

## COMMITTEE AGAINST TORTURE

### V. N. I. M. v. Canada

Communication No 119/1998

12 November 2002

CAT/C/29/D/119/1998

### VIEWS

*Complainant: Mr. V. N. I. M.*

*State party concerned: Canada*

*Date of submission: 3 November 1998*

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

Meeting on 12 November 2002,

Having considered complaint No. 119/1998, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account the information made available to it by the author of the complaint and the State party,

Adopts the following decision:

#### Decision under article 22, paragraph 7, of the Convention

1.1 The complainant is Mr. V. N. I. M., a national of Honduras born in 1966. He is currently living in Canada, where he requested asylum on 27 January 1997. This request was rejected and he claims that his enforced repatriation to Honduras would be a violation by Canada of article 3 of the Convention against Torture. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the

complaint to the attention of the State party on 18 November 1998. At the same time, acting under rule 108 of its rule of procedure, the Committee requested the State party not to expel the complainant to Honduras while his complaint was being considered.

### **The facts as submitted by the complainant**

2.1 The complainant claims that, in April 1988, he was accused by the military of having planted a bomb in a building where he was arrested, being the only person on the scene at the time of the explosion on 19 April 1988. While seriously injured, he was interrogated the day after his arrest and claims that doctors amputated his arm under pressure from the military in order to make him reveal the names of his alleged accomplices. An army officer reportedly told a nurse and a doctor that removing part of his arm was a way of sending a warning to other "leftists".

2.2 Following his arrest, he was detained for three years and four months until 8 August 1991. Meanwhile, a decision by San Pedro Sula Criminal Court No. 3 of 13 January 1989 dismissed the proceedings against him for lack of evidence.<sup>1/</sup> The complainant claims that during his detention, he was treated by the military as if he was guilty of the bombing and was tortured and ill-treated many times.

2.3 With the help of the Pentecostalist Church, the author then contacted the Canadian authorities to obtain refugee status in Canada, but was informed that he had to be present himself in Canada for an application to be valid. In April 1992, he fled to Costa Rica. During this period, his brothers and sisters were constantly harassed by the military to make them say where he was hiding. In May 1992, his brother was detained illegally for five days for that purpose. He was then released, but only after having again been threatened with death. The complainant then contacted the Canadian Embassy in Costa Rica once more to obtain help, but this was refused because the political situation was delicate, on account of terrorist acts carried out by Honduran citizens during that period and the Canadian authorities could not assist him. For lack of resources, the complainant returned to Honduras in March 1993, where he hid in a small village near the border with El Salvador until 1995.

2.4 In 1995, a law was adopted in Honduras inviting all citizens to report abuses by the military. The complainant tried in vain to exercise this right by filing various complaints against the officers who had ordered, or were responsible for, the amputation of his arm.

2.5 In January 1996, the complainant tried to obtain a disability pension and, in support of his claim, he needed to submit a complete medical report. However, the hospital denied him access to his file and informed the military of his request. The author was then arrested again by members of the military in civilian clothes, who questioned him, beat him and stabbed him in the abdomen. He was seriously injured and had to go into hiding again.

2.6 The complainant also states that, after 1994, he remained in contact by mail with Radio Moscow and some Cuban friends and that, in January 1997, the Honduran authorities intercepted one of his letters, which was later used as evidence of his "subversive activities".

2.7 The complainant stayed in hiding until January 1997, when he left Honduras after having obtained a Salvadoran passport. The author arrived in Canada and immediately applied for refugee status.

2.8 After the complainant's departure, his sister was reportedly questioned and threatened with death at her place of work by members of the military, who wanted to know the complainant's whereabouts.

2.9 In Canada, the complainant was first denied his request for asylum dated 17 September 1997. Following that decision, he submitted an application for a judicial review to the Federal Court of Canada, which was rejected on 6 February 1998.

2.10 The complainant then initiated the appropriate proceedings to be included in the "Post-Determination Refugee Claimants in Canada" class (PDRCC application). This request was rejected and he again applied to the Federal Court for a judicial review. The Court also rejected that application.

2.11 On 21 October 1998, the complainant filed a request for a ministerial dispensation to be exempted from the normal application of the law on humanitarian grounds (application for humanitarian status). This request was rejected on 30 March 1999.

### **The complaint**

3.1 The complainant believes that human rights are not respected in Honduras and that impunity for the perpetrators of abuses is the rule. He claims that persons possessing information concerning illegal acts committed by the military are particularly threatened, as in his own case. He therefore considers that he may face torture, extrajudicial execution or enforced disappearance if returned to Honduras.

