COMMITTEE AGAINST TORTURE

Z. Z. v. Canada

Communication No. 123/1998

15 May 2001

VIEWS

Submitted by : Z.Z. (name withheld)
[represented by counsel]

Alleged victim: The author

State party: Canada

Date of communication: 11 November 1998

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 15 May 2001,

Having concluded its consideration of communication No. 123/1998, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts its Views under article 22, paragraph 7, of the Convention.

1.1 The author of the communication, dated 11 November 1998, is Mr. Z.Z., a citizen of Afghanistan, born on 8 July 1948. He was deported to Afghanistan on 27 November 1998, following a conviction for drug offences in Canada. He claims that his deportation to Afghanistan constitutes a violation by Canada of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 11 December 1998 and requested the latter to provide observations on the admissibility and merits of the communication.

The facts as presented by the author

2.1 The author allegedly fled Afghanistan in 1977 at the time of the armed intervention of the Soviet Union in the Afghan conflict. His brother was killed by Soviet forces and he feared the same fate. He went to Iran where he remained for two years without legal status. He then travelled to Pakistan where he also remained two years without a legal status. From Pakistan, the author decided to enter India where he requested to be recognized as a refugee by UNHCR. He was allegedly recognized as a Convention refugee but did not keep any evidence of it. However, having no work permit and no right to education, the author decided to join his brother who had been recognized as a refugee in Canada.

2.2 The author arrived in Canada in 1987 on a false passport. Upon his arrival in Montreal, he applied for asylum. He was found to have a credible basis for his refugee claim, which entitled him to apply for permanent residence, and he became a permanent resident in 1992.

2.3 On 29 June 1995, the author, found guilty of importing narcotics, was sentenced to 10 years' imprisonment. On 10 April 1996, the Minister of Citizenship and Immigration declared him a "danger to the public in Canada" and decided that he should therefore be removed to his country of origin. The Minister argued that the serious criminal offence of which he had been convicted and the need to protect Canadian society outweighed any humanitarian and compassionate considerations. The author applied for review of this decision before the Federal Court but his application was denied.

2.4 On 4 November 1998, the author attended a detention review hearing during which he was told that his detention would continue and that his removal would take place on 14 November 1998. The same day, counsel for the author faxed a request to the Removal Officer to defer the deportation until a proper risk assessment had been made, referring to recent documentation about the situation in Afghanistan.

2.5 The request being denied, the author sought a stay of the expulsion order in the Federal Court Trial Division, arguing that because of his ethnic background, he would be subjected to torture if removed to Afghanistan. On 12 November 1998, the Court refused the stay. Finally, on 13 November 1998, the author applied for an interim injunction before the Ontario Court of Justice to stay the execution of the deportation order. The application was dismissed because the matter had already been decided by the Federal Court.

2.6 In his submission to the Committee dated 11 November 1998, the author argued, in relation to the issue of exhaustion of internal remedies, that as soon as the Court rendered its decision on the application for the stay of removal, there would be no other internal remedy left.

2.7 The author alleges that the State party did not make a proper risk assessment at the time of the decision in April 1996 nor any subsequent review of the risk assessment, despite the existence of major political and human rights problems in the country to which the author was to be deported. The Taliban had become a major actor in the Afghan political situation and conditions in the country had changed dramatically as a consequence.

2.8 The author is a Sunni Muslim and a member of the Tajik ethnic group. The bigger part of

Afghanistan is at present controlled by the Taliban who, although Sunnis, are of a different ethnic group, the Pashtun.

2.9 The author states that Afghanistan continues to experience civil war and political instability and that ethnic divisions are increasingly influencing the fighting. The Taliban, who emerged as a military and political force in 1994, are an ultra-conservative Islamic movement. In January 1997, they were controlling two thirds of Afghanistan including Kabul, the capital.

