HUMAN RIGHTS COMMITTEE

Nartey v. Canada

Communication No 604/1994

18 July 1997

CCPR/C/60/D/604/1994

ADMISSIBILITY

Submitted by: Joseph Nartey [represented by Mr. Stewart Istvanffy]

Victim: The author

State party: Canada

Date of communication: 15 June 1994 (initial submission)

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

Meeting on 18 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Joseph Nartey, a Ghanaian citizen, at the time of submission residing in Canada, where he requested recognition as refugee. He claims to be a victim of a violation by Canada of articles 2(1) and (3), 6(1), 7, 9, 13, 14(1) and 26 of the Covenant. He is represented by Mr. Stewart Istvanffy, a Montreal lawyer.

The facts as presented by the author

2.1 The author, who was born on 20 February 1959, claims that he was a student activist since 1978, and that, in 1989, he became vice-president of the Takoradi Students' Union. He was a supporter of the Armed Forces Revolutionary Council (AFRC), which took power after a coup on 4 June 1979, and which is the predecessor of the Provisional National Defence Council (PNDC), the government in power at the time of the author's entrance into

Canada. On 15 July 1989, the author was informed by the Minister of Education that he was selected to go and study in Bulgaria for six months. On 17 August 1989, the author left Ghana by plane, together with the other students selected for the program. During the flight, they were informed that their destination was Libya, and not Bulgaria, and that they would undergo a six-month military intelligence training.

2.2 Upon arrival in Libya, the students' passports were confiscated and they were sent to a military training camp. They were told not to try to communicate with anyone from Ghana. After six months of training, the students were informed that they would continue their training for another 18 months. The disappointed author wrote a letter to the Takoradi Student Union in Ghana accusing the Minister of Education of being a liar, condemning the government for wasting scarce resources and warning other students not to participate in study programs abroad. The author mailed the letter in February 1990. On that very day, he was arrested, shown the letter, kicked, and forced to sign a statement of which he did not know the contents. He was told that the Chairman of the PNDC would be informed. He then was imprisoned at the Tajuara prison in Libya.

2.3 On 1 September 1991, a friend helped the author escape. It was arranged for him to leave Libya through the help of a third person, who, on 15 September 1991, put him on a plane with destination Canada.

2.4 The author arrived in Canada on 16 September 1991 and claimed recognition as a refugee immediately upon arrival. He claimed to fear for his life because of what he had witnessed in Libya, because of the opinions that he has expressed and because he had broken PNDC law. A hearing into his claim was held on 10 March 1992 before two commissioners of the Refugee Division of the Canadian Immigration and Refugee Board, in Montreal, Quebec. On 29 September 1992, the Refugee Division dismissed the author's claim for recognition as political refugee. The Refugee Division considered inter alia that there was no evidence that the Ghanaian Government sends forced recruits to Libya. Leave to appeal was granted by the Federal Court, but the appeal was dismissed by judgment of 20 January 1994 [1].

The complaint

3.1 The author claims that he has not received a fair hearing of his refugee claim, in violation of article 14, paragraph 1, of the Covenant. He argues that the two commissioners at the hearing were biased against him. He claims that one of the commissioners, a Ms. Wolfe, based herself on false and misleading information which she was given outside the meeting room and to which the author had no chance to respond. The author further submits that the other commissioner, a Mr. Sordzi, is himself from Ghana, has the same ethnic origin as Mr. Rawlings, the leader of the regime in Ghana, has publicly expressed his support for the regime in Ghana, and has acted against political refugees from Ghana in the past.

3.2 In support of his claim that Mr. Sordzi was biased, the author explains that there is a very serious ethnic conflict in Ghana, and that the military regime is dominated by the Ewe tribe, to which Mr. Sordzi belongs. The author states that for these reasons Ghanaian refugees are

afraid to testify before a person from Ewe origin and therefore not able to tell their full story. In this context, it is submitted that Mr. Sordzi was one of the leading members of the Concerned Ghanaians' Association, until this organization fell apart in 1988 over the issue whether or not to help Ghanaian refugees. Mr. Sordzi is said to have vehemently opposed help to Ghanaian refugees and to have opined that all so called refugees from Ghana were economic migrants. In support of his allegations, the author provides sworn statements made by Ghanaians now living in Canada.

3.3 The author further argues that the decision by the Refugee Division cannot be justified on the basis of the available evidence and that the language of the decision clearly shows administrative bias against refugee claimants from Ghana. In particular, it is stated that sufficient evidence was placed before the Division as to the Ghanaian practice to send forced recruits to Libya. In this context, reference is made to an alleged understanding among Western nations to deny the severity of the human rights violations taking place in Ghana. In support of his claim, the author refers to a report of the Country Assessment Approach Working Group Ghana, which was the outcome of inter-governmental consultations held in Canada in 1992. Moreover, it is stated that Mr. Sordzi represented the Montreal office at a meeting of Immigration and Refugee Board's regional directors about the situation in Ghana, on 25 March 1992. The author argues that it was totally inappropriate for Mr. Sordzi to attend this meeting, in view of his personal bias. The report from that meeting is said to contain seriously wrong assessments. Commissioners allegedly have on several occasions made statements about the human rights situation in Ghana which are blatantly untrue, and regarding issues which moreover had been differently assessed by the Federal Court of Appeal.