3.2 In support of his allegations of the risk of a violation of article 3 of the Convention, the complainant submits, inter alia, a detailed psychological report referring to the existence of "chronic post-traumatic stress" and also stating that "he fears for his physical integrity and his anxiety level is very high ... His anxiety level is so high and the tension so great that he cannot constructively use his inner resources to solve day-to-day problems". The complainant also indicates that the Canadian authorities did not attach any importance to this psychological report, stating only that it had been submitted late. In this regard, the complainant explains that, for a number of reasons, which are primarily financial and psychological, he has so far been unable to undergo such a psychological evaluation.

3.3 The complainant also submitted a copy of the decision by San Pedro Sula Criminal Court No. 3 of 13 January 1989, which found him innocent of involvement in the 19 April 1988 attack. The Court acquitted the complainant on the basis, inter alia, of the statements made by a number of witnesses who corroborated the complainant's claims.<sup>2/</sup>

3.4 The complainant indicates that he has some information about the members of the military

who tortured him, particularly a certain Major Sánchez Muñoz, and maintains that it is a well known fact that the military goes to any lengths to remove any traces of its crimes, especially by making the victims disappear.

3.5 In response to the Canadian authorities' argument that he lived without any problem in Honduras for a few years following his detention, the complainant also states that he cannot be blamed for having tried to stay in his country.

3.6 With regard to the situation in Honduras, the complainant stresses that, although a democratic regime now exists, the military is still a "sub-State". As proof of this affirmation, the complainant refers to various reports by Amnesty International and FIDH (International Federation of Human Rights). In its 1997 report, Amnesty International indicates that at least five former members of the National Investigation Department were killed in circumstances suggesting extrajudicial execution; one of them was supposed to testify about a murder reportedly committed by members of that Department in 1994. The complainant also indicates that Honduras is one of the only countries to have been censured many times by the Inter-American Court of Human Rights and refers, in particular, to the Velásquez Rodríguez case, which involved the disappearance of a student and in connection with which the impunity enjoyed by some members of the military in Honduras was sharply criticized.

#### **State party's observations on the admissibility of the complaint**

4.1 The State party transmitted its observations on the admissibility of the complaint by a note verbale dated 15 September 2000.

4.2 The State party maintains that the complainant did not exhaust all domestic remedies before submitting his complaint to the Committee. More specifically, he did not request leave to apply to the Federal Court for a judicial review of the decision not to grant him humanitarian status.

4.3 The State party recalls in this connection that all decisions taken by the Canadian authorities concerning immigration are subject to judicial review. The complainant has, moreover, availed himself of this remedy twice before, during the proceedings which he initiated to obtain refugee status.

4.4 The State party also submits that this remedy is still open to the complainant even though there is normally a time limit of 15 days for filing a request. The law in fact allows for this deadline to be extended when special grounds are adduced to justify the delay. It should also be noted that, if this possibility of seeking a remedy had been used, the law furthermore allowed for any decision of the Federal Court to be appealed to the Federal Court of Appeal and likewise to the Supreme Court of Canada.

4.5 In support of its arguments, the State party refers to the decision taken by the Committee in the R. K. v. Canada case (CAT/C/19/D/42/1996), where it had deemed that the complaint should be declared inadmissible on the ground of non-exhaustion of domestic remedies because the complainant had not made an application for a judicial review challenging the rejection of the

request for asylum and had furthermore not filed an application for humanitarian status. In the P. S. v. Canada case (CAT/C/23/D/86/1997), also cited by the State party, the Committee had in particular deemed that the fact that the complainant had, inter alia, failed to enter an application for a judicial review was contrary to the principle of the exhaustion of domestic remedies. The State party refers in addition to the Committee's decision in the L. O. v. Canada case (CAT/C/24/D/95/1997) concerning the absence of a request for humanitarian status.

4.6 Referring lastly to the case law of the European Court of Human Rights, the State party argues that a judicial review is an effective remedy within the meaning of article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that, even in cases where the complainant might be subjected to inhuman or degrading treatment if returned to his country, he must observe the formalities and time limits of the domestic procedures before turning to an international body (Bahaddar v. Netherlands, No. 145/1996/764/965, 19 February 1998).

4.7 The State party concludes that, for these various reasons, the Committee should declare the present complaint inadmissible on the ground of non-exhaustion of domestic remedies.

### **Comments by the complainant**

5.1 In a letter dated 27 October 2000, the complainant submitted his comments regarding the State party's observations on the admissibility of the complaint.