2.10 In addition to the general situation of insecurity caused by the internal armed conflict between the Taliban and other factions, the human rights situation in the territory controlled by the Taliban is of serious concern. According to the author, there is discrimination between the different ethnic groups. The Taliban have detained hundreds of people solely because of their ethnic origin. Among these minority groups are the Uzbeks, Tajiks, Hazaras, Shi'ite Muslims and Turkmen. The author submits that a significant number of Tajiks have been detained and some of them have disappeared.

2.11 The author also refers to Amnesty International reports stating that Taliban guards have beaten and kicked people in custody and that long-term prisoners have been severely tortured. It is also submitted that according to a Human Rights Watch report on one of the worst massacres of civilians committed by the Taliban, in August 1998 when they took Mazar-el-Sharif, the author's city of origin, in the days after the incident the Taliban searched and arrested all males of Hazara, Uzbek and Tajik origin in the city. Moreover, since the city jail was overcrowded, thousands of the detainees were transferred to other cities in large container trucks holding 100-150 persons. In two known instances, nearly all the men in the container were asphyxiated or died of heat stroke.

The complaint

3.1 At the time of the submission of his communication, the author alleged that he would be at serious risk of torture if he were removed to Afghanistan, and that the decision to forcibly remove him to Afghanistan would entail a violation of article 3 of the Convention. It is also submitted that no competent official of the State party has properly assessed whether there was a risk of torture. As a result, there has been both a substantive and a procedural violation of the Convention.

3.2 The author recalls that the specific prohibition on removing persons to where they may be at risk of torture is explicitly enshrined in article 3 of the Convention against Torture. In determining whether article 3 should apply, the Committee should base itself on whether there is a consistent pattern of gross, flagrant or mass violations of human rights in the country concerned and whether the author runs a personal risk, which may emanate from his/her class or character.[i]

State party's observations on the admissibility and merits

4.1 In a submission dated 14 December 1999, the State party transmitted to the Committee its observations on both the admissibility and merits of the case.

On the admissibility

4.2 The State party submits that the communication was inadmissible as the author had not exhausted the internal remedies as required by article 22 (5) (b) of the Convention and rule 91 of the Committee's rules of procedure. It underlines that it is a fundamental principle of international law that local remedies must be exhausted before a remedy is sought from an international body. This principle gives the State an opportunity to correct internally any wrong that may have been committed before the State's international responsibility is engaged.

4.3 Under the Immigration Act, judicial review of decisions are available before the Federal Court Trial Division, and it is submitted that an applicant does only need a "fairly arguable case" or "a serious question to be determined" for leave to be granted.

4.4 The State party argues that the Committee, as well as other international tribunals, consider judicial review as an available and effective remedy. In the case M.A. v. Canada (CAT/C/14/D/22/1995), the author was granted refugee status but later declared a threat to Canadian security so that he had to be removed from Canada. The communication was declared inadmissible because the author was in the process of challenging the removal decision by way of judicial review. The European Court of Human Rights has a similar jurisprudence[ii] and considers that judicial review provides a sufficiently effective remedy in asylum cases.

4.5 In the present case, the author's application to the Federal Court Trial Division for leave for judicial review of the Minister's opinion that the author constituted a danger to the public was denied on 8 September 1997. On 5 November 1998, the author applied to the Federal Court Trial Division against the decision of the Removal Officer not to defer deportation. He subsequently submitted the present communication to the Committee on 11 November 1998 before the Federal Court could examine his application.

4.6 Moreover, the author failed to perfect the application for judicial review by filing an Application Record within the prescribed period. In this regard, the State party again refers to the jurisprudence of the European Court of Human Rights according to which complainants have to respect and follow domestic procedures also with respect to time limits before bringing an international claim.[iii]

4.7 The State party argues that the Federal Court could have examined the case if the application of 5 November 1998 had been perfected and leave had been granted, which could have led to a reconsideration of the case.

