HUMAN RIGHTS COMMITTEE

Adu v. Canada

Communication No 654/1995

18 July 1997

CCPR/C/60/D/654/1995

ADMISSIBILITY

Submitted by: Kwame Williams Adu [represented by Mr. Stewart Istvanffy]

Victim: The author

State party: Canada

Date of communication: 28 December 1994 (initial submission)

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

Meeting on 18 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Kwame Williams Adu, a Ghanian national, at the time of submission residing in Canada where he requested recognition as a refugee. He claims to be the victim of violations by Canada of articles 2, paragraphs 1 and 3; 6, paragraph 1; 7; 9; 13; 14, paragraph 1; and 26, of the International Covenant on Civil and Political Rights. He is represented by Mr. Stewart Istvanffy, a Montreal lawyer.

The facts as presented by the author

2.1 The author was born on 16 November 1968. He claims that he was a leading member of the Esaase Youth Association in the Ashanti Region, as well as a soccer player with a popular local club; he was well known and a natural leader in his area. His father is a sub-chief of the local chieftaincy structure. In March 1992, representatives of the military

Government of Ghana went to Esaase, to solicit support for the candidacy of Jerry Rawlings to the presidency. The author and the President of the Youth Association manifested their opposition to Mr. Rawlings' candidacy, initiating a door to door campaign against the government. That night, the author was arrested and detained for over five months in bad conditions. A former coach of the Kumani soccer team, availing himself of bribery, was able to secure the author's escape in September 1992.

2.2 The author arrived in Canada on 17 September 1992. He requested refugee status, on the grounds that he had a well founded fear of persecution based on his political opinion and membership in a particular social group. His claim was heard on 10 May 1993, before two commissioners of the Refugee Division of the Canadian Immigration and Refugee Board, in Montreal, Quebec. The Refugee Division dismissed the author's request for recognition as a political refugee. His application for leave to appeal was denied on 28 June 1994.

The complaint

3.1 The author claims that he has not received a fair hearing of his refugee claim, in violation of article 14, paragraph 1, of the Covenant. He states that one of the commissioners at the hearing, a Mr. Sordzi, was biased against him; the author therefore claims that the hearing did not meet the requirements for a competent independent and impartial tribunal. In support of his claim that Mr. Sordzi was biased, the author explains that there is a serious ethnic conflict in Ghana, and that the military regime is dominated by the Ewe tribe, to which both Mr. Sordzi and Mr. Rawlings, the President of Ghana, belong, whereas the author belongs to a different ethnic group. Counsel contends that, contrary to the opinion of the Federal Court of Canada, tribal affiliations in Ghana run deep and are not extinguished by physical displacement. The author states that for these reasons Ghanian refugees are afraid to testify before a person of Ewe origin, often contradicting themselves; this is then used to discredit the veracity of their testimony. Mr. Sordzi is said to have opined that all so called refugees from Ghana were economic migrants. In this respect, counsel claims that Mr. Sordzi is a supporter of the Government in Ghana and that the fact that he sits as judge of his compatriots on Refugee claims, violates the right to a fair hearing. Counsel adds affidavits from prominent members of the Ghanaian community in Montreal in order to prove that Mr. Sordzi has a long history of antipathy towards refugee claimants from Ghana.

3.2 The author argues that the language used in the decisions by the Refugee Division clearly shows administrative bias against refugee claimants from Ghana. In this context, reference is made to an alleged preconceived political line with respect of Ghana which does not recognize the factual situation in that country; counsel adds that the panel went to great lengths to find his client's story not credible even though it would appear to be in line with what is known to be the current situation in Ghana.

3.3 Counsel argues that the above mentioned events and facts also amount to a violation by Canada of articles 2 paragraph 1 and 26 of the Covenant, as he was treated in a discriminatory fashion, because of his ethnic origin and political opinions.