3.4 The author further argues that the above mentioned events and facts also amount to a violation by Canada of articles 2, paragraph 1, and 26 of the Covenant, since he was treated in a discriminatory fashion because of his ethnic origin and political opinions.

3.5 The author further argues that many political opponents in Ghana are being sentenced to death, and that the State party, by returning him to Ghana, would place him in a very dangerous situation which may lead to a violation of his right to life, in violation of article 6 of the Covenant. The author also contends that the deportation of an individual who has not had his claim to refugee status heard by an impartial tribunal, but by a biased one, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 as well as to a violation of article 9, paragraph 1, of the Covenant. It is moreover argued that the author's expulsion would not be in pursuance of a decision reached in accordance with the law, as required by article 13 of the Covenant, because commissioner Sordzi has exceeded his jurisdiction by making decisions on the credibility of refugee claimants from Ghana.

3.6 The author claims that the Federal Court, by dismissing his appeal, has misapplied the Canadian law and thereby eliminated the only effective recourse available to the author, in violation of article 2, paragraph 3, of the Covenant.

3.7 The author states that Canadian legislation provides for a Post-Determination Review and for a Humanitarian and Compassionate Review, but claims that these remedies are

devoid of substance and illusory. He claims therefore that he fulfils the requirement of article 5, paragraph 2(b), of the Optional Protocol.

State party's observations

4.1 By submission of 16 October 1995, the State party argues that the communication is inadmissible and provides information with regard to its refugee determination process.

4.2 The State party recalls that the author arrived in Canada on 16 September 1991 and indicated his intention to seek refugee status. He was not in possession of a valid visa, nor did he possess a valid passport, identity or travel document. On 30 October 1991, the author was found to have a prima facie claim under the Refugee Convention, and a conditional exclusion order was issued.

4.3 On 10 March and 3 April 1992, two Commissioners of the Refugee Division of the Immigration and Refugee Board heard the author in order to determine whether he met the definition of Convention refugee under the Immigration Act. The State party explains that a claim succeeds if either member of the panel is satisfied that the claimant meets the definition. At the hearing, the author was represented by counsel, evidence on country conditions was presented, the author gave oral testimony and a number of exhibits were filed.

4.4 On 29 September 1992, the panel decided that there was no serious possibility that the author would be persecuted if returned to his country of nationality. The author then applied for leave to appeal to the Federal Court of Appeal. Leave was granted on 26 January 1993. On 1 March 1993, the law was changed, and the author's appeal accordingly was treated as an application for judicial review by a judge of the Federal Court Trial Division. The author based his appeal on errors of law and fact, including allegations of institutional bias and personal bias of the panel members who had heard his claim.

4.5 On 20 January 1994, the Judge dismissed the application for judicial review. The Judge found that the panel's finding was on the whole supported by the evidence. He further found that there was no evidence of partiality on the part of the members of the panel. In particular, with regard to Mr. Sordzi, the judge found that the interventions made by him did not demonstrate an unfavorable attitude towards the author. The judge also considered that the allegations against him were very general and based on affidavit evidence indicating problems between the Ewe tribe (to which he belonged) and the Ashanti and Akan tribes, whereas the author belonged to the Ga tribe. Moreover, the judge considered that neither the author nor his counsel had raised the issue of a reasonable apprehension of bias during the hearing, although they claimed before the Court that this bias was well known in the Ghanaian community.

4.6 The State party points out that the author could have appealed the judge's decision to the Federal Court of Appeal, but failed to do so.

4.7 The State party notes that other review processes were available to the author after his

asylum request had been denied. He could have sought a humanitarian and compassionate review of his case under section 114(2) of the Immigration Act[2]. The review includes a risk assessment and the test is one of disproportionate hardship. Judicial review of a negative decision may be sought before the Federal Court Trial Division, with leave., which he failed to do.

4.8 Under the post-determination refugee claimants in Canada class (PDRCC) review process, established in February 1993, individuals determined not to be Convention refugees can apply for residency in Canada if upon return to their country they would face a risk to their life, of extreme sanctions or of inhumane treatment. On 5 April 1995, the author was informed that the post-claim determination officer had concluded that the author did not belong to that class of individuals. On 24 April 1995, the author's counsel filed an application for leave for judicial review in the Federal Court of Canada, Trial Division. He subsequently failed to perfect the application by filing an application record with supporting affidavits. On 26 May 1995, counsel filed a demand to cease being counsel for the author, because of failure to cooperate on the author's part. On 29 August 1995, the Court dismissed the author's application for leave because of the failure to file an affidavit in time.

