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HUMAN RIGHTS COMMITTEE
Eighty-first session
5 – 30 July 2004

DECISION

Communication No. 1040/2001

Submitted by:	Steven Romans (represented by counsel, Mr. Lorne Waldman)
Alleged victim:	The author
State party:	Canada
Date of communication:	13 December 2001 (initial submission)
Document references:	Special Rapporteur's rule 86/91 decision, transmitted to the State party on 19 December 2001 (not issued in document form)
Date of adoption of decision:	9 July 2004

[ANNEX]

* Made public by decision of the Human Rights Committee.

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER
THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT
ON CIVIL AND POLITICAL RIGHTS

Eighty-first session

concerning

Communication No. 1040/2001[**]

Submitted by:	Steven Romans (represented by counsel Mr. Lorne Waldman)
Alleged victim:	The author
State party:	Canada
Date of communication:	13 December 2001 (initial submission)

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

Meeting on 9 July 2004

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication, dated 13 December 2001, is Mr. Steven Romans, a Jamaican national born on 30 October 1965. He is a permanent resident of Canada, however subject to a deportation order as at the time of submission of the communication. He claims that his deportation to Jamaica would constitute a violation by Canada of his rights under articles 6, 7, 10 and 23 of the Covenant. He is represented by counsel.

1.2 On 19 December 2001, the Committee, acting through its Special Rapporteur on New Communications, pursuant to Rule 86 of the Committee's Rules of Procedure, requested the State party not to deport the author to Jamaica until the Committee had considered the case.

1.3 On 26 May 2003, the Special Rapporteur on New Communications decided to separate consideration of the admissibility and the merits of the case.

[**] The following members of the Committee participated in the examination of the present communication: Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski.

The facts as presented by the author

2.1 The author emigrated from Jamaica to Canada in 1967, then under two years old. He arrived as a permanent resident and has since retained that status. Since 1967, he has lived continuously in Canada, save for one trip to Jamaica when he was eleven years old. The author's entire family, including his mother, father and two brothers are also in Canada and have lived there for over thirty years. There are no remaining relatives in Jamaica.

2.2 In June 1991, the author was convicted of breaking and entering with intent. In July 1992, he was convicted of trafficking in narcotics. In December 1992, he was convicted of possession of narcotics for purposes of trafficking. By 1995, he had been diagnosed to suffer from chronic paranoid schizophrenia, and to have both substance abuse and personality disorders. In December 1996, he was convicted of assault and of assault causing bodily harm.

2.3 On 7 July 1999, after a deportation inquiry, an immigration adjudicator issued a deportation order on the ground of these offences and ordered the author's deportation from Canada. On 30 November 1999, the Immigration and Refugee Board (Appeal Division) dismissed his appeal that having regard to all the circumstances of the case, he should not be removed. The Appeal Division accepted that the "probable cause" of the author's crimes was mental illness, but found that there was a "very high probability" that he would re-offend, and that his offences would be of violent nature. No medication had been demonstrated to control the mental illness, even when he was detained and medication could be administered regularly. It accepted that there would be "great emotional hardship" inflicted on his family in the event of deportation, but found, on balance of probabilities, that there would not be undue hardship upon him in that event.

2.4 On 11 June 2001, the Federal Court (Trial Division) dismissed the author's application for judicial review of the Appeal Division's decision. The Court considered that it was not a violation of fundamental justice, contrary to section 7 of the Canadian Charter of Rights and Freedoms,[1] to deport a permanent resident who had resided in Canada since early childhood and had no establishment outside of Canada, and where the permanent resident suffered from a serious mental illness so serious that he was unable to function in society. The Court also rejected the contention that the Appeal Division's findings of fact were patently unreasonable.

2.5 On 18 September 2001, the Court of Appeal dismissed the author's appeal against the Federal Court's decision, holding that the author's circumstances did not give him an absolute right to remain in Canada. The Appeal Division had properly balanced the competing interests before it and could, on the evidence, justifiably conclude that deportation was in accordance with principles of fundamental justice. On 29 November 2001, an Immigration Officer refused the authors' application to

[1] Section 7 provides : "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

remain in Canada on humanitarian and compassionate grounds. On 6 December 2001, the Supreme Court rejected the author's application for leave to appeal, with costs.

2.6 At the time of the submission of the communication, the author had initiated an application for judicial review of the Immigration Officer's decision, as well as an application to re-open the appeal of the deportation order to the Appeal Division. However, none of these proceedings had the effect of automatically staying the deportation order.