5.2 The complainant maintains first of all that he availed himself of the opportunity to apply for a judicial review of the decision by which he was denied refugee status, that being the last remedy in all of the proceedings which he had pursued, and had addressed the very substance of the claims made in support of his request for asylum. The subsequent appeals and remedies had concerned only matters of procedure.

5.3 The complainant also states that his application for a judicial review of the decision rejecting the PDRCC application was based on the same arguments as that which could have been made against the decision on his humanitarian status and points out that the two proceedings were concurrent. He therefore considers that applying for a judicial review of the decision on his humanitarian status would have made little sense because the Federal Court would certainly not have decided otherwise than in the other proceeding.

5.4 The procedure to include a person in the "Post-Determination Refugee Claimants in Canada" (PDRCC) class and the request for humanitarian status are not, according to the complainant, valid remedies in international law because they are entirely discretionary. Likewise, judicial reviews made where applicable by the Federal Court are also not valid under international law because they cannot give rise to a final decision and the case must be referred back to the administrative authorities for a new decision. Furthermore, following its consistent practice, the Federal Court deals not with questions of fact, which are to be determined entirely at the discretion of the administrative authorities, but only with the observance of such principles as must guide the administrative proceedings.

5.5 The complainant refers in this connection to the reasons why domestic remedies must be exhausted under article 22 of the Convention. He submits that the domestic remedies to be exhausted cannot be incapable of offering any chance of success. This applies, according to the complainant, to the judicial review in question, since the practice whereby the review deals only with matters of procedure and not with the facts or the law is particularly well established in the Federal Court of Canada. An application for a judicial review to show that a person runs a real risk of being tortured in the country to which the authorities wish to return him therefore has no chance of success.

5.6 According to the complainant, the remedies to be exhausted are those which make it possible to establish, where appropriate, the violation of the right invoked. Thus, the application for asylum and the ensuing application for a judicial review, notwithstanding the doubt as to its effectiveness, as discussed above, are remedies that, in the complainant's view, have to be exhausted. By contrast, the complainant maintains that the application for humanitarian status and any ensuing application for a judicial review are not remedies which must be exhausted because, even if, in some cases, it is justified to make use of extraordinary remedies, this cannot be the rule for an entirely discretionary remedy such as the application for humanitarian status. The complainant refers in this connection to C. Amerasinghe (Local Remedies in International Law, p. 63), according to whom it is not necessary to make use of an extraordinary remedy if it is only discretionary and non-judicial, as in the case of those whose purpose is to obtain a favour and not to claim a right. Now, it has been established, and is not contested by the State party, that the purpose of the application for humanitarian status is not to secure a right, but, rather, to obtain a favour from the Canadian State; this point has, moreover, been emphasized on many occasions by the Federal Court.

5.7 Applications for a judicial review of discretionary decisions like those following a request for humanitarian status are no more effective, even when the Federal Court examines the merits of the case. The complainant illustrates this contention with reference to a similar case, where the decision on an application for humanitarian status had been the subject of a judicial review in which the Federal Court had found that the person concerned was indeed at risk of being subjected to torture or inhuman or degrading treatment. Being unable to take a final decision in such a proceeding, however, the Federal Court had had to refer the case back to the administrative authority, which took a new decision that was contrary to the Federal Court's findings and refused to grant humanitarian status. The complainant considers that the fiction of the judicial review is thereby demonstrated all the more clearly.

5.8 Deeming that he has shown the inadequacy and ineffectiveness of the remedies which he is reproached with not having employed, the complainant then submits to the Committee his contention that the State party has not assumed the burden of proof necessary for it to establish that effective domestic remedies are still available. He refers in this connection to the case law of the Inter-American Court of Human Rights in the Velásquez Rodríguez v. Honduras case, according to which it is for the State which contests the exhaustion of all remedies to prove that there are remedies still to be exhausted and that those remedies are effective. The complainant, therefore suggests that the Inter-American Court of Human Rights has transferred the burden of proof of the exhaustion of all remedies from the complainant to the State. He observes that this is also the case law applied by the Human Rights Committee, which requests the State, in addition to giving details

of the remedies available, to provide evidence that there is a reasonable chance of those remedies being effective. In the complainant's view, that should also be the approach of the Committee against Torture.

5.9 After making a more general criticism of the State party's regulations concerning refugees and of the procedures relating thereto, the complainant submits that he has offered proof of his rights and of the risks facing him if returned to Honduras.

