

COMMITTEE AGAINST TORTURE

P. Q. L. v. Canada

Communication No 57/1996

17 November 1997

CAT/C/19/D/57/1996

VIEWS

Submitted by: P. Q. L. (name deleted) (represented by counsel)

Alleged victim: The author

State party concerned: Canada

Date of communication: 10 October 1996

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

Meeting on 17 November 1997,

Having concluded its consideration of communication No. 57/1996, 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 all information made available to it by the author of the communication, his representative and the State party,

Adopts the following:

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is P. Q. L., a Chinese national currently under an order of deportation issued by the Canadian immigration authorities. He alleges that his deportation to China would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

The facts as submitted by the author

2.1 P. Q. L. was born in 1974 in Viet Nam. His mother is Vietnamese and his father Chinese. He was three years old when his family fled from the Vietnamese civil war to China. They left China in 1988, and the applicant has been living in Canada with his family since then.

2.2 Since 1990, P. Q. L. has been convicted three times for robbery and sentenced to terms of three months', six months', and, finally, three years' imprisonment. Immigration Canada issued a deportation order on 9 May 1995, stating that P. Q. L. was a danger to public order. He should have been released on 26 April 1996, after serving his sentence of three years' imprisonment, but the immigration authorities ordered that he be kept in jail while awaiting expulsion.

2.3 The author appealed to the Immigration Commission against the deportation order, but the appeal was dismissed on 9 August 1995. He then asked Immigration Canada to review his case, but on 6 May 1996 the Ministry of Immigration concluded that there was no risk of him being subject to torture or inhuman treatment by the Chinese authorities upon return to China. With this, it is submitted, all domestic remedies have been exhausted.

The complaint

3.1 The applicant argues that his life would be in danger should he return to China. He states that there are substantial grounds for fearing that he could be imprisoned and ill-treated by the Chinese authorities because of his past convictions in Canada. He refers to the Chinese Criminal Code, article 7 of which states that any crime outside China's territory is punishable, even if it has already been tried in the foreign country concerned. He further states that acts of robbery are punished by disproportionate sentences such as 10 years or life imprisonment and even the death penalty.

3.2 P. Q. L. also states that he fears persecution by the Chinese authorities because of his Vietnamese origins. He states that minorities' rights are not respected in China.

3.3 The author refers to the existence of systematic violations of human rights in China. In support of that assertion, he submits reports from Amnesty International referring, in particular, to arbitrary imprisonment, the use of torture and ill-treatment of prisoners and the death penalty in China, as well as of reports from Human Rights Watch/Asia and other institutions and to newspaper articles.

3.4 He further states that China is not party to any treaty protecting human rights which would permit him to address any United Nations body, and that it would not, therefore, be possible for him to obtain any protection if his rights were violated in China.

3.5 Finally, the applicant states that China is a completely unknown country to him because he was very young when he came to Canada. The parting caused by the deportation would cause irreparable harm to him and his family. The author produces affidavits from members of his family in support of this allegation.

State party's observations

4. On 4 November 1996, the Committee, through its Special Rapporteur, transmitted the communication to the State party for comments and requested it not to expel the author while his communication was under consideration by the Committee.

5.1 By a note dated 14 March 1997, the State party challenges the admissibility of the communication but also addresses the merits of the case. It requests the Committee, should it not find the communication inadmissible, to examine the communication on its merits as soon as possible. It states that the author has not been expelled.

5.2 The State party notes that the communication dwells at length on the disturbing human rights situation in China but does not demonstrate any link between the author's personal situation and the general situation in that country. It recalls that the Committee's case law has established that a disturbing situation of human rights in a country does not in itself constitute sufficient grounds for believing that the author of the communication would be personally at risk of being subjected to torture.

5.3 The State party emphasizes that neither in his communication to the Committee against Torture nor in his submissions to the Canadian authorities has the author claimed to have been tortured, arrested, imprisoned or subjected to ill-treatment in China. He does not claim either to have participated in political activities or to be known to or sought by the Chinese authorities.

