HUMAN RIGHTS COMMITTEE

Canepa v. Canada

Communication No 558/1993

3 April 1997

CCPR/C/59/D/558/1993

VIEWS

Submitted by: Giosue Canepa [represented by Ms. B. Jackman]

Victim: The author

State party: Canada

Date of communication: 16 April 1993 (initial submission)

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

Meeting on 3 April 1997,

Having concluded its consideration of communication No. 558/1993 submitted to the Human Rights Committee on behalf of Mr. Giosue Canepa under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

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 18 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 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 judgement 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 judgement 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 to impossible 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 re-entering 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.

The Committee's decision on admissibility

6.1 At its fifty-second session, the Human Rights Committee considered the admissibility of the communication.

6.2 The Committee noted that it was uncontested that there were no further remedies for the author to exhaust, and that the requirements of article 5, paragraph 2 (b), of the Optional Protocol had been met.

6.3 The Committee noted that some of the author's claims under article 17 of the Covenant concerned the absence of legislation in Canada to guarantee the protection of the family life of permanent residents against whom an immigration inquiry is initiated with a view of ordering their deportation. The Committee recalled 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 referred to the failure of the Canadian legislature to guarantee the family life of non-Canadian residents in general, his communication was therefore inadmissible.

6.4 The Committee considered 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 found that the author's deportation to Italy could not 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 re-enter Canada. Accordingly, the consequences of the deportation, however disagreeable they might be for the author in his situation, did not cause "irreparable damage" to the author in the enjoyment of his rights, which would have justified the granting of interim protection under rule 86 of the Committee's rules of procedure.

8. Accordingly, on 13 October 1994, the Human Rights Committee decided that the communication was admissible insofar as it appeared to raise issues under articles 7, 12, paragraph 4, 17 and 23 of the Covenant.

State party's observations on the merits and counsel's comments thereon

9.1 By submission of 21 December 1995, the State party argues that the author's allegations in respect to article 7 of the Covenant are not substantiated, since there is no evidence that the author's separation from his family poses any particular risk to his mental or physical health. The State party argues that article 7 is not as broad in scope as contended by the author and does not apply to the present situation, where the author does not face a substantial risk of torture or of serious abuse in the receiving country. The author has not shown that he will suffer any undue hardship as a result of his deportation. The State party adds that the author is not absolutely barred from returning to Canada. Furthermore, the author's family is apparently able to join the author in Italy, as indicated by the author's father at the Immigration Appeal Board hearing. The State party argues that the question of separation from family is rather an issue to be dealt with under articles 17 and 23 of the Covenant.

9.2 The State party argues that the author has never acquired an unconditional right to remain in Canada as his "own country" and cannot acquire such status by virtue only of long-term residence in Canada. The State party contends that a definition of "own country" other than that of country of nationality would seriously erode the ability of States to exercise their sovereignty through border control and citizenship access requirements. According to the State party this interpretation is supported by article 13 of the Covenant, from which can be inferred that there is no class of aliens that enjoys an unconditional right to stay in Canada. Moreover, the State party argues that if the Committee were to decide that article 12 may provide a right to permanent residents to return or remain in their country of residence, such a right must be dependent on the retention of legal status. The author thus has lost this right when he lost his permanent residence status.

9.3 The State party further submits that the rights contained in articles 17 and 23 of the Covenant are not absolute and are to be balanced against societal interests. The Immigration Appeal Board considered all relevant factors and weighed the author's rights against the risk that he posed to the Canadian public. The Board noted that the author's community ties were not particularly compelling and concluded that the individual concerns of the author were overtaken by the larger societal interests. The length of the author's residence in Canada was duly considered and weighed in the balance.

9.4 If the Committee would find that articles 12, 17 and 23 do apply to the author's situation, the State party argues moreover that there is no evidence that the author has been arbitrarily deprived of his rights. The actions taken by the immigration officials were authorized by statute and the author was at all times afforded full procedural safeguards. The decision taken in the author's case was the result of a legal process that provided him with a full hearing and complied with both natural justice requirements and the requirements of the Canadian Charter of Rights and Freedoms.

10.1 In her comments on the State party's submission, counsel for the author maintains that the author's deportation, resulting in separation from his social and familial network amounts to cruel, inhuman and degrading treatment within the context of article 7 of the Covenant. In this connection, counsel emphasizes the author's dependency on heroin, and the general recognition that family and social ties are crucial aspects of successful rehabilitation.

10.2 As regards article 12, paragraph 4, counsel explains that the issue is not whether or not the author ought to be considered a national or a citizen of Canada, but whether article 12 applies to his circumstances. In this context, counsel submits that States have imposed limits on their sovereignty through ratification of international treaties, such as the Covenant. Counsel refers to the travaux préparatoires which give the impression that the meaning of "his own country" was left undefined by the drafters. Because of this, it is open to the Committee to interpret the provision in a manner which best ensures that human rights of a person are protected. Counsel is of the opinion that the State party's argument that if there is a right for permanent residents under article 12, such right must be dependent on the retention of the status, negates the rights under article 12 entirely. In this connection, counsel argues that Covenant rights cannot depend on the internal laws of the State.

