HUMAN RIGHTS COMMITTEE

Canepa v. Canada

Communication No. 558/1993*/

13 October 1994

CCPR/C/52/D/558/1993

ADMISSIBILITY

Submitted by: Giosue Canepa [represented by counsel]

Alleged victim: The author

State party: Canada

Date of communication: 16 April 1993 (initial submission)

Date of present decision: 13 October 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, dated 16 April 1993, is Giosue Canepa, an Italian citizen, at the time of submission of the communication under deportation order in Canada. He claims to be a victim of a violation of articles 7, 12, paragraph 4, 17 and 23, paragraph 1, of the International Covenant on Civil and Political Rights by Canada. He is represented by counsel.

The facts as submitted by the author:

2.1 The author was born in Italy in January 1962; at the age of five, he emigrated to Canada with his parents. After the family settled in Canada, a younger brother was born, who is Canadian by birth. The author has extended family in Italy, knows some Italian, but does not feel any meaningful connection with the country.

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 his criminal convictions that he realized that he was a permanent resident. Between 1978 and 1987, the author was convicted on 37 occasions, mostly related to breaking and entering, theft, or possession of narcotics. On several occasions, he was sentenced to imprisonment. Counsel notes that the author's convictions are attributable to her client's addiction to heroin which he developed at the age of 13. He has no record of violence. Counsel notes that the author received no drug rehabilitation treatment while in prison, but on his own initiative attempted in 1988 to overcome his addiction. He was able to remain drug-free until 1990, when he became depressed over his immigration situation and returned to drug use. In 1990, he was again convicted of possession of a narcotic and imprisoned for eighteen months. After his release in January 1993 he resumed living at home with his parents and his brother. He was still addicted to heroin and committed further offences shortly after his release; he was recently convicted on further charges of breaking and entering and was serving a one year prison term at the time of the submission of the communication.

2.3 On 1 May 1985, the author was ordered deported on the basis of his criminal convictions. The author appealed the deportation order to the Immigration Appeal Board. The Board heard his appeal on 25 February 1988 and dismissed it by judgment of 30 March 1988. On 26 April 1988, the author petitioned the Federal Court of Appeal for leave to appeal of the decision of the Immigration Appeal Board. On 31 August 1988 leave to appeal was granted. The Federal Court of Appeal heard the appeal on 25 May 1992 and dismissed it by judgment of 8 June 1992. On 1 October 1992, the author applied to the Supreme Court of Canada for leave to appeal of the decision of the Federal Court of Appeal. The Supreme Court of Canada dismissed the application for leave to appeal on 21 January 1993. Thus, no further domestic remedy is said to be available.

2.4 It is stated that, after deportation, the author is not able to return to Canada without the express consent of the Minister of Immigration. A reapplication for immigration to Canada would not only require ministerial consent but also that the author meet all other criteria for immigrants. Because of his convictions, the author would be barred from readmission to Canada under section 19(2)(a) of the Immigration Act.

3.1 On 2 June 1994, counsel to the author informs the Committee that the author has completed his prison sentence and that his deportation is imminent. She requests the Committee to request the State party, under rule 86 of its rules of procedure, not to remove the author from Canada while his communication is under consideration by the Committee. It is submitted that the author's deportation will make the author's rehabilitation next toimpossible and that without a guarantee from the Canadian government that the author will be allowed to return to Canada, should the Committee find that the deportation constitutes a violation of his rights, the deportation appears to be irrevocable.

3.2 On 7 June 1994, counsel to the author informs the Committee that, on 6 June 1994, the author has been removed from Canada to Rome, Italy. According to counsel, the author had been informed of the date and time of his removal a few hours before the removal was to take place. This made it impossible for him to get his belongings and money from his family,

allegedly contrary to normal procedure. Counsel requests the Committee to request the State party to return the author to Canada, awaiting the outcome of the examination of his communication under the Optional Protocol. It is submitted that the author's mental health will deteriorate if he is to stay in Italy, a country with which he is not familiar and where he feels isolated, and that this will cause him irreparable harm.

The complaint:

4.1 The author claims that the facts as described reveal violations of articles 7, 17 and 23, paragraph 3, of the Covenant, as interpreted in the light of articles 9, 12 and 13 of the Covenant. He claims that in respect of articles 17 and 23, the State party has failed to provide for clear legislative recognition of the protection of privacy, family and home life of persons in the author's position. 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 Appeal Board, he claims there is a **prima facie** issue as to whether Canadian law is compatible with the requirement of protection of the family. The author also refers to the Committee's General Comment 15 ("The position of aliens under the Covenant"), according to which aliens may enjoy the protection of the Covenant even in relation to entry or residence, when considerations of respect for family life arise. The author furthermore refers to the Committee's General Comment on article 17, according to which States have a positive obligation to ensure respect for the right of every person to be protected against arbitrary or unlawful interference with her privacy, family and home.

4.2 The author argues that his right to family life is violated by his deportation, since his deportation separates him from his nuclear family in Canada, consisting of his father, mother and brother, a household unit of which the unmarried author has always been a part.

4.3 The author further submits that his rights to "privacy" and "home" have been violated. It is argued that the term "home" must be interpreted broadly and that it should encompass the community of which an individual is a part. In this sense, his "home" is said to be Canada. It is further argued that the author's right to privacy includes 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.