5.4 The State party notes that the author says he is afraid that, if he is returned to China, he will be arrested and sentenced to life imprisonment or to death, or that he will be given a disproportionate sentence or subjected to inhuman treatment under article 7 of the Chinese Criminal Code, which deals with the punishment of crimes committed outside China's territory. First of all, the State party notes that protection under article 3 of the Convention is not explicitly provided in cases of cruel, inhuman or degrading treatment, defined by article 16 of the Convention. According to the State party, therefore, article 3 applies only to the most serious forms of cruel, inhuman or degrading treatment, in other words, situations which threaten human dignity. The State party also recalls that the Convention excludes from the definition of torture "pain or suffering arising only from, inherent in or incidental to lawful sanctions". Therefore, imprisonment and the normal conditions of detention do not as such constitute torture as defined by the Convention and interpreted by the Committee. Furthermore, the State party explains that information obtained from the Canadian Embassy in China suggests that the Chinese authorities will not retry a person for offences such as those committed by the author in Canada. In any case, the State party notes that article 7 of the Chinese Criminal Code stipulates that the penalty will be either suspended or mitigated if the person in question has already been punished in the country where the criminal act was committed. Since the author has been punished in Canada for his offences, punishment in China (if any) would be mitigated. Moreover, according to article 150 of the Chinese Criminal Code, theft accompanied by threats, the use of force or similar measures is punishable by 3 to 10 years' imprisonment. According to the State party, sentences of life imprisonment or the death penalty may be imposed only where there are aggravating circumstances, if the victim is seriously injured or killed, none of which apply to the case in question. The State party therefore maintains that there is no objective proof that offences such as those committed by the author of the communication would entail the death penalty

or life imprisonment in China. The State also points out that it has not informed the Chinese authorities of the author's convictions.

5.5 The State party notes that the documentary evidence annexed to the author's arguments deals, not with the application of article 7 of the Chinese Criminal Code, but with conditions of imprisonment in China. It does not support a prima facie conclusion that the author would be accused, sentenced or imprisoned.

5.6 The State party notes that the allegations submitted by the author to the Ministry of Immigration are essentially the same as those adduced in support of his communication to the Committee. It explains that the potential danger to the author, should he return to China, was examined by a specially trained official of the Ministry of Immigration, who concluded that the author's particular circumstances did not constitute grounds for believing that he would be personally at risk of being subjected to inhuman treatment or disproportionate sentences or of being executed in China. The Canadian Government refers to the case law of the Human Rights Committee, according to which "it is generally for domestic courts to assess facts and evidence in a particular case, and for appellate courts of States parties to review the assessment of such evidence by the lower courts. It is not for the Committee to question the evaluation of the evidence by the domestic courts unless this evaluation was manifestly arbitrary or amounted to a denial of justice". *Valentijn v. France*, Communication No. 584/1994, para. 5.3, decision dated 22 July 1996. The State party maintains that no proof of bad faith, manifest error or denial of justice, that would justify the intervention of the Committee, has been established in the case in question.

5.7 In conclusion, the Canadian Government asserts that the communication should be rejected because it does not establish substantial grounds, prima facie and on the merits, for believing that the author's expulsion to China would constitute a violation of article 3 of the Convention. It argues that the mere demonstration of the situation of human rights in a country is not in itself sufficient to establish such substantial grounds. According to the State party, the author's fears that he would be imprisoned or tortured under article 7 of the Chinese Criminal Codes is not substantiated by the evidence submitted to the Committee. The State party submits that this evidence does not provide substantial grounds for believing that article 7 of the Chinese Criminal Code would be applied in his case or that it would be applied in the manner he alleges and with the consequences he suggests. The State party asks the Committee to reject the communication because it does not establish the minimum basis necessary to ensure compatibility with article 22 of the Convention or, alternatively, because it is without merit.

Comments by the author

6.1 Counsel for the author alleges that the State party has failed to evaluate the author's arguments in an objective and equitable way. According to counsel, international non-governmental organizations have confirmed the existence of arbitrary detention, ill-treatment of prisoners and regular use of torture since 1993.

6.2 Counsel submits that the author would be automatically imprisoned, retried and tortured under the Criminal Code of the Republic of China. Furthermore, since China is not a party to article 22 of the Convention, the author would not have recourse to the Committee as a means of obtaining the

necessary protection. Counsel refers to the case of a Chinese national, expelled by the United States after refusal of his application for political refugee status, who was fined on his return to China.

