

COMMITTEE AGAINST TORTURE

V. V. v. Canada

Communication No 47/1996

19 May 1998

CAT/C/20/D/47/1996

ADMISSIBILITY

Submitted by: V. V. (name withheld) (represented by counsel)

Alleged victim: The author

State Party: Canada

Date of communication: 15 March 1996

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

Meeting on 19 May 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication is V. V., a Sri Lankan citizen of Tamil origin currently residing in Canada, where he has applied for refugee status and is at risk of expulsion. He alleges that his expulsion would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The facts as submitted by the author

2.1 The author states that in July 1983 he was living with his father, brother and sister at Vauvniya and that, after a series of intercommunity riots, he was forced to seek refuge in a camp, where he remained for three months. In 1990 the village was bombed and his father lost an eye. In August 1990, members of the Liberation Tigers of Tamil Eelam (LTTE) stole his father's van and used it to attack a bank. The author was then arrested by the military and

taken to the military camp at Vauvniya, where he was interrogated, beaten and tortured. The author states that he was struck with nail-studded planks, held close to a flame, kicked with metal-toed boots and threatened with the "barbed wire treatment". After 25 days he managed to bribe someone and return to his father's home. Also in August 1990, Tamil fighters came to his family's home and demanded money, which the family paid. The soldiers returned for more money in December 1990 and again in March 1991.

2.2 In August 1991, the author opened a business together with an associate whose sister was the minister of education and whose brother was a police inspector. The author says that this caused him problems because "it was thought that [he] supported the Government". In 1992, his associate's brother-in-law and brother were killed by the LTTE. The author then decided to move to Colombo. He adds that, because of the riots and violence taking place at the time, he had to close his business.

2.3 In Colombo, both the LTTE and the Eelam People's Democratic Party (EPDP) demanded protection money from him. The author did not feel safe and decided to pay someone to help him leave the country.

2.4 The author arrived in Canada on 17 November 1992 from the United States of America and applied for refugee status the same day. On 16 July 1993, the Immigration and Refugee Board rejected his application on the ground that his story was inconsistent and that he had provided no evidence to justify his fears of persecution. On 10 March 1994, the author's request for leave to appeal the Board's decision was rejected by the Federal Court. On 29 November 1995 the application he had submitted on the basis of a subsequent risk evaluation procedure was rejected. The official responsible for the evaluation found, *inter alia*, that the author had not been harassed by the police when he had informed them that he was living in Colombo, that the greatest risk of imprisonment was run by young Tamils whereas the author was 46, and that the Office of the United Nations High Commissioner for Refugees (UNHCR) had standardized its approach and was no longer requesting that, as a precautionary measure, rejected Tamil asylum seekers only be sent back to Sri Lanka if they had family or friends in Colombo.

2.5 In January 1996, the author applied for a residence permit on humanitarian grounds; the immigration authorities rejected the request. The author states that he has exhausted all domestic remedies.

The complaint

3.1 The author states that he fears for his life if he returns to his country. He argues that, in view of the extensive military operations being conducted by the Government in his region of origin, it is impossible for him to return there, and that in Colombo all Tamils are looked on with suspicion because of the suicide bombings. According to the author, numerous Tamils have been arrested following these bombings and some have been tortured. The author also states that his family has been subjected to violence in Sri Lanka. He points out that he has already been arrested once and tortured and submits a medical certificate dated 20 March 1996 indicating that he has a lump on his forehead, a scar from an old burn on his

left forearm and a scar on his right leg.

3.2 The author asks the Committee to request Canada not to send him back to Sri Lanka. He argues that there is a consistent pattern of gross, flagrant or mass violations of human rights in Sri Lanka.

3.3 Finally, the author states that he is fully integrated into Canadian society, that several members of his family reside in Canada, that he has found a job and that his employer is supportive of his attempts to remain in Canada.

State party's observations on the admissibility of the communication

4. On 4 December 1996, the Committee, through its Special Rapporteur, sent the communication to the State party for comments and requested it not to expel the author while his communication was under consideration by the Committee.