The complaint

3.1 Counsel contends that the author's deportation would violate articles 6, 7, 10 and 23 of the Covenant, observing that a State's right to deport a non-citizen is not absolute, but subject to restrictions under international human rights law. He refers to the Committee's Views in Winata v Australia,[2] as well as the jurisprudence of the Committee against Torture under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

3.2 On articles 6, 7 and 10, counsel contends it is clear that the author is mentally incompetent to act on his own and to care for himself, a fact recognized by the Appeal Division. In contrast to the medical facilities available in Canada, deportation to Jamaica would leave the author with virtually no treatment facilities. Bellevue Hospital in Jamaica had advised that it could not treat violent patients, and such persons are placed in regular prison facilities. There are substantial grounds to believe that due to the author's mental illness and the state of Jamaican prisons, he would be subjected to physical and emotional abuse. Counsel contends that Jamaica has a long history of mistreating the mentally ill, from targets of random violence by police to inhuman treatment in correctional facilities and lack of rehabilitative treatment. His family thus fears for his life and physical integrity. Counsel invokes the judgment of the European Court of Human Rights in D v United Kingdom,[3] where it was held that to expel a non-citizen enjoying AIDS treatment to a country without care facilities amounted to a breach of article 3 of the European Convention; he maintains that the present case is even stronger in light of the duration and width of the author's family in Canada.

3.3 On article 23, counsel contends that there are no grounds upon which a limitation on the author's rights to family life and protection of the family can be justified. In counsel's view, the author does not represent a threat to society, as found by the Appeal Division. His longest criminal sentence did not exceed 12 months. Two drug convictions resulted from sales to finance his own habit, three sexual assault convictions only resulted in a suspended sentence, while eight convictions concerned non-compliance with court orders. The person most harmed by these offences is the author himself, rather than others. He remains in need of a treatment plan to allow him to function properly in Canadian society, and will remain in detention, under psychiatric treatment, until this has been achieved.

[2] Case No 930/2000, Views adopted on 16 August 2001.
[3] Application 30240/1996, judgment of 2 May 1997.

3.4 The author's removal would leave his family, who care deeply for him, without a son and brother and cause grief and loss. Maintaining close family ties is particularly important to people of colour, given difficulties in Canadian society. His family, willing and able to support the author in Canada, would be unable to do so in Jamaica. Deportation would be equivalent to exile, given the length of his residence in Canada. Counsel refers to jurisprudence of the European Court, pursuant to which expulsion of long-term residents with strong family ties must be particularly justified.[4] He argues that deportation of the author in view of his mental illness, inability to care for himself, absence of other family and non-serious offending would be disproportionate.

The State party's submissions on the admissibility of the communication

4.1 By submissions of 16 May 2002, the State party disputed the admissibility of the communication, contending that it was inadmissible for failure to exhaust domestic remedies and, with respect to articles 6 and 10, for lack of substantiation.

4.2 On exhaustion of domestic remedies, the State party argued that the author was currently pursuing two remedies which, if successful, would allow him to remain in Canada. Firstly, upon application by a permanent resident prior to a deportation, the independent Appeal Division could re-open an appeal and exercise its discretion in a different way. On 13 December 2001, the author had filed a motion for re-opening, which was granted on 24 January 2002. A date for hearing of the re-opened appeal had not been set. Applications for judicial review of any adverse decision would lie, with leave, to the Federal Court, and in turn to the Court of Appeal and the Supreme Court. Stays preventing deportation may be sought at these points. Secondly, as to the judicial review proceedings concerning the decision of the Immigration Officer, the Federal Court had granted leave to apply for judicial review on 20 March 2002. The substantive application for judicial review would be heard on 12 June 2002, and any adverse decision would be appealable as described. A positive decision would result in the case being sent back for re-determination.

4.3 As the Committee has repeatedly held that judicial review constitutes an available and effective remedy,[5] the State party considered the communication to be inadmissible.

4.4 While not admitting a prima facie violation of articles 7 and 23, issues in relation to which are currently before domestic tribunals, the State party argued that the claims under articles 6 and 10 were unsubstantiated, for purposes of admissibility. The author had presented no evidence that death would be a necessary and foreseeable consequence of a return to Jamaica, while an alleged deterioration of his condition after return was largely speculative. The allegations under article 6 were not materially different to the claims under article 7, which were currently sub judice. In terms of article 10, the author made no allegation of mistreatment in Canadian custody, while his allegation of detention in a Jamaican pentitentiary and abuse there

[4] Beldjoudi v France Application No 12083/86, judgment of 26 March 1992.
[5] See, for example, Badu v Canada Case No 603/1994, Nartey v Canada Case No 604/1994 and Adu v Canada Case No 654/1995, Decisions adopted on 18 July 1997.

was speculative. Again, these claims were also subsumed under the article 7 issues presently sub judice.