4.9 The State party explains that since the author failed to leave Canada voluntarily, a deportation order was issued against him and a warrant has been issued for his arrest.

4.10 The State party argues that the author's communication is inadmissible for failure to exhaust domestic remedies. First, because he failed to appeal the Federal Court Trial Division's decision of January 1994, in which the court dismissed his application for review based on bias of the commissioners, to the Federal Court of Appeal, which he could have done without leave. Second, the author failed to seek a humanitarian and compassionate review under section 114(2) of the Immigration Act. Third, the author failed to complete his application for judicial review of the negative PDRCC decision; the State party explains that on an application for judicial review the author could have made arguments under the Canadian Charter of Rights and Freedoms similar to the arguments made in his communication to the Committee.

4.11 The State party further claims that the communication is inadmissible for failure to substantiate violations of Covenant rights. As regards the author's claims under article 6, the State party argues that the author's exclusion from Canada does not constitute a prima facie violation of his right to life, as his claims were rejected by the competent authorities and he did not complete his judicial review against these negative decisions.

4.12 As regards the author's claims under articles 9 and 13, the State party argues that these articles do not grant a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in Canada for the purpose of having his refugee claim determined and was ordered deported only following the rejection of his claim after a full hearing with possibility of judicial review.

4.13 As regards the author's claim under article 14, paragraph 1, of the Covenant, the State party argues that refugee proceedings are in the nature of public law and as such are not

encompassed by the phrase "suit at law" in article 14 of the Covenant. In this context, the State party refers to its submissions in respect of communication No. 236/1987 (V.R.M.B. v. Canada) [3].

4.14 Moreover, the State party argues that, even if Immigration and Refugee Board proceedings are held to constitute a "suit at law", sufficient guarantees of independence [4] exist so that it can reasonably be said to be an independent tribunal within the meaning of article 14, paragraph 1. The State party further submits that the two member panel which decided the author's claim was impartial. In this respect, the State party refers to the consideration by the Federal Court Trial Division of the author's allegations of bias. As regards the author's allegations of institutional bias, the State party submits that the author's case was decided on the basis of the evidence produced in the proceedings, and this evidence did not include the reports referred to by the author. The State party further argues that sufficient legal guarantees exist to exclude any legitimate doubt of the tribunal's institutional impartiality.

4.15 As to the author's claim under article 7, that his deportation amounts to cruel, inhuman or degrading treatment, because his claim had not been heard by an impartial tribunal, the State party refers to its argument above and argues that the tribunal was impartial and that the author's claim is thus inadmissible.

4.16 As regards the author's claims that he was denied equality before the law because one of the members of the panel was of Ewe ancestry, the State party submits that the allegations of denial of equality rights are without any factual or legal basis and should thus be declared inadmissible.

4.17 The State party finally argues that the Human Rights Committee is not a "fourth instance" competent to reevaluate findings of fact or to review the application of domestic legislation, unless there is clear evidence that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. In the absence of such evidence, the State party argues that the author's claims are inadmissible.

Issues and proceedings before the Committee

5. The deadline for counsel's comments on the State party's observations was 27 November 1995. By letter of 29 May 1997, counsel was informed that the Committee would examine the admissibility of the communication at its sixtieth session, in July 1997. No submission has been received.

6.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 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 the State party has argued that the communication is inadmissible for non-exhaustion of domestic remedies. It has also noted the contention of counsel that the post-determination review and the humanitarian and compassionate review

are devoid of substance. In this context, the Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them. Further, the Committee notes that it was open to the author to appeal the decision of the Federal Court Trial Division to the Federal Court of Appeal and that he failed to perfect his application for judicial review against the negative post-claim determination decision. The communication is therefore inadmissible for non-exhaustion of domestic remedies.

7. The Human Rights Committee therefore decides:

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

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

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* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Danilo Türk.

** Mr. Maxwell Yalden did not participate in the adoption of the decision, pursuant to rule 85 of the Committee's rules of procedure.

1/ Due to a change in law, the author's appeal was in fact treated as an application for judicial review by the Federal Court Trial Division and denied. See further paragraphs 4.4 and 4.5.

2/ Under section 114(2) of the Immigration Act a refugee claimant may request a humanitarian and compassionate review, to see whether extraordinary circumstances warrant landing.

3/ Declared inadmissible on 18 July 1988.

4/ Members are appointed by the Governor in Council for terms of up to seven years and drawn from all segments of Canadian society. They may only be removed on limited grounds by an inquiry procedure presided over by a judge, supernumerary judge or former judge of the Federal Court of Canada. The Immigration and Refugee Board operates autonomously and has its own budget. Decisions of the Refugee Division can be overturned in a court of law.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's

annual report to the General Assembly.]