3.4 The author further argues that the death penalty is frequently imposed in Ghana on

people convicted for political crimes, and that the State party, by returning him to Ghana would place him in a very dangerous situation, which could lead to a violation of his right to life, in contravention of article 6 of the Covenant. Counsel contends that the deportation of an individual who has not had his claim to refugee status heard by an impartial tribunal, but by a biased one, amounts to cruel, inhuman and degrading treatment within the meaning of article 7, as well as to a violation of article 9, paragraph 1, of the Covenant. It is moreover argued that the author's expulsion would not be in pursuance of a decision reached in accordance with the law, as required by article 13 of the Covenant, because commissioner Sordzi is said to have exceeded his jurisdiction by making decisions on the credibility of refugee claimants from Ghana.

3.5 Counsel contends that the Federal Court, by dismissing the author's appeal has misapplied Canadian law and thereby eliminated the only effective recourse available to the author, in violation of article 2, paragraph 3, of the Covenant.

3.6 Counsel further submits that Canadian legislation provides for a Post-Determination Review and for a Humanitarian and Compassionate review, but alleges that these remedies are devoid of substance and illusory. He claims therefore that for purpose of article 5, paragraph 2, of the Covenant domestic remedies have been exhausted.

State party's observations

4.1 By submission of 23 July 1996, the State party argues that the communication is inadmissible and provides information with regard to its refugee determination process.

4.2 The State party recalls that the author reported to immigration authorities in Montreal claiming refugee status on 17 September 1992. He stated that he had arrived in a truck from New York, after having left Ghana for Burkina Faso by car and then by plane to New York with stopovers somewhere in Africa and in Switzerland. On 5 November 1992, the author was found to have a prima facie claim under the Refugee Convention, and a conditional departure notice was issued with obligation to leave Canada within one month of any negative decision of the Immigration and Refugee Board concerning his claim.

4.3 On 10 May 1993, two Commissioners of the Refugee Division of the Immigration and Refugee Board heard the author in order to determine whether he met the definition of Convention refugee under the Immigration Act. The State party explains that a claim succeeds if either member of the panel is satisfied that the claimant meets the definition. At the hearing, the author was represented by counsel (who had been representing him since the initial interview with immigration officers on 13 October 1992), evidence on country conditions was presented, the author gave oral testimony and a number of exhibits were filed. The State party emphasizes that neither the author nor his counsel raised any objection to the constitution of the panel.

4.4 On 15 October 1993, the panel decided that the author was not a Convention refugee. It found the author not credible because of the inconsistencies in his story and because of the implausibility of certain events described by the author. In particular, the panel noted that

at the time that the author claimed to have been arrested for opposing the soliciting of votes for the National Democratic Congress' presidential candidate Rawlings, the party did not as yet exist and Rawlings' candidacy was not announced until three months after the events alleged by the author. The author then applied for leave to appeal to the Federal Court Trial Division [1]. The author based his appeal on errors of law and fact, including allegations of reasonable apprehension of bias of on the part of panel member Sordzi. On 28 June 1994, his application was denied with no reasons given. No further appeal is available.

4.5 On 17 January 1994, the author, represented by a new counsel, filed a motion for reopening with the Refugee Division in order to have new evidence considered. On 22 March 1994, his request was dismissed since the Division lacked competence to reopen a claim to hear new evidence, and could only reopen a case if the Division had violated a principle of natural justice or committed an error of fact.

4.6 Under the post-determination refugee claimants in Canada class (PDRCC) review process, individuals determined not to be Convention refugees can apply for residency in Canada if upon return to their country they would face a risk to their life, of extreme sanctions or of inhumane treatment. The author's (new) counsel made representations, including evidence not earlier presented. On 23 January 1995, the author was informed that the post-claim determination officer had concluded that he did not belong to that class of individuals. The author has not sought judicial review of this decision.

4.7 On 12 April 1995, the author failed to show up at a hearing to prepare his voluntary departure from Canada. The State party submits that it is not aware of his present whereabouts.