5.10 In conclusion, the complainant considers that the rule of the exhaustion of domestic remedies should be interpreted with reference to the objectives of the Convention against Torture. In this connection, he emphasizes that this principle is furthermore applied by the European Court of Human Rights, which has expressly stated that the European Convention on Human Rights should be interpreted with reference to its ultimate objective of ensuring the effective protection of human rights.

5.11 In a letter dated 18 April 2001, the complainant indicates that on 1 November 2000 he finally decided to submit an application to the Federal Court for a judicial review of the decision not to grant him humanitarian status. However, the court rejected the application for a judicial review on 2 March 2001. Therefore, while maintaining the arguments he set forth previously concerning the principle of the exhaustion of domestic remedies, the complainant considers that the arguments originally put forward by the State party are no longer an obstacle to the admissibility of his complaint.

### **The Committee's decision on admissibility**

6.1 At its twenty-sixth session from 30 April to 18 May 2001, the Committee considered the admissibility of the complaint. It thus ascertained that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement and noted that the complaint was not an abuse of the right to file a complaint and is not incompatible with the provisions of the Convention.

6.2 With regard to the admissibility criterion of the exhaustion of domestic remedies, as provided for in article 22, paragraph 5 (b), the Committee noted that the proceedings instituted by the complainant had gone on for a period of over four years and considered that any further extension of that period would in any case have been unreasonable. Consequently, the Committee declared the complaint admissible.

### **State party's observations on the merits**

7.1 In its note verbale of 15 September 2000, the State party transmitted its observations on the merits of the complaint together with those on admissibility.

7.2 The State party recalls, first of all, that it is up to the complainant to prove that he runs the risk of being tortured if he is returned to his country. Referring to the jurisprudence of the European Court of Human Rights and the work entitled United Nations Convention against Torture: A

Handbook, the State party also recalls that an act of torture involves severe suffering, since intense pain is the main feature that distinguishes torture from other inhuman treatment. Referring to the forward-looking nature of article 3 of the Convention, the State party stresses that the fact that the person was tortured in the past does not necessarily mean that he may be subjected to similar treatment in future. With regard to the Committee's jurisprudence, the State party also explains that there must be a foreseeable, real, present and personal risk of torture, thereby implying, *inter alia*, that it is not enough for a consistent pattern of gross, flagrant or mass violations of human rights to exist in the country of origin. On the basis of several of the Committee's earlier decisions, the State party gives a non-exhaustive list of relevant indicators for the purposes of the implementation of article 3 and, in particular, the existence of independent medical and other evidence in support of the complainant's allegations, possible changes in the country's human rights situation, the existence of political activities by the complainant, proof of his credibility and factual errors in what he says.

7.3 In the present case, the State party maintains that the complainant has not established that there was a foreseeable, real and personal risk that he would be subjected to torture because he is not credible, there is no evidence that he is wanted by the Honduran authorities and he has not established that there is a pattern of mass violations of human rights in Honduras.

7.4 The State party contests the complainant's credibility, particularly because he gave different explanations of the reasons why he was in the place where the explosion occurred. The decision to release him stated that he had gone there to make some telephone calls, whereas he told the Canadian authorities that he had gone there to find some documents for a university examination, and, according to a Honduran newspaper, he went into the building because he had seen a light inside. The complainant's claims that the amputation of his arm and the stomach operation he underwent were unnecessary are also not credible because the above-mentioned decision indicates that he was right near the place where the explosion occurred and parts of a hand were found there. The complainant himself stated that he had been blinded by a flash of light and that his eyes and ears were bleeding, that he felt that his arm had been injured and that he had been able to crawl out onto a balcony to call for help. The State party therefore considers that, in view of these elements, it is more than likely that the amputation of his arm was necessary, as was the stomach operation to remove a foreign body. The complainant also contradicted himself about his marital status, having stated in the information file that he was single and had no children, whereas, in the visa application he made in 1995, he had said that he had a wife and two children. He also contradicted himself about a job he held from 1993 to 1995. In addition, he did not give any credible explanations of these contradictions and inconsistencies, something which the psychological report can also not explain.

7.5 The State party also considers that, objectively, the complainant has never been an active opponent or member of an opposition group, that there is no evidence that he is wanted by the Honduran authorities, since he was able to obtain an exit passport in 1997 and the members of his family have never had any problems with the authorities, apart from his brother's detention for five days, that he lived in his country without any problems from 1993 to 1995 and that he left his country four times and returned to it voluntarily each time. He also did not apply for refugee status in Guatemala or Costa Rica, which have both signed the Geneva Convention relating to the Status



of Refugees.

