HUMAN RIGHTS COMMITTEE

Stewart v. Canada

Communication No. 538/1993

18 March 1994

CCPR/C/50/D/538/1993*

ADMISSIBILITY

Submitted by: Charles Edward Stewart [represented by council]

Alleged victim: The author

State party: Canada

Date of communication: 18 February 1993 (initial submission)

Documentation references: Prior decisions: - Special Rapporteur's combined rule 86/ rule 91 decision, dated 24 April 1993 (not issued in document form)

Date of present decision: 18 March 1994

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The author of the communication is Charles Edward Stewart, a British citizen born in 1960. He has resided in Ontario, Canada, since the age of seven, and currently faces deportation from Canada. He claims to be a victim of violations by Canada of articles 7, 9, 12, 13, 17 and 23 of the International Covenant on Civil and Political Rights. He is represented by counsel.

The facts as submitted by the author

2.1 The author was born in Scotland in December 1960. At the age of seven, he emigrated to Canada with his mother; his father and older brother were already, at the time, living in Canada. The author's parents have since separated, and the author lives together with is mother and with his younger brother. His mother is in poor health, having suffered a recent heart attack, and his brother

is mentally disabled and suffers from chronic epilepsy. His older brother was deported to the United Kingdom in 1992, because of a previous criminal record. This brother apart, all of the author's relatives reside in Canada; the author himself has two young twin children, who live with their mother, from whom the author divorced in 1989.

2.2 For most of his life, the author considered himself to be a Canadian citizen. It was only when he was contacted by immigration officials because of a criminal conviction that he realized, legally, he was only a permanent resident, as his parents had never requested Canadian citizenship for him during his youth. It is stated that between September 1978 and May 1991, the author was convicted on 42 occasions, mostly for petty offences and traffic offences. Two convictions were for possession of marijuana seeds and of a prohibited martial arts weapon. One conviction was for assault with bodily harm, committed in September 1984, on the author's former girlfriend. Counsel indicates that most of her client's convictions are attributable to her client's substance abuse problems, in particular alcoholism. Since his release on mandatory supervision in September 1990, the author has participated in several drug and alcohol rehabilitation programmes. He has further received medical advice to control his alcohol abuse and, with the exception of one relapse, has remained alcohol-free.

2.3 It is stated that although the author cannot contribute much financially to the subsistence of his family, he does so whenever he is able to and helps his ailing mother and retarded brother around the home.

2.4 In 1990, an immigration enquiry was initiated against the author to Section 27, paragraph 1, of the Immigration Act. Under this provision, a permanent resident in Canada must be ordered deported from Canada if an adjudicator in an immigration enquiry is satisfied that the defendant has been convicted of certain specified offences under the Immigration Act. On 20 August 1990, the author was ordered deported on account of his criminal convictions. He appealed the order to the Immigration Appeal Division. The Board of the Appeal Division heard the appeal on 15 May 1992, dismissing it by judgment of 21 August 1992, which was communicated to the author on 1 September 1992.

2.5 On 30 October 1992, the author complained to the Federal Court of Appeal for an extension of the time limit for applying for leave to appeal. The Court first granted the request but subsequently dismissed the application for leave to appeal. There is no further appeal or application for leave to appeal from the Federal Court of Appeal to the Supreme Court of Canada, or to any other domestic tribunal. This is expressly prohibited under Section 83, paragraph 2, of the Immigration Act. Thus, no further effective domestic remedy is said to be available.

2.6 If the author is deported, he would not be able to return to Canada without the express consent of the Canadian Minister of Employment and Immigration, under the terms of Sections 19(1)(i) and 55 of the Immigration Act. A re-application for emigration to Canada would not only require ministerial consent but also that the author fulfill all the other statutory admissibility criteria for immigrants. Furthermore, because of his convictions, the author would be barred from readmission to Canada under Section 19(2)(a) of the Act.