5.1 In a reply dated 25 March 1997, the State party challenges the admissibility of the communication.

5.2 The State party notes that the author left his country on 30 October 1992 and arrived in Canada on or about 15 November 1992. He claimed refugee status the same day. On 20 July 1993, the competent court, the Refugee Determination Division of the Immigration and Refugee Board, rejected the author's claim for lack of credibility. The Federal Court of Canada denied his request for leave to apply for judicial review of the Refugee Division's decision.

5.3 An official of the Ministry of Citizenship and Immigration evaluated whether the author's expulsion would expose him personally to torture or cruel, inhuman or degrading treatment. The author did not ask the Federal Court to review the decision. The author also invoked paragraph 114 (2) of the Immigration Act and asked to be exempted on humanitarian grounds from the provisions of the Immigration Act and to be allowed to apply for permanent residence in Canada. On 8 and 30 January 1996, on inspection of the file, it was concluded that the author had not established humanitarian grounds for exemption from the provisions of the Immigration Act. The author did not ask the Federal Court to review those decisions. On 2 April 1996, he was expelled to the United States.

5.4 The State party points out that the Committee's communication was sent to it on 4 December 1996, several months after the author's expulsion.

5.5 On 3 July 1996, the author returned to Canada from the United States and again filed a claim to refugee status. The new claim began a completely new process identical to the one followed for the first claim. Thus, a conditional residence prohibition was issued against the author on 3 July 1996 and his claim was referred to the Refugee Determination Division for consideration on the merits. The expulsion order will not be carried out unless and until the Refugee Division hands down a negative decision on the claim to refugee status.

5.6 The author's communication is aimed at preventing him from being sent back to Sri Lanka in accordance with the expulsion order handed down against him on 28 December 1992, which became enforceable on 29 November 1995. The author was expelled from Canada on 2 April 1996. His communication is therefore completely unwarranted and should be declared inadmissible.

5.7 In addition, a new situation was created by the author's second claim to refugee status; this situation is totally different from the one which gave rise to the communication, and is not covered in the communication.

5.8 Against the possibility that, despite the fact that the grounds for it no longer exist, the Committee wishes to study the process followed for the author's first claim to refugee status and the decisions taken at that time, the State party maintains that the author failed to exhaust domestic remedies in connection with at least three decisions readied under the Immigration Act, namely the decision that no risk was involved in his return and the findings that there were no humanitarian grounds for exemption from the Immigration Act.

5.9 The purpose of article 3 of the Convention against Torture is not to prohibit all expulsions, returns or extraditions but rather to prohibit expulsion, return or extradition to a country where there are substantial grounds for believing that the person might be subjected to torture.

5.10 In the case at hand, the facts have demonstrated the communication's lack of merit: contrary to the fear he alleges in his communication, the author was not sent back to Sri Lanka, but to the United States, the country from which he had entered Canada.

5.11 The State party maintains that even if the Committee concludes that it is able to consider the situation subsequent to the author's expulsion to the United States, the communication should still be considered inadmissible because the author has not established a minimum of support for his communication. He is currently at no risk of expulsion from Canada as his claim to refugee status is pending before the appropriate court.

5.12 In addition, the country to which he would be sent if expelled has not yet been determined. As indicated by his 2 April 1996 expulsion and consistent with the agreement with the American authorities, if expelled the author would most probably be sent to the United States since he entered Canada from that country.

5.13 The Committee against Torture has made it quite clear that an author must establish, at the very least prima facie at the admissibility stage, that he is personally at risk of being tortured. Recent evidence does not support the statements to the effect that the Tamils are in danger in Colombo. According to a UNHCR document dated 9 September 1996, torture and other forms of ill-treatment are not practised by the police and authorities in Colombo.

5.14 The Canadian Government maintains that the author of the communication has not established prima facie either that he risks being returned to Sri Lanka or that he would be personally at risk of being tortured if he were returned there.