4.8 The author also brought an action in the Federal Court Trial Division challenging the constitutionality of the provision denying him the opportunity to claim refugee protection. He also argued that the Immigration Act and the immigration process are contrary to the Canadian Charter of Rights and Freedom because neither requires a risk assessment. The author, however, did not continue this action, which was, at the time of the submission, still pending. He could indeed have instructed his lawyer to proceed on his behalf. The State party argues in this connection that the author's deportation does not render his rights or pending actions ineffective or moot.

4.9 The State party also submits that the author could have sought a humanitarian and compassionate assessment of his case. It refers to X v. Sweden where the Committee found that

such an application was an effective remedy since the Appeals Board in that case had the competence to grant the authors a residence permit.[iv] This option was available to the author prior to the deportation and there was no time limit for submitting it.

4.10 The State party deems that the above-mentioned remedies are effective in the sense of article 22 (5) of the Convention. The author should therefore have pursued them prior to petitioning the Committee and has failed to exercise due diligence in not doing so.

On the merits

4.11 As for the risk faced by the author, the State party refers to the principle, laid down by the Committee in the case Seid Mortesa Aemei v. Switzerland,[v] that it has to determine "whether there are substantial grounds for believing that [the author] would be in danger of being subjected to torture [in the country to which he is being returned]" and "whether he would be personally at risk". The State party also recalls that the burden of proof is on the author to establish that there are substantial grounds to believe that he or she would be personally at risk of being subjected to torture.

4.12 The State party submits that since the protection provided by article 3 is, according to the Committee's jurisprudence, absolute, irrespective of the author's past conduct, the determination of risk must be particularly rigorous. To that purpose, it refers to a decision of the European Court of Human Rights where it is stated with regard to article 3 of the European Convention on Human Rights that "the Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision".[vi]

4.13 In order to assess the risk of torture faced by the author, the State party contends that the following factors are pertinent: (a) whether the State concerned is one in which there is evidence of a consistent pattern of gross, flagrant or mass violation of human rights; (b) whether the author has been tortured or maltreated by or with the acquiescence of a public official in the past; (c) whether the situation referred to in (a) has changed; and (d) whether the author has engaged in political or other activity within or outside the State concerned which would appear to make him particularly vulnerable to the risk of being tortured.

4.14 Contrary to the author's allegations, the State party emphasizes that the risks faced by the author upon his return to Afghanistan were assessed by the Minister of Citizenship and Immigration in April 1996 when considering whether the author was a danger to the public. The jurisprudence cited by the author to support his argument[vii] has not always been followed and is now under appeal before the Federal Court of Appeal. Moreover, the State party submits that it is not for the Committee to question its internal procedures on risk assessment. Finally, such a risk assessment was also evaluated by the Federal Court Trial Division on the request to stay the deportation.

4.15 The State party considers that the author has not demonstrated, on a prima facie basis, that he is personally at risk of torture because of his ethnic origin. Although it is not denied that there are violations of human rights perpetrated by the Taliban, there is no indication that the Tajiks are specifically targeted. The State party refers to information from the Research Directorate of the Canadian Immigration and Refugee Board stating that persecution is rather aimed at the Shia Hazar people and the Turkish-speaking supporters of General Dostam. The same source of information

underlines that, "generally, people who are suspected of supporting … the Northern Alliance would be under tight surveillance from the Taliban security forces. Ethnic affiliation is not a primary reason for being targeted by the Taliban …; however, Tajiks living under the Taliban rules are careful and venture in the streets of Kabul with caution". Moreover, the report indicates that Tajiks can freely and safely live in the north of Afghanistan while the ones living on the territory controlled by the Taliban are not systematically targeted for surveillance. There is also no evidence that torture is routinely practised by the Taliban against the Tajiks, the author himself acknowledges in his communication that "torture does not appear to be a routine practice in all cases".