2.7 As the deportation order against the author could now be enforced at any point in time, counsel

requests the Committee to seek from the State party interim measures of protection, pursuant to rule 86 of the rules of procedure.

The complaint

3.1 The author claims that the above facts reveal violations of articles 7, 9, 12, 13, 17, and 23 of the Covenant. He claims that in respect of article 23, the State party has failed to provide for clear legislative recognition of the protection of the family. In the absence of such legislation which ensures that family interests would be given due weight in administrative proceedings such as, for example, those before the Immigration and Refugee Board, he claims, there is a prima facie issue as to whether Canadian law is compatible with the requirement of protection of the family.

3.2 The author also refers to the Committee's General Comment on article 17, according to which "interference [with home and privacy] can only take place on the basis of law, which itself must be compatible with the provisions, aims and objectives of the Covenant". He asserts that there is no law which ensures that his legitimate family interests or those of the members of his family would be addressed in deciding on his deportation from Canada; there is only the vague and general discretion given to the Immigration Appeal Division to consider all the circumstances of the case, which is said to be insufficient to ensure a balancing of his family interests and other legitimate State aims. In its decision, the Immigration Appeal Division allegedly did not give any weight to the disabilities of the author's mother and brother; instead, it ruled that "taking into account that the appellant does not have anyone depending on him and there being no real attachment to and no real support from anyone, the Appeal Division sees insufficient circumstances to justify the appellant's presence in this country".

3.3 According to the author, the term "home" should be interpreted broadly, encompassing the (entire) community of which an individual is a part. In this sense, his "home" is said to be Canada. It is further submitted that the author's privacy must include the fact of being able to live within this community without arbitrary or unlawful interference. To the extent that Canadian law does not protect aliens against such interference, the author claims a violation of article 17.

3.4 The author submits that article 12, paragraph 4, is applicable to his situation since, for all practical purposes, Canada is his own country. His deportation from Canada would result in an absolute statutory bar from reentering Canada. It is noted that in this context that article 12(4) does not indicate that everyone has the right to enter his country of nationality or of birth but only "his own country". Counsel argues that the U.K. is no longer the author's "own country", since he left it at the age of seven and his entire life is now centred upon his family in Canada - thus, although not Canadian in a formal sense, he must be considered de facto a Canadian citizen. Finally, it is noted that although the Committee has never addressed this issue it might, by analogy, draw upon a recent judgment of the European Court of Human Rights in which similar issues had been examined.

3.5 The author claims that his allegations under articles 17 and 23 should also be examined in the light of other provisions, especially articles 9 and 12. He refers to the Committee's Views in Aumeeruddy-Cziffra (Communication No. 35/1978), where it was held that there are implicit limits in article 23, in the light of other provisions of the Covenant. While article 9 addresses deprivation

of liberty, there is no indication that the only concept of liberty is one of physical freedom. Article 12 recognizes liberty in a broader sense: the author believes that his deportation from Canada would violate "his liberty of movement within Canada and within his community", and that it would not be necessary for one of the legitimate objectives enumerated in article 12, paragraph 3.

3.7 In this connection, the author recalls that (a) he has resided in Canada since the age of seven; (b) at the time of issue of the deportation order all members of his immediate family resided in Canada; (c) while his criminal record is extensive, it does by no means reveal that he is a danger to public safety; (d) he has taken voluntary steps to control his substance-abuse problems; (e) deportation from Canada would effectively and permanently sever all his ties in Canada; and (f) the prison terms served for various convictions already constitute adequate punishment and the reasoning of the Immigration Appeal Division, by emphasizing his criminal record, amounts to the imposition of additional punishment.

The Special Rapporteur's request for interim measures op protection and State party's reaction

4.1 On 26 April 1993, the Special Rapporteur on New Communications transmitted the communication to the State party, requesting it, under rule 91 of the rules of procedure, to provide information and observations on the admissibility of the communication. Under rule 86 of the rules of procedure, the State party was requested not to deport the author to the United Kingdom while his communication was under consideration by the Committee.