4.8 The State party argues that the author's communication is inadmissible for failure to exhaust domestic remedies. First, the author failed to seek a humanitarian and compassionate review under section 114(2) of the Immigration Act [2]. The State party contests the author's claim that this remedy and the post-determination review are devoid of substance. It notes that counsel for the author has based himself on statistics showing a 99% rejection rate, but argues that these figures relate to the situation before the introduction of the PDRCC at a time that such a review was conducted as routine without applications made on behalf of the applicants. The State party maintains that the review is effective in particular cases.

4.9 The author also failed to apply for leave for judicial review of the negative PDRCC decision to the Federal Court Trial Division. The State party explains that on review, the author would have been entitled to raise arguments under the Canadian Charter of Rights and Freedoms similar to the arguments made in his communication to the Committee. Decisions of the Trial Division would have been appealable (with leave) to the Federal court of Appeal and from there with leave to the Supreme Court.

4.10 Finally, the State party explains that the author could challenge the constitutionality of any provision of the Immigration Act by way of declaratory action or bring an action in the Federal Court Trial Division for breach of his Charter rights.

4.11 The State party concludes that the domestic remedies above were available to the author and that he had a duty to avail himself of these remedies prior to petitioning an international body. Any doubts that the author may have about the effectiveness of the remedies would not absolve him from exhausting them.

4.12 The State party further claims that the communication is inadmissible for failure to substantiate violations of Covenant rights. As regards the author's claims under article 6, the State party argues that the author's exclusion from Canada does not constitute a prima facie violation of his right to life, as his claims were rejected by the competent authorities after a full hearing with possibility of judicial review. In this context, the State party refers to the Committee's Views in Ng v. Canada[3], where the Committee found that the extradition of the petitioner to a country where he faced the possibility of the death penalty did not constitute a violation of article 6(1) since the decision to extradite had not been taken summarily or arbitrarily. The State party adds that the author still has available remedies to exhaust.

4.13 As regards the author's claims under articles 9 and 13, the State party argues that these articles do not grant a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in Canada for the purpose of having his refugee claim determined and was ordered deported only following the rejection of his claim after a full hearing with possibility of judicial review. In this context, the State party refers to the Committee's Views in Maroufidou v. Sweden[4].

4.14 As regards the author's claim under article 14, paragraph 1, of the Covenant, the State party argues that refugee proceedings are in the nature of public law and as such not encompassed by the phrase 'suit at law' in article 14 of the Covenant. In this context, the State party refers to its submissions in respect of communication No. 236/1987 (VRMB v. Canada)[5].

4.15 Moreover, the State party argues that, even if Immigration and Refugee Board proceedings are held to constitute a "suit at law", sufficient guarantees of independence[6] exist so that it can reasonably be said to be an independent tribunal within the meaning of article 14, paragraph 1. The State party further submits that the two member panel which decided the author's claim was impartial. In this respect, the State party notes that the author's allegations of bias specifically relate to Mr. Sordzi and not to the presiding member who wrote the decision. In this context, the State party recalls that the author's claim would have succeeded even if the presiding member alone would have come to the conclusion that he was a Convention refugee. The State party submits that the author's allegations of bias are unfounded, as shown by the rejection of his application for judicial review by the Federal Court Trial Division, which apparently did not consider that he had established a "fairly arguable case" of bias. In this context, the State party refers to Federal Court's reasoned decisions dealing with the same allegation of bias against Mr. Sordzi[7]. The State party also refers to the transcript of the hearing, which shows no improper interventions by Mr. Sordzi, and to the text of the decision where the reasons for not finding the author credible are well set out. The State party submits that the fact that Mr. Sordzi was of Ghanaian origin and belonged to the Ewe tribe does not in itself create a reasonable apprehension of bias. In this context, the State party explains that the Immigration and Refugee Board relies on members

who have a personal knowledge or experience of the countries from which refugee claimants come or who speak the language of the claimants. According to the Canadian courts, this is a desirable feature of the refugee determination process.