10.3 As regards the balancing of interests, counsel acknowledges that the author's interests were balanced against those of Canadian society, but argues that under Canadian law there is no recognition of individual rights in the removal process, whereas the right of the State to deport is recognized. Counsel further submits that in the decision-making process family integrity is not a relevant consideration, but only economic dependency.

10.4 Counsel states that for all practical purposes, the author is barred from returning to Canada, since the Minister would not give his consent in the light of the Immigration Appeal's Board decision. Furthermore, the author cannot apply as a regular immigrant because of his criminal record, and even if he could, he would not qualify for admission under the selection criteria.

10.5 As regards the question whether the interference with the author's rights were arbitrary or not, counsel argues that since the Immigration Act applied to the author is inconsistent with the provisions, aims and objectives of the Covenant in the absence of recognition of family integrity as a justiciable issue, the decision taken in the author's case is unlawful. In this connection, counsel also argues that although due process in the procedural sense exists it does not in the substantive sense. Counsel submits that in the circumstances of the author's case, in particular his drugs dependency, the interference with his right to home and family life was arbitrary and constitutes a violation. In this connection, it is stated that the author's family did in fact remain in Canada after the author's deportation.

Issues and proceedings before the Committee

11.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

11.2 The author has claimed that his removal from Canada constituted a violation of article 7 of the Covenant, since the separation of his family amounts to cruel, inhuman and degrading treatment. On the basis of the material before it, the Committee is of the opinion that the facts of the instant case are not of such a nature as to raise an issue under article 7 of the Covenant. The Committee concludes that there has been no violation of article 7 of the Covenant in the instant case.

11.3 As to the author's claim that his expulsion from Canada violates article 12, paragraph 4, of the Covenant, the Committee recalls that in its prior jurisprudence, [4] it expressed the view that a person who enters a State under the State's immigration laws, and subject to the conditions of those laws, cannot regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. An exception might only arise in limited circumstances, such as where unreasonable impediments are placed on the acquisition of nationality. No such circumstances arose in the prior case the Committee dealt with, nor do they arise in the present case. The author was not impeded in acquiring Canadian citizenship, nor was he deprived of his original citizenship arbitrarily. In the circumstances, the Committee concludes that the author cannot claim that Canada is his own country, for purposes of article 12, paragraph 4, of the

Covenant.

11.4 As regards the author's claim under article 17 of the Covenant, the Committee observes that the author's removal from Canada did interfere with his family life and that this interference was in accordance with Canadian law. The issue for the Committee to examine is whether the interference was arbitrary. The Committee has noted the State party's argument that the decision to remove the author from Canada was not taken arbitrarily as the author had a full hearing with procedural safeguards and his rights were weighed against the interests of society. The Committee observes that arbitrariness within the meaning of article 17 is not confined to procedural arbitrariness, but extends to the reasonableness of the interference with the person's rights under article 17 and its compatibility with the purposes, aims and objectives of the Covenant. The separation of a person from his family by means of his expulsion could be regarded as an arbitrary interference with the family and as a violation of article 17 if in the circumstances of the case the separation of the author from his family and its effects on him were disproportionate to the objectives of removal.

11.5 The circumstances are that the author has committed many offences, largely of the break, enter and steal kind, and mostly committed to get money to support his drug habit. His removal is seen as necessary in the public interest and to protect public safety from further criminal activity by the author. He has had an almost continuous record of convictions (except for a period in 1987-88), from age 17 to his removal from Canada at age 31. The author, who has neither spouse nor children in Canada, has extended family in Italy. He has not shown how his deportation to Italy would irreparably sever his ties with his remaining family in Canada. His family were able to provide little help or guidance to him in overcoming his criminal tendencies and his drug-addiction. He has not shown that the support and encouragement of his family is likely to be helpful to him in the future in this regard, or that his separation from his family is likely to lead to a deterioration in his situation. There is no financial dependence involved in his family ties. There appear to be no circumstances particular to the author or to his family which would lead the Committee to conclude that his removal from Canada was an arbitrary interference with his family, nor with his privacy or home.

11.6 Finally, the Committee is of the opinion that the facts of the case do not raise an issue under article 23 of the Covenant.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not disclose a violation of any of the provisions of the Covenant.

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* The following members of the Committee participated in the examination of the present communication: Messrs. Nisuke Ando and Prafullachandra N. Bhagwati, Mrs. Christine Chanet, Lord Colville, Mr. Omran El Shafei, Mrs. Elizabeth Evatt, Messrs. Eckart Klein, David Kretzmer and Rajsoomer Lallah, Mrs. Cecilia Medina Quiroga, Mrs. Laure Moghaizel, Messrs. Julio Prado Vallejo, Martin Scheinin and Maxwell Yalden.

** The text of three individual opinions signed by four Committee members is appended to the present document.

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 judgement 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, para. 9.3) and No. 163/1984 (C. et al. v. Italy, declared inadmissible on 10 April 1984, para. 6.2).