4.4 The author further argues that articles 17 and 23, paragraph 1, have been violated in his case, because the interference with his family and home, resulting from his deportation, is arbitrary. According to the author, the deportation of long-term, deeply-rooted and substantially-connected resident aliens who have already been duly punished for their crimes is not related to a legitimate state interest. In this connection, the author asserts that the word "arbitrary" in article 17 should be interpreted in the light of articles 4, 9, 12 and 13 of the Covenant. He argues that "arbitrary interference" within the meaning of article 17 of the Covenant is interference which is not "necessary to protect national security, public order, public health or morals or rights and freedoms of others" or is not "consistent with other rights recognized in the Covenant".4.5 The author contends that article 12, paragraph 4, which recognizes everyone's right to enter his own country, is applicable to his situation

since, for all practical purposes, Canada is his "own country". His deportation from Canada results in a statutory bar from reentering Canada. In this context, it is pointed out that article 12, paragraph 4, indicates that everyone has the right to enter "his own country", not just his country of nationality or birth. It is submitted that Italy is not the author's own country, as he left it at the age of five and his entire life is centred around his family in Canada - thus, although not Canadian in a formal sense, he must be considered a **de facto** Canadian citizen[1].

4.6 Finally, the author contends that the enforcement of the deportation order amounts to cruel, inhuman and degrading treatment within the meaning of article 7 of the Covenant. He acknowledges that the Committee has not yet considered whether the permanent separation of an individual from his family and close relatives and the effective banishment of a person from the only country which he ever knew and in which he grew up can amount to cruel, inhuman or degrading treatment; he submits, however, that this issue should be considered on the merits[2].

4.7 In this connection, the author recalls that (a) he has been residing in Canada since the age of five; (b) at the time of deportation all the members of his immediate family resided in Canada; (c) while his criminal record is extensive, it does not reveal that he is a person who poses a danger to the public safety since he never committed crimes of violence; (d) although drug rehabilitation was part of some of his sentences, he received no such treatment while imprisoned and was actually able to obtain heroin in prison; (e) the deportation from Canada has effectively severed all his ties with Canada; and (f) the prison terms for his various convictions already constitute adequate and sufficient punishment and the deportation amounts to the imposition of additional punishment.

State party's comments on admissibility:

5. By submission of 21 July 1994, the State party informs the Committee that it has no comments to offer on the issue of admissibility of the communication. It reserves the right to make submissions on the merits of the communication, should the Committee declare the communication admissible.

Issues and proceedings before the Committee:

6.1 Before considering any claims contained in a communication the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.6.2 The Committee notes that it is uncontested that there are no further remedies for the author to exhaust, and that the requirements of article 5, paragraph 2(b), of the Optional Protocol have been met.

6.3 The Committee notes that some of the author's claims under article 17 of the Covenant concern the absence of legislation in Canada to guarantee the protection of the family life of permanent residents against whom an immigration enquiry is initiated with a view of ordering their deportation. The Committee recalls that it cannot, under the Optional Protocol procedure, examine **in abstracto** whether a State party has complied with its obligations

under the Covenant [3]. To the extent that the author's claims refer to the failure of the Canadian legislature to guarantee the family life of non-Canadian residents in general, his communication is therefore inadmissible.

6.4 The Committee considers that the author's claims that his deportation makes him a victim of a violation of articles 7, 12, paragraph 4, 17 and 23 of the Covenant, should be considered on the merits.

7. As regards counsel's request under rule 86 of the Committee's rules of procedure, the Committee finds that the author's deportation to Italy cannot be considered to constitute "irreparable damage" in respect of the rights the author considers violated by his deportation. Should the Committee find in favour of the author and conclude that his deportation was contrary to the Covenant, the State party would be under an obligation to allow the author to reenter Canada. Accordingly, the consequences of the deportation, however disagreeable they may be for the author in his present situation, do not cause "irreparable damage" to the author in the enjoyment of his rights, which would justify the granting of interim protection under rule 86 of the Committee's rules of procedure.

8. The Human Rights Committee therefore decides:

(a) that the communication is admissible in so far as it appears to raise issues under articles 7, 12, paragraph 4, 17 and 23 of the Covenant;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated to the author's counsel pursuant to rule 93, paragraph 3, of the Committee's rules of procedure, with the request that any comments she may wish to submit thereon should reach the Committee, care of Centre for Human Rights, United Nations Office in Geneva, within six weeks of the transmittal;

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

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

Footnotes

*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ In this context, counsel refers to the Committee's decision in Lovelace v. Canada , in which the fact that the complainant was not recognized as an Indian under Canadian

legislation did not prevent the Committee from considering the complainant to belong to the minority concerned and to benefit from the protection of article 27 of the Covenant. Counsel also refers to the judgment of the European Court of Human Rights in the Beldjoudi case (55/1990/246, 26 March 1992).

2/ Counsel refers to the separate opinion of Judge De Meyer of the European Court of Human Rights in the Beldjoudi case , in which it was stated that the removal of the applicant from his country of residence and the severance of the ties with his wife and family would amount to inhuman treatment.

3/ See inter alia the Committee's decisions with respect to communication No. 61/1979 (Hertzberg et al. v. Finland , Views adopted on 2 April 1982, paragraph 9.3) and No. 163/1984 (C. et al. v. Italy , declared inadmissible on 10 April 1984, paragraph 6.2).