4.16 The State party further argues that the author did not bring any evidence that he would be personally at risk of torture in Afghanistan. There is no evidence that the author was ever arrested and the reasons for which he left his country in 1977 no longer exist. Neither has the author stated that persons in his entourage were persecuted or tortured because they were Tajiks, nor has the author been engaged in a political activity that could draw the Taliban's attention. The facts alleged therefore do not reveal a prima facie case that his expulsion would expose him to the risk of torture.

4.17 The State party submits that the present communication is based on exactly the same facts as those presented to the Minister of Citizenship and Immigration when he made his "danger opinion" and those presented on judicial review before the Federal Court Trial Division. As a consequence, since the national proceedings did not disclose any manifest error or unreasonableness and were not tainted by abuse of process, bad faith, manifest bias or serious irregularities, the Committee should not substitute its own findings on whether the author risks being subjected to torture in Afghanistan; it should not become a "fourth instance" that would re-examine the findings of facts by the internal authorities.

4.18 As a consequence, the State party is of the view that, on the basis of the criteria referred to in paragraph 4.13 above, there is no indication: (a) that the author was tortured or maltreated by or with the acquiescence of a public official in Afghanistan in the past; (b) that he is currently being sought by Afghan authorities; (c) that persons in his immediate circle were arrested or tortured because they are Tajiks; (d) that ethnic Tajiks are specifically targeted for mistreatment; and (e) that he has been involved in any high-profile activity that could draw the attention of the Taliban.

4.19 The State party therefore requests that, if the communication is declared admissible, it is declared without merits.

Counsel comments

On the admissibility

5.1 In a submission of 21 January 2000, counsel for the author made her comments on the observations of the State party. In connection with the exhaustion of internal remedies, counsel recalls that the author was granted permanent residence in 1992 and that he was later convicted of a criminal offence leading to the deportation order issued against him. Under the Immigration Act, a person can be deported from Canada and denied access to the refugee procedure if the Minister certifies the person as a "danger to the public in Canada". In this case, the only issue is whether or not the person is a danger to the public in Canada, not whether the person is at risk. As a result,

when such a decision is taken, the person no longer has a right to appeal to the Appeal Division and is also denied a right to make a refugee claim.

5.2 Counsel reiterates that the procedure for certifying that a person is a danger to the public in Canada is not an adequate assessment of risk. She considers that the position of the State party has consistently been that, in certain circumstances, persons who constitute a danger to the public can be deported to their countries of origin even when there is a risk of torture. This was also the substance of the ruling of the Court of Appeals in the case Suresh v. M.C.I. (Minister of Citizenship and Immigration). The interpretation of the Federal Court of Appeal is that the Convention does not prohibit in all cases deportation to countries where there is a significant risk of torture. It is therefore counsel's contention that the official position of the State party, as substantiated by the second highest court in Canada, is that persons can be deported to countries where there would be a substantial risk of torture if there is a compelling State interest. Counsel submits that the Committee must act urgently to make its view clear to the State party that removal to countries where there is a risk of torture is not permitted under any circumstances.

5.3 Counsel argues that, as a result of the deportation and the fact that she is unable to receive instructions from the author, the obligation to challenge the decision to execute deportation by internal remedies has become moot. The same may be said for the questioning of the constitutionality of the provision denying the author the opportunity to claim refugee protection. As a consequence, once the author was unable to obtain a stay of the deportation and was indeed deported, all domestic remedies had been exhausted because the deportation order was executed. To perfect applications challenging a decision to execute a decision of removal under these circumstances would, according to counsel, be meaningless.

On the merits

5.4 With respect to the merits, it is the counsel's opinion that no person has adequately and properly assessed the risk run by the author. To allow any assessment of risk to be made within the context of a determination as to whether a person is a danger to the public to permit his deportation is, according to counsel, unsatisfactory. The risk assessment has to be conducted independently of any evaluation of danger. Counsel submits that the Committee should know whether or not the State party concluded that the author was at risk. This is particularly important in light of the position of the State party that deportation to countries where a person risks torture is possible under certain circumstances.