4.2 In a submission dated 9 July 1993 in reply to the request for interim measures of protection, the State party indicates that although the author would undoubtedly suffer personal inconvenience should he be deported to Scotland, there are no special or compelling circumstances in the case that would appear to cause irreparable harm. In this context, the State party notes that the author is not being returned to a country where his safety or life would be in jeopardy; furthermore, he would not be barred once and for all from readmission to Canada. Secondly, the State party notes that although the author's social ties with his family may be affected, his complaint makes it clear that his family has no financial or other objective dependence on him: the author does not contribute financially to his brother, has not maintained contact with his father for seven to eight years and, after the divorce from his wife in 1989, apparently has not maintained any contact with his wife or children.

4.3 The State party submits that the application of rule 86 should not impose a general rule on States parties to suspend measures or decisions at a domestic level unless there are special circumstances where such a measure or decision might conflict with the effective exercise of the author's right to petition. The fact that a complaint has been filed with the Committee should not automatically imply that the State party is restricted in its power to implement a deportation decision. The State party argues that considerations of state security and public policy must be considered prior to imposing restraints on a State party to implement a decision lawfully taken. It therefore requests the Committee to clarify the criteria at the basis of the Special Rapporteur's decision to call for interim measures of protection and to consider withdrawing the request for interim protection under rule 86.

4.4 In her comments, dated 15 September 1993, counsel challenges the State party's arguments related to the application of rule 86. She contends that deportation would indeed bar the author's

readmission to Canada forever. Furthermore, the test of what may constitute "irreparable harm" to the petitioner should not be considered by reference to the criteria developed by the Canadian courts where, it is submitted, the test for irreparable harm in relation to family has become one of almost exclusive financial dependency, but by reference to the Committee's own criteria.

4.5 Counsel submits that the communication was filed precisely because Canadian courts, including the Immigration Appeal Division, do not recognize family interests beyond financial dependency of family members. She adds that it is the very test applied by the Immigration Appeal Division and the Federal Court which is at issue before the Human Rights Committee: it would defeat the effectiveness of any order the Committee might make in the author's favour in the future if the rule 86 request were to be cancelled now. Finally, counsel contends that it would be unjustified to apply a "balance of convenience" test in determining whether or not to invoke rule 86, as this test is inappropriate where fundamental human rights are at issue.

State party's admissibility observations and counsel's comments

5.1 In its submission under rule 91, dated 14 December 1993, the State party contends that the author has failed to substantiate his allegations of violations of articles 7, 9, 12, and 13 of the Covenant. It recalls that international and domestic human rights law clearly states that the right to remain in a country and not to be expelled from it is confined to nationals of that state. These laws recognize that any such rights possessed by non-nationals are available only in certain circumstances and are more limited than those possessed by nationals. Article 13 of the Covenant "delineates the scope of that instrument's application in regard to the right of an alien to remain in the territory of a State party ... Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. Its purpose os clearly to prevent arbitrary expulsions. [The provision] aims to ensure that the process of expelling such a person complies with what is laid down in the State's domestic law and that it is not tainted by bad faith or the abuse of power". Reference is made to the Committee's Views in case No. 58/1979, Maroufidou v. Sweden.

5.2 The State party submits that the application of the Immigration Act in the instant case satisfied the requirements of article 13. In particular, the author was represented by counsel during the injury before the immigration adjudicator, was given the opportunity to present evidence as to whether he should be permitted to remain in Canada, and to cross-examine witnesses. Based on evidence adduced during the inquiry, the adjudicator issued a deportation order against the author. The State party explains that the Immigration Appeal Board to which the author complained is an independent and impartial tribunal with jurisdiction to consider any ground of appeal that involved a question of law or fact, or mixed law and fact. It also has jurisdiction to consider an appeal on humanitarian grounds that an individual should not be removed from Canada. The Board is said to have carefully considered and weighed all the evidence presented it, as well as the circumstances of the author's case.