4.16 As to the author's claim under article 7, that his deportation amounts to cruel, inhuman or degrading treatment, because his claim had not been heard by an impartial tribunal, the State party refers to its argument above and argues that the tribunal was impartial and that the author's claim is thus inadmissible.

4.17 As regards the author's claims that he was denied equality before the law because one of the members of the panel was of Ewe ancestry, the State party submits that the allegations of denial of equality rights are without any factual or legal basis and should thus be declared inadmissible.

4.18 The State party finally argues that the Human Rights Committee is not a "fourth instance" competent to reevaluate findings of fact or to review the application of domestic legislation, unless there is clear evidence that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. In the absence of such evidence, the State party argues that the author's claims are inadmissible.

Issues and proceedings before the Committee

5. The deadline for counsel's comments on the State party's observations was 30 August 1996. By letter of 29 May 1997, counsel was informed that the Committee would examine the admissibility of the communication at its sixtieth session, in July 1997. No submission has been received.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The State party has argued that the communication is inadmissible for non-exhaustion of domestic remedies, while the author's counsel has contended that the post-determination review and the humanitarian and compassionate review are devoid of substance. The Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies do not relieve an author of the duty to exhaust them. In the instant case the author failed to avail himself of the avenue of judicial review against the negative post-claim determination decision. It follows that as far as it relates to the author's claim that his return to Ghana would be in violation of the Covenant, the communication is inadmissible for non-exhaustion of domestic remedies.

6.3 As regards the author's claim that he did not have a fair hearing, once the Federal Trial Court Division rejected the author's application for leave to appeal which was based, inter alia, on allegations of bias, no further domestic remedies were available. The author claims that the hearing was not fair, as one of the two Commissioners who participated was of Ghanaian origin and a member of the Ewe tribe whose hostile attitude towards Ghanaian

refugees was said to be well known among members of the Ghanaian community in Montreal. However, neither the author nor his counsel raised objections to the participation of the Commissioner in the hearing until after the author's application for refugee status had been dismissed despite the fact that the grounds for bias were known to the author and/or his counsel at the beginning of the hearing. The Committee is therefore of the opinion that the author has failed to substantiate, for purposes of admissibility, his claim that his right to a fair hearing by an impartial tribunal was violated. In the circumstances, the Committee need not decide whether or not the decision in the author's refugee claim was a determination "of his rights and obligations in a suit at law", within the meaning of article 14, paragraph 1, of the Covenant.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author's counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Danilo Türk.

** Mr. Maxwell Yalden did not participate in the adoption of the decision, pursuant to rule 85 of the Committee's rules of procedure.

1/ In the immigration context, the Court's stated test for granting leave is that an applicant show "a fairly arguable case" or "a serious question to be determined".

2/ The State party explains that this is a broad discretionary review by an immigration officer to determine whether a person's admission to Canada should be facilitated for humanitarian and compassionate reasons. A wide range of circumstances may be taken into account, including risk of unduly harsh treatment, conditions in the country concerned and any new developments.

3/ Communication No. 469/1991, Views adopted 5 November 1993.

4/ Communication No. 58/1979, Views adopted on 9 April 1981.

5/ Declared inadmissible on 18 July 1988.

6/ Members are appointed by the Governor in Council for terms of up to seven years and

drawn from all segments of Canadian society. They may only be removed on limited grounds by an inquiry procedure presided over by a judge, supernumerary judge or former judge of the Federal Court of Canada. The Immigration and refugee Board operates autonomously and has its own budget. Decisions of the Refuge Division can be overturned in a court of law.

7/ In particular, the State party quotes from the Federal Court's decision in Badu v. Minister of Employment and Immigration, 15 February 1995, where the judge stated:

> "It is an aberration to suggest that Mr. Sordzi, who arrived in Canada in 1968 and became a Canadian citizen in 1976, cannot, by reason of ancestral warfare and conflict, carry out properly, objectively and judicially the duties and responsibilities which Parliament has imposed upon him."

The Court concluded that the affidavits submitted in evidence were highly subjective and provided no objective corroboration or support.

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