overseas. There is a close correlation between place of birth and place of training in that most people are educated in their country of birth. Accordingly, a restriction purportedly based on place of training is effectively a restriction based on national origin, particularly if that restriction is in no way connected to the issue of training. He also states that in the author's 1995 case before the HREOC there was no clear evidence of an oversupply of doctors in the country. Rather, it was the increase in the number of Australian medical graduates coupled with the automatic registration of doctors from the United Kingdom (which existed until recently) which had been the major reasons for the increase in doctors' numbers. It was also emphasized that the principal supply problem was one of geographical distribution of doctors, that the imposition of the quota was motivated by a desire to restrict the number of doctors to control the health expenditures of Commonwealth countries (and protect doctors' incomes) and that the Health Ministers' advisers were advocating immigration quotas, not examination

quotas. The only reasonable conclusion to be drawn from the evidence of the Government's own witnesses and reports was that the decision to impose the quota was based not on fact and analysis but on feelings and perceptions.

8.5 The State party asserts that the author has been practising medicine in Australia under temporary registration and that he is subject to strict supervision and practice requirements while working as a practitioner in the public hospital system. This statement is totally untrue. The author has now worked as a doctor for 14 years, 10 of which have been in Australian public hospitals. He is classified as a Senior Hospital Medical Officer Year 5 and in his last position at Maroondah Hospital (a large hospital in Melbourne) he was the Night Senior, i. e. he was in charge of the whole hospital at night. Unfortunately, he is now unable to practise even under temporary registration. The Medical Board of Victoria, following advice from the Australian Medical Council regarding his examination results, has placed such tight restrictions on this registration that it has made him unemployable.

8.6 The State party asserts that the United States, Canada, the United Kingdom and New Zealand have similar examination systems to Australia. It does not say, however, that while the United States and Canada have an initial evaluating examination for overseas-trained doctors, the licensing examination is the same for both overseas-trained and locally-trained doctors. Thus, there is not a differential system allowing differential standards and open to abuse, as is the case in Australia.

8.7 Counsel further states that the right to work must embrace the right to be fairly assessed to work in the occupation for which a person is qualified and not to be denied that right by reasons of a capricious assessment system or quota.

Issues and proceedings before the Committee

9.1 In accordance with rule 94, paragraph 6, of its rules of procedure, the Committee reconsidered the question of admissibility in the light of the observations made by the State party with respect to the Committee's decision of 19 August 1997 that declared the communication admissible. The Committee, however, did not find reasons to revoke its previous decision, since the State party's observations as well as the author's comments thereon referred mainly to the substance of the matter. In the circumstances, the Committee proceeded with the examination of the merits.

9.2 The main issue before the Committee is whether the examination and the quota system for overseas-trained doctors respect the author's right, under article 5 (e) (i) of the Convention, to work and to free choice of employment. The Committee notes in this respect that all overseas-trained doctors are subjected to the same quota system and are required to sit the same written and clinical examinations, irrespective of their race or national origin. Furthermore, on the basis of the information provided by the author it is not possible to reach the conclusion that the system works to the detriment of persons of a particular race or national origin. Even if the system favours doctors trained in Australian and New Zealand medical schools such an effect

would not necessarily constitute discrimination on the basis of race or national origin since, according to the information provided, medical students in Australia do not share a single national origin.

9.3 In the Committee's view, there is no evidence to support the author's argument that he has been penalized in the clinical examination for having complained to the HREOC, in view of the fact that an independent observer, appointed by him, was present during two of his attempts.

10. The Committee on the Elimination of Racial Discrimination, acting under article 14, paragraph 7 (a), of the International Convention on the Elimination of All Forms of Racial Discrimination, is of the opinion that the facts as submitted do not disclose a violation of article 5 (e) (i) or any other provision of the Convention.

11.1 Pursuant to article 14, paragraph 7 (b), of the Convention, the Committee recommends that the State party take all necessary measures and give transparency to the procedure and curriculum established and conducted by the Australian Medical Council, so that the system is in no way discriminatory towards foreign candidates irrespective of their race or national or ethnic origin.

11.2 After considering several complaints concerning Australia under article 14 of the Convention, the Committee also recommends to the State party that every effort be made to avoid any delay in the consideration of all complaints by the Human Rights and Equal Opportunity Commission.

[Done in English, French, Russian and Spanish, the English text being the original version.]