5.3 While the State party concedes that the right to remain in a country might exceptionally fall within the scope of application of the Covenant, it is submitted that there are no such circumstances in the case: the decision to deport Mr. Stewart is said to be "justified by the facts of the case and by Canada's duty to enforce public interest statutes and protect society. Canadian courts have held that the most important objective for a government is to protect the security of its nationals. This is

consistent with the view [of] ... the Supreme Court that the executive arm of government is pre-eminent in matters concerning the security of its citizens ... and that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country".

5.4 The State party argues that both the decision to deport Mr. Stewart and to uphold the deportation order met with requirements of the Immigration Act, and that these decisions were in accordance with international standards; there are no special circumstances which would "trigger the application of the Covenant to justify the complainant's stay in Canada". Furthermore, there is no evidence of abuse of power by Canadian authorities and in the absence of such an abuse, "it is inappropriate for the Committee to evaluate the interpretation and application by those authorities of Canadian law".

5.5 As to the alleged violation of articles 17 and 23 of the Covenant, the State party argues that its immigration laws, regulations and policies are compatible with the requirements of these provisions. In particular, Section 114(2) of the Immigration Act allows for the exemption of persons from any regulations made under the Act or the admission into Canada of persons where there exist compassionate or humanitarian considerations". Such considerations include the existence of family in Canada and the potential harm that would result if a member of the family were removed from Canada.

5.6 A general principle of Canadian immigration programs and policies is that dependants of immigrants into Canada are eligible to be granted permanent residence at the same time as the principal applicant. Furthermore, where family members remain outside Canada, the Immigration Act and ancillary regulations facilitate reunification through family class and assisted relative sponsorships: "[r]eunification in fact occurs as a result of such sponsorships in almost all cases".

5.7 In the light of the above, the State party submits that any effects which a deportation may have on the author's family in Canada would occur further to the application of legislation that is compatible with the provisions, aims and objectives of the Covenant: "In the case at hand, humanitarian and compassionate grounds, which included family considerations, were taken into account during the proceedings before the immigration authorities and were balanced against Canada's duty and responsibility to protect society and to properly enforce public interest statutes".

5.8 In conclusion, the State party affirms that Mr. Stewart has failed to substantiate violations of rights protected under the Covenant and is in fact claiming a right to remain in Canada. He is said to in fact be seeking to establish an avenue under the Covenant to claim the right not to be deported from Canada: this claim is incompatible ratione materiae with the provisions of the Covenant and inadmissible under article 3 of the Optional Protocol.

6.1 In her comments, counsel notes that the State party wrongly conveys the impression that the author had two full hearings before the immigration authorities, which took into account all the specific factors in his case. She observes that the immigration adjudicator conducting the inquiry "has no equitable jurisdiction". Once he is satisfied that the person is the one described in the initial report, that this person is a permanent resident of Canada, and that he has been convicted of a criminal offence, a removal order is mandatory. Counsel contends that the adjudicator "may not take into account any other factors and has no statutory power of discretion to relieve against any

hardship caused by the issuance of the removal order".

6.2 As to the discretionary power, under Section 114(2) of the Immigration Act, to exempt persons from regulatory requirements and to facilitate admission on humanitarian grounds, counsel notes that this power is not used to relieve against the hardship to a person and his/her family caused by the removal of a permanent resident from Canada: [T]he Immigration Appeal Division exercises a quasi-judicial statutory power of discretion after a full hearing, and it has been seen as inappropriate for the Minister or his officials to in fact 'overturn' a negative decision ... by this body".

6.3 Counsel affirms that the humanitarian and compassionate discretion delegated to the Minister by the Immigration Regulations can in any event hardly be said to provide an effective mechanism to ensure that family interests are balanced against other interests. In recent years, Canada is said to have routinely separated families or attempted to separate families where the interests of young children were at stake: thus, "the best interests of children are not taken into account in this administrative process".