7.6 The State party maintains that there is little documentary evidence to support the complainant's fear resulting from his denunciation of abuses of power by the army because there are not only very few disappearances at the present time - and those that do exist primarily involve human rights advocates and criminals - but several members of the military have also been prosecuted for abuses of power. The State party argues that Honduras is not a country where there is a consistent pattern of gross human rights violations and that its situation has changed substantively since the 1980s. In support of this assertion, the State party emphasizes, for example, that, according to a report by the United Nations Development Programme, the number of cases of torture in Honduras dropped from 156 in 1991 to 7 in 1996. The 1999 report by the Special Rapporteur of the Commission on Human Rights on torture does not refer to any case of torture and, for the period prior to 1999, the State party stresses that the Government of Honduras has always replied to the Special Rapporteur's questions. A number of urgent appeals relating to executions were made by the Special Rapporteur on extrajudicial, summary or arbitrary executions for the period from 1997 to 1999. The reports of the Working Group on Arbitrary Detention for 1997, 1998 and 1999 do not refer to any case of torture involving Honduras. The reports of the Working Group on Enforced or Involuntary Disappearances show that most cases of disappearances took place between 1981 and 1984 and the 1998 report refers to only one case of a disappearance involving a Jesuit priest. As far as the other documentary sources are concerned, the State party indicates that, in 1999, Amnesty International referred to violations of the human rights of human rights advocates, that the 1999 Human Rights Watch report does not deal with Honduras and that the United States State Department "Country Reports on Human Rights Practices for 1999" states that human rights were generally respected in Honduras during the period under review, although serious problems continue to exist with regard to some allegations of extrajudicial executions by members of the security forces. Lastly, with regard to the FIDH document submitted by the complainant, the State party stresses that it refers to human rights advocates, something which the complainant cannot claim to be. In conclusion, the State party maintains that, although this information does reflect some definite concerns, there is no consistent pattern of gross, flagrant or mass violations of human rights in Honduras and that the documentary evidence does not support the allegation of the danger of torture made by the complainant, who has never opposed the Government and never been part of an organization that does.

7.7 The State party draws the Committee's attention to the fact that this type of evaluation is entrusted at the internal level to highly specialized and experienced bodies and that the latest evaluation is subject to monitoring by the Federal Court of Canada. Referring to the Committee's general observation on article 3, as well as the Committee's jurisprudence, the State party expresses the view that it is not up to the Committee to substitute its own evaluation of the facts for that of the authorities, since the complainant's case does not reveal any blatant errors, abuse of procedure or any other irregularity and the standard of article 3 has been applied by the Canadian authorities in the evaluation of the present case.

### **Issues and proceedings before the Committee**

8.1 The Committee must decide whether the claimant's return to Honduras would be a breach of

the State party's obligation under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

8.2 As provided in article 3, paragraph 1, the Committee must decide whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if he were returned to Honduras. In order to take this decision, the Committee must take into account all relevant considerations, in accordance with article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the purpose of this analysis is to determine whether the person concerned would personally be in danger of being subjected to torture in the country to which he would be returned. It follows that the existence in a country of a consistent pattern of gross, flagrant or mass violations of human rights is not in itself a sufficient reason for establishing that a particular person would be in danger of being subjected to torture if he were returned to that country. There must be other reasons to suggest that the person concerned would personally be in danger, but the absence of a consistent pattern of flagrant violations of human rights does not mean that a person cannot be subjected to torture in his own particular situation.

8.3 The Committee draws attention to its General Comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

8.4 In the present case, the Committee takes note of the State party's observations that the claimant's statements about the risks of torture are not credible and not corroborated by objective evidence.

8.5 On the basis of the information submitted to it, the Committee considers that the complainant has not demonstrated that he is an opponent of the regime who is wanted for terrorist activities. The Committee notes that he was acquitted of responsibility for the 1988 explosion and that he has not been accused of other opposition activities since then. He has thus not shown that there is a personal risk of being subjected to torture if he returns to Honduras. Accordingly, the Committee takes the view that it is not necessary to examine the general human rights situation in Honduras and that the claimant has not demonstrated that there are substantial grounds, in accordance with article 3 of the Convention, for believing that he would be in danger of being subjected to torture if he returned to his country of origin.

9. Consequently, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the return of the complainant to Honduras would not constitute a breach of article 3 of the Convention.

## **Notes**

1/ He claims that he was not released on the day of the decision because of an appeal filed by the opposing party.

2/ The complainant also provided a statement from the Reverend Leo Frade, Anglican Bishop of Honduras, who, having taken into consideration various aspects of the general situation in Honduras and of the complainant's personal situation, confirmed the author's fears.