4.5 By further submission of 20 August 2002, the State party noted that the author's application for judicial review of the Immigration Officer's decision had been heard as scheduled, while his appeal against deportation was scheduled for hearing by the Appeal Division on 6 September 2002. Either of these decisions could give rise to appeal, with stays on execution being available pending the appeal. Thus, the author was not presently at risk of removal, as no final and enforceable removal order is in place. Given the requirement to exhaust domestic remedies prior to submission of a communication, the communication should thus be declared inadmissible.

The author's comments

5. On 14 March 2003, counsel responded to the State party's admissibility submissions, arguing that, at the time of submission, all foreseeable remedies had been exhausted: the Supreme Court had dismissed the application for judicial review, while immigration officials were under no obligation to consider the then pending application for humanitarian and compassionate consideration prior to deportation. After the issuance of interim measures, counsel had obtained leave of the Appeal Division to reconsider its decision. The Appeal Division then reconfirmed, on 3 January 2003, its decision to dismiss the application. Counsel then applied for judicial review in the Federal Court of that decision, while the Federal Court's decision on the application for judicial review of the Immigration Officer's decision was still being awaited. Accordingly, counsel sought a three month deferral of a determination of admissibility to await these decisions.

Supplementary submissions by the parties

6.1 By submission of 10 September 2003, the State party advised that on 28 May 2003, the author had been granted leave to apply for judicial review of the Appeal Divisions dismissal of the author's fresh appeal. On 6 August 2003, this appeal, which included a constitutional challenge to the relevant legislation, was heard and judgment was reserved. In the second proceedings concerning judicial review of the Immigration Officer's decision remained outstanding. Accordingly, both sets of domestic proceedings remained afoot and the communication should be declared inadmissible.

6.2 By submission of 13 October 2003, the State party advised that the Federal Court had, on 6 October 2003, granted the author's application for judicial review of the Immigration Officer's decision on his application to remain in Canada on humanitarian and compassionate grounds. Accordingly, the application had been remitted for reconsideration by a different immigration officer. The State party thus argued that the author continues to have failed to exhaust domestic remedies, and the communication is inadmissible.

6.3 By letter of 27 October 2003, the author responded arguing that an application to remain on humanitarian and compassionate grounds is not an effective remedy, as it takes several years to be considered, is discretionary on the part of the immigration

officer, and would, in the present case, anyway have to be refused on the grounds that the author is inadmissible in Canada as a result of his convictions. With respect to the ongoing judicial review proceedings concerning the Appeal Division's dismissal of the reopened appeal, the author observes that three levels of the Canadian courts have already determined "on virtually the same facts" that his removal would be consistent with Canadian law. In any event, the outstanding judicial review proceedings do not operate to block removal.

6.4 By submission of 3 March 2004, the State party advised that on 29 December 2003, the Federal Court granted the author's application for judicial review of the Appeal Division's dismissal of his reopened appeal. The State party's Government waved its right to appeal the decision, with the result that the appeal will be remitted to the Appeal Division for redetermination by a differently constituted panel. The State party also advised that the author's application to remain in Canada on humanitarian and compassionate grounds was still outstanding, and that for both reasons the communication remains inadmissible for failure to exhaust domestic remedies. No further comment has been received from the author.

Issues and proceedings before the Committee

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

7.2 The Committee recalls that its assessment of the requirement to exhaust available and effective domestic remedies, as required by article 5, paragraph 2(b), of the Optional Protocol takes place at the time of its consideration of the communication. The Committee observes that according to the most recent information before it the author's appeal has been remitted to the Appeal Decision. An adverse decision by that body would itself be subject to judicial review in the courts. Accordingly, the communication is inadmissible on the ground of failure to exhaust domestic remedies.

7.3 In the light of this finding, the Committee need not examine further arguments as to the admissibility of the communication, including the extent to which an application to remain on humanitarian and compassionate grounds should be considered a remedy which must be exhausted for purposes of article 5, paragraph 2(b), of the Optional Protocol.

8. The Committee therefore decides:

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

b) that this decision shall be communicated to the author and to the State party.

[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.]