6.4 Counsel submits that Canada ambiguously conveys the impression that family class and assisted relative sponsorships are almost always successful. This, according to her, may be true of family class sponsorships, but it is clearly not the case for assisted relative sponsorships, since assisted relative applicants must meet all the selection criteria for independent applicants. Counsel further dismisses as "patently wrong" the State party's argument that the Court, upon application for judicial review of a deportation order, may balance the hardship caused by removal against the public interest. The Court, as it has articulated repeatedly, cannot balance these interests, is limited to strict judicial review, and cannot substitute its own decision for that of the decision maker(s), even if it would have reached a different conclusion on the facts: it is limited to quashing a decision because of jurisdictional error, a breach of natural justice or fairness, an error of law, or an erroneous finding of fact made in a perverse or in a capricious manner (Sec. 18(1) Federal Court Act).

6.5 As to the compatibility of the author's claims with the Covenant, counsel notes that Mr. Stewart is not claiming an absolute right to remain in Canada. She concedes that the Covenant does not per se recognize a right of non-nationals to enter or remain in a state. Nonetheless, it is submitted that the Covenant's provisions cannot be read in isolation but are inter-related: accordingly, article 13 must be read in the light of other provisions.

6.6 Counsel acknowledges that the Committee has held that article 13 provides for procedural and not substantive protection; however, procedural protection cannot be interpreted in isolation from the protection provided under other provisions of the Covenant. Thus, legislation governing expulsion cannot discriminate on any of the grounds listed in article 26; nor can it arbitrarily or unlawfully interfere with family, privacy and home (article 17).

6.7 As to the claim under article 17, counsel notes that the State party has only set out the provisions of the Immigration Act which provide for family reunification - provisions which she considers inapplicable to the author's case. She adds that article 17 imposes positive duties upon States parties, and that there is no law in Canada which would recognize family, privacy, or home interests in the context raised in the author's case. Furthermore, while she recognizes that there is a process provided by law which grants to the Immigration Appeal Division a general discretion to consider

the personal circumstances of a permanent resident under order of deportation, this discretion does not recognize or encompass consideration of fundamental interests such as integrity of the family. Counsel refers to the case of Sutherland as another example of the failure to recognize that integrity of the family is an important and protected interest. For counsel, there "can be no balancing of interests if ... family ... interests are not recognized as fundamental interests for the purpose of balancing. The primary interest in Canadian law and jurisprudence in the protection of the public...".

6.8 Concerning the State party's contention that a "right to remain" may only come within the scope of application of the Covenant under exceptional circumstances, counsel claims that the process whereby the author's deportation was decided and confirmed proceeded without recognition or cognizance of the author's rights under articles 7, 9, 12, 13, 17 or 23. While it is true that Canada has a duty to ensure that society is protected, this legitimate interest must be balanced against other protected individual rights.

6.9 Counsel concedes that Mr. Stewart was given an opportunity, before the Immigration Appeal Division, to present all the circumstances of his case. She concludes, however, that domestic legislation and jurisprudence do not recognize that her client will be subjected to a breach of his fundamental rights if he were deported. This is because such rights are not and need not be considered given the way immigration legislation is drafted. Concepts such as home, privacy, family or residence in one's own country, which are protected under the Covenant, are foreign to Canadian law in the immigration context. The overriding concern in view of removal of a permanent resident, without distinguishing long-term residents from recently arrived immigrants, is national security.

Issues and proceedings before the Committee

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

7.2 The Committee notes that it is uncontested that there are no further domestic remedies for the author to exhaust, and that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

7.3 In as much as the author's claims under articles 7 and 9 of the Covenant are concerned, the Committee has examined whether the conditions of articles 2 and 3 of the Optional Protocol are met. In respect of articles 7 and 9, the Committee does not find, on the basis of the material before it, that the author has substantiated his claim that deportation to the United Kingdom and separation from his family would amount to cruel or inhuman treatment within the meaning of article 7, or that it would violate his right to liberty and security of person within the meaning of article 9, paragraph 1. In this respect, therefore, the author has no claim under the Covenant, within the meaning of article 2 of the Optional Protocol.

