

## COMMITTEE AGAINST TORTURE

### Akhimien v. Canada

Communication No 67/1997

17 November 1998

CAT/C/21/D/67/1997

### ADMISSIBILITY

*Submitted by: E.O. Akhidenor, E. Ainabe, R. Akhidenor