4/ Case No. 538/1993 (Stewart v. Canada), Views adopted on 1 November 1996, paragraphs 12.2 to 12.9.

[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 annual report to the General Assembly.]

APPENDIX

A. Individual opinion by Committee member Martin Scheinin *(concurring)*

While I share the Committee's view that there was no violation of the author's rights, I wish to explain my reasoning for such a conclusion.

As regards the alleged violation of article 12, paragraph 4, I have difficulties in accepting the majority reasoning in communication No. 538/1993 (Stewart v. Canada), decided prior to my term as a member of the Committee. In my opinion, there are situations in which a person is entitled to protection both as an alien (i.e. a non-citizen) under article 13 and because the country of residence being understood as his or her "own country" under article 12, paragraph 4. In paragraph 11.3 of the present case, reference is made to the Views in Stewart which, in my opinion, give too narrow a picture of situations in which a non-citizen is to be understood to reside in his or her "own country". Besides a situation in which there are unreasonable impediments on the acquisition of nationality, as mentioned in the Views, the same conclusion must, in my opinion, be made in certain other situations as well, for

instance, if the person is stateless or if it would be impossible or clearly unreasonable for him or her to integrate into the society corresponding to his or her de jure nationality. Just to take one illustrative example, for a blind or deaf person who knows the language used in the country of residence but not the language of his or her nationality country, the country of residence should be interpreted as the person's "own country" under article 12, paragraph 4.

As to whether there was a violation of the author's rights under article 17, I likewise concur in a finding of non-violation. In addition to the factors mentioned in paragraph 11.5 of the Views, I emphasize that the deportation of the author did not in itself mean that his contacts with his family members in Canada were made impossible. If the author, aged 32 at the time of deportation, and his parents and brother in Canada wish to maintain those contacts, they can do so by correspondence, by telephone and by the other family members visiting Italy, the country of origin of the parents. In due course, the author may also apply for a right to visit his family in Canada, the State party in such a situation being bound by its obligations under article 17 of the Covenant not to interfere arbitrarily or unlawfully with the author's family.

Martin Scheinin [signed]

[Original: English]

B. Individual opinion by Committee members Elizabeth Evatt and Cecilia Medina Quiroga *(dissenting)*

For reasons more fully expressed in a separate opinion in Stewart v. Canada (No. 538/1993), we agree neither with the restrictive way in which the Committee has interpreted the expression "his own country" nor with the conclusions of the Committee set out in paragraph 11.3. In our view there are factors other than nationality which may establish close and enduring connections between a person and a country. The circumstances of the author suggest that he has such connections with Canada. We are therefore of the opinion that the author has a strong claim to the protection of article 12, paragraph 4, a claim which should be considered on its merits.

Elizabeth Evatt [signed]

Cecilia Medina Quiroga [signed]

[Original: English]

C. Individual opinion by Christine Chanet (*dissenting*)

With regard to this case I stand by the comments which I made in the Stewart case (No. 538/1993).

In the present case, paragraph 11.3 of the Committee's views assimilates more clearly than in the aforesaid case the two distinct notions referred to in article 12, paragraph 4, of the Covenant, namely the notion of one's "own country" on the one hand and, on the other, that concerning the arbitrary nature of the decision to "deprive" (entry or re-entry).

The notion of "own country" does not fall within established legal categories such as nationality or temporary or permanent resident status; it is a term that refers not to the State but to a geographical place whose content and boundaries are less precise, and hence, in the absence of any reference to a specific legal concept, a case-by-case appreciation of the term is required. That appreciation has to be made by the State party to the Covenant, which can define what it means by "own country" in its internal legislation, subject to observance of the other provisions of the Covenant, which obviously excludes any "variable-geometry, discriminatory" definition. If the State were to engage in the latter exercise, it would create a situation of arbitrariness - arbitrariness in the definition of "own country".

However, such action is not to be confused with another, more limited situation of arbitrariness, as covered by the Covenant (art. 12, para. 4), which in this instance concerns the actual decision to deport a person or to deny a person's right to enter his own country ("no one shall be arbitrarily deprived ..."). As worded, paragraph 11.3 of the Committee's views fails to make this distinction and intermingles, on the one hand, the criteria for determining whether a State is the "own country" of the author of the communication and, on the other, the entry and exit requirements for aliens. This amalgam leads to a simplification which reduces the text to the sole criterion of nationality, to that of its acquisition or withdrawal, and deportation measures (or entry rules) are never arbitrary when they comply with the conditions for acquisition or withdrawal of that nationality.

Rendering the application of article 12, paragraph 4, of the Covenant indissociable from nationality, or indeed naturalization, is in my view too easy a solution and is not in keeping with the actual letter of the text, which, had it been intended to be so restrictive, would have employed appropriate terms relating to nationality, a legal notion that is easier to define. The deliberate use of a vaguer and hence broader term indicates that the drafters of the Covenant did not wish to limit the scope of the text in the manner decided by the Committee.

Christine Chanet [signed]

[Original: French]