7.4 As to article 13, the Committee notes that the author's deportation was ordered pursuant to a decision adopted in accordance with the law, and that the State party has invoked arguments of

protection of society and national security. It is not apparent that this assessment was reached arbitrarily. In this respect, the Committee finds that the author has failed to substantiate his claim, for purposes of admissibility, and that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.5 Concerning the claim under article 12, the Committee has noted the State party's contention that no substantiation in support of this claim has been adduced, as well as counsel's contention that article 12, paragraph 4, is applicable to Mr. Stewart's case. The Committee notes that the determination of whether article 12, paragraph 4, is applicable to the author's situation requires a careful analysis of whether Canada can be regarded as the author's "own country" within the meaning of article 12, and, if so, whether the author's deportation to the United Kingdom would bar him from reentering "his own country", and, in the affirmative, whether this would be done arbitrarily. The Committee considers that there is no a priori indication that the author's situation can not be subsumed under article 12, paragraph 4, and therefore concludes that this issue should be considered on its merits.

7.6 As to the claims under articles 17 and 23 of the Covenant, the Committee observes that the issue whether a State is precluded, by reference to articles 17 and 23, from exercising a right to deport an alien otherwise consistent with article 13 of the Covenant, should be examined on the merits.

7.7 The Committee has noted the State party's request for clarifications of the criteria that formed the basis of the Special Rapporteur's request for interim protection under rule 86 of the Committee's rules of procedure, as well as the State party's request that the Committee withdraw its request under rule 86. The Committee observes that what may constitute "irreparable damage" to the victim within the meaning of rule 86 cannot be determined generally. The essential criterion is indeed the irreversibility of the consequences, in the sense of the inability of the author to secure his rights, should there later be a finding of a violation of the Covenant on the merits. The Committee may decide, in any given case, not to issue a request under rule 86 where it believes that compensation would be an adequate remedy. Applying these criteria to deportation cases, the Committee would require to know that an author would be able to return, should there be a finding in his favour on the merits. Accordingly, the Committee would wish to know from the Government of Canada whether it is able to offer that guarantee.

7.8 The Committee notes that both parties have already, at this stage of the procedure, made extensive submissions which would enable the Committee to pronounce on the merits of the matter under consideration. At this stage, the Committee must, however, limit itself to the procedural requirement of deciding on the admissibility of the communication. Should the State party wish to make a further submission on the merits of the complaint, it should do so within six months of the transmittal to it of the present decision. Author's counsel will be given an opportunity to comment thereon. If no further explanations or statements are received from the State party under article 4, paragraph 2, of the Optional Protocol, the Committee will proceed to adopt its Views on the basis of the written information already submitted.

8. The Human Rights Committee therefore decides:

(a) the communication is admissible in so far as it may raise issues under articles 12, paragraph 4,

17, and 23 of the Covenant;

(b) that any further explanations or statements which the State party may wish to make to clarify the matter and the measures taken by it should, in accordance with article 4, paragraph 2, of the Optional Protocol, reach the Committee within six months of the date of transmittal to it of this decision. Should the State party not intend to make a further submission, it is requested to so inform the Committee as soon as possible to permit an early disposition of the matter;

(c) that any further explanations or statements received from the State party shall be communicated by the Secretary-General pursuant to rule 93, paragraph 3, of the rules of procedure, to the author and his counsel, with the request that any comment which they wish to make thereon should reach the Committee within six weeks of the date of the transmittal;

(d) that the State party is requested to provide the Committee with the information referred to in paragraph 7.7 above;

(e) that this decision shall be communicated to the State party, to the author and to his counsel.

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