6.3 Counsel recalls that, in its observations on the occasion of the presentation of the report of China, the Committee had expressed concern about: (a) the failure to incorporate the crime of torture into the domestic legal system, in terms consistent with the definition contained in article 1 of the Convention; (b) the assertions, drawn to the attention of the Committee by non-governmental organizations, that torture occurred in China in police stations and prisons; and (c) the failure to provide access to legal counsel to persons at the earliest time of their contact with the authorities and the allegations by some non-governmental organizations that the incommunicado detention is still prevalent in China. Counsel concludes that the author has thus sufficient reason to fear for his life if he is returned to China. She maintains that, even if the facts submitted to the Committee may give rise to certain doubts, the Committee's role is to ensure the safety of the individual concerned.

6.4 Counsel submits that, for the following reasons, the author would be personally at risk if he were returned to China: (a) the author had been deported from Viet Nam to China when he was three years old; (b) the Chinese authorities are obviously aware of the reasons why Canada has requested a travel document in the author's name; (c) the Chinese authorities are also aware of the author's conviction; (d) the author will be turned over directly to the Chinese authorities; (e) under article 7 of the Chinese Criminal Code, another sentence will be imposed; (f) article 150 of the Code states that the sentence may include the death penalty; and (g) torture is common practice in police stations and prisons in China.

6.5 Counsel argues that the author's deportation under current circumstances would violate article 3 of the Convention and that its foreseeable consequence would be to place him in genuine danger of torture.

6.6 In a subsequent letter, counsel denies that the author is a danger to the public and argues that the Canadian authorities' decision on that matter was arbitrary, unreasonable and not supported by any evidence. She also maintains that the Ministry of Immigration did not give the author's file completely independent consideration and that the legislation applied was very recent.

6.7 Counsel notes that the author has been living with his family since 10 February 1997 and submits documents attesting to his rehabilitation and reintegration into society.

Additional observations by the State party

7.1 The State party maintains that the counsel's allegations that the author would be automatically imprisoned and re-sentenced are gratuitous. According to the State party, there is nothing to suggest that the Chinese authorities are aware of the offence committed by the author and there is no evidence to support the application and interpretation of article 7 of the Chinese Criminal Code suggested by counsel. The State party maintains that the author has failed to establish the existence of substantial grounds for believing that he would be imprisoned and subjected to torture if he returned to China.

7.2 With regard to the question of whether the author constitutes a danger to the public, the State party points out that this is not the issue before the Committee.

The Committee's admissibility decision

8. The Committee notes with satisfaction the State party's statement that, in accordance with the Committee's request, the author has not been expelled.

9. Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do by article 22, paragraph 5, subparagraph (a), of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement. It has noted that all domestic remedies have been exhausted and that it is not, therefore, precluded from considering the communication under article 22, paragraph 5, subparagraph (b). The Committee has found that there is no other obstacle to the admissibility of the communication and has thus proceeded to consider the case on its merits.

Consideration of the case on its merits

10.1 The Committee has considered the communication in the light of all the information made available to it by the parties, in accordance with article 22, paragraph 4, of the Convention.

10.2 The issue before the Committee is whether or not the forced return of the author to China would violate the obligation of Canada under article 3 of the Convention not to expel a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

10.3 In reaching its decision, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

10.4 The Committee notes that the author claims the protection of article 3 on the grounds that he is in danger of being arrested and retried for the offences which he committed in Canada. However, he does not claim that he has participated in political activities in China, nor that he belongs to a political, professional or social group targeted by the authorities for repression or torture.

10.5 The Committee adds that, according to the information in its possession, there is no indication

that the Chinese authorities intend to imprison the author because of his Canadian convictions. On the contrary, the State party has stated that judicial proceedings are not undertaken in such cases. Moreover, the Committee considers that, even if it were certain that the author would be arrested on his return to China because of his prior convictions, the mere fact that he would be arrested and retried would not constitute substantial grounds for believing that he would be in danger of being subjected to torture.

10.6 Furthermore, the Committee refers to the documents submitted by the author, in support of his request for repeal of the decision to revoke his permanent resident status, which allegedly provide proof of his rehabilitation and reintegration into Canadian society. The Committee notes that article 3 of the Convention authorizes it to determine whether return would expose a person to the danger of being subjected to torture but that it is not competent to determine whether or not the author is entitled to a residence permit under a country's domestic legislation.

10.7 The Committee is aware of the seriousness of the human rights situation in China, but, on the basis of the above, considers that the author has not substantiated his claim that he will be personally at risk of being subject to torture if he is returned to China.

11. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the situation as established by the Committee does not reveal a breach of article 3 of the Convention.

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