5.5 Moreover, counsel is of the opinion that the assessment of risk made by the State party after the removal of the author is not satisfactory. The assessment should have taken place prior to the removal.

5.6 As for the current situation of the author, counsel acknowledges that she has been unable to communicate with him. Counsel argues, however, that the State party has not made any effort to verify the author's current situation and determine whether he is safe and at risk of being subjected to torture.

Additional comments by State party

6.1 In a submission of 10 May 2000, the State party argued with regard to the admissibility of the case that a positive determination on the application on humanitarian and compassionate grounds could have enabled the author to remain in Canada. Furthermore, the State party reiterates its arguments that the removal of the author did not render his rights or pending actions ineffective or moot.

6.2 With regard to the merits of the case, the State party submits that, in its consideration as to whether the author constituted a danger to the public in Canada, the Minister did assess the risk faced by the author in case of return to Afghanistan. Such assessment was also done by the Federal Court Trial Division in its 12 November 1998 decision.

6.3 The State party finally reiterates its concern that the Committee should not become a fourth instance by re-evaluating findings of domestic courts unless there was a manifest error or if the decision was tainted by abuse of power, bad faith, manifest bias or serious irregularities.

Additional comments by counsel on behalf of the author

7.1 In a submission of 7 June 2000, counsel underlined that the application on humanitarian and compassionate grounds is not an effective remedy because it does not stay the removal; in any event it was useless to pursue an application challenging a decision of removal after the deportation had been executed.

7.2 Counsel also repeated that the "danger opinion" is not a risk assessment and that the decision of the Federal Court was based on misconstructions of evidence, and the judge had no expertise in assessing risk.

Issues and proceedings before the Committee

8.1 Before considering any claims contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

8.2 With regard to the exhaustion of domestic remedies, the Committee has taken note of the observations by the State party and by the author's counsel. Pursuant to article 22, paragraph 5 (b), of the Convention, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted. This rule does not, however, apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the presumed victim. In this connection, the Committee notes that the author was removed to Afghanistan on 27 November 1998. The Committee therefore declares the communication admissible.

8.3 The Committee notes that both the State party and the author's counsel have provided observations on the merits of the communication. It therefore decides to consider the merits at the present stage.

8.4 The Committee is of the opinion that the author did not bring any evidence that he would be personally at risk of being subjected to torture if he were returned to Afghanistan. The Committee also noted that the author has not suggested that he had been subjected to torture in the past. Nor has he alleged that he has been involved in any political or religious activities such that his return could draw the attention of the Taliban to the extent of putting him at personal risk of torture.

8.5 The author only brought information on the general situation in Afghanistan and claimed that, as a member of the Tajik ethnic group, he would face torture upon return to Afghanistan. Although it recognizes the difficulties encountered by some ethnic groups in Afghanistan, the Committee considers that the mere claim of being a member of the Tajik ethnic group does not sufficiently substantiate the risk that the author would be subjected to torture upon return.

9. As a consequence, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as presented by the author and as found by the Committee do not reveal a breach of article 3 of the Convention.

Notes

[i] Khan v. Canada, communication No. 15/1994, (CAT/C/13/D/15/1994); Mutombo v. Switzerland, communication No. 13/1993 (CAT/C/12/D/13/1993).

[ii] See Vilvarajah and Others v. United Kingdom, 14 E.H.R.R. 218 (30 October 1991).

[iii] See Bahaddar v. The Netherlands, No. 145/1996/764/965 (19 February 1998).

[iv] X v. Sweden, communication No. 64/1997 (19 November 1997).

[v] Views, communication No. 34/1995, CAT/C/18/D/34/1995, 9 May 1997.

[vi] Supra, note 3.

[vii] Saini v. Canada (Minister of Citizenship and Immigration) [1998] 3 F.C. 315 (T.D.); Farhadi v. Canada (Minister of Citizenship and Immigration) [1998] 4 F.C. 325 (T.D.).