5.15 The consideration of the second claim to refugee status is still pending. Should the decision on that claim be negative, the author could ask to be included in the category of "asylum seekers without recognized refugee status", as a person at risk of being tortured or subjected to inhuman or degrading treatment in the country to which he would return.

5.16 The author can also repeat his request under paragraph 114 (2) of the Immigration Act to be exempted, on humanitarian grounds, from the provisions of the Act and to be allowed to file an application for permanent residence in Canada.

5.17 Should the decision on the claim to refugee status be negative, a request could be made for leave to apply to the Federal Court for judicial review. The same is true of the decision concerning the "asylum seekers without recognized refugee status" category and the decision concerning exemption from the provisions of the Act on humanitarian grounds.

Comments by the author

6.1 In a letter dated 15 May 1997, the author states that he has been a victim of torture, as confirmed in the report of a Canadian doctor belonging to the *Réseau d'intervention auprès des personnes ayant subi la violence organisée* (RIVO) (Intervention network for victims of organized violence), which has been submitted to the Committee.

6.2 A treaty between Canada and the United States for monitoring asylum seekers and immigrants, which will probably be signed this year, will end the possibility of being sent back to the United States after being refused asylum in Canada. Persons claiming asylum in Canada whose applications have been rejected will no longer be entitled to travel to the United States to file their claims and vice versa. The two countries will exchange information and block access to their territory by claimants who have been rejected by the other partner to this agreement.

6.3 The second claim has virtually no chance of succeeding, as the usual practice is for the Immigration Board's decision to be based almost entirely on the first negative decision and the stenographic notes of the first testimony.

6.4 Regarding the State party's assertion that the claimant has a remedy available for the risk of return before he is expelled a second time, it should be noted that only 3 per cent of the applications filed under this procedure are currently being accepted.

6.5 Concerning exhaustion of domestic remedies, the author appealed the rejection of his claim by filing an application for review with Federal Court; the application was rejected. The so-called "risk of return" procedure was then begun. The application was, however, rejected, on the ground that the author could take refuge in Colombo. That was a senseless argument, since Colombo had been the target of terrorist attacks for over a year.

6.6 At that point ordinary remedies had been concluded. The author again applied to the Ministry of Immigration for a residence permit on humanitarian grounds, which is a special and costly remedy. He received a negative decision within 24 hours, which casts some doubt

on the fairness of the procedure.

6.7 The immigration officials told counsel that she could make representations to an adjudicator prior to the author's expulsion. On the day of the hearing, however, counsel learned that the author had been expelled two days earlier.

6.8 In the author's opinion, his application to the Committee concerns his past, present and future situation as long as the risk of being sent back to Sri Lanka persists. He has therefore asked the Committee to suspend consideration of his case pending the decision on his new application for asylum.

Issues and proceedings before the Committee

7.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention.

7.2 In contrast to the State party's opinion, the Committee is of the view that the author's communication also concerns the second claim to refugee status, for its purpose is identical to that of the first claim.

7.3 Article 22, paragraph 5 (b), of the Convention provides that the Committee shall not consider any communication unless it has ascertained that all available domestic remedies have been exhausted; this shall not be the rule if it is established that the application of remedies has been or would be unreasonably prolonged or would be unlikely to bring the alleged victim effective relief. In the present case the author has claimed refugee status, but the Refugee Division of the Immigration and Refugee Board has not yet taken a decision on his case. The author has not said that this delay in the decision is unreasonable. Other remedies will still be available when the decision has been handed down. In these circumstances the Committee finds that the conditions laid down in article 22, paragraph 5 (b), of the Convention have not been met.

8. Accordingly, the Committee against Torture decides:

- (a) That the communication as it stands is inadmissible;
- (b) That pursuant to rule 109 of its rules of procedure, this decision may be reviewed by the Committee upon a written request containing documentary evidence to the effect that the reasons for inadmissibility are no longer valid;
- (c) That this decision shall be communicated to the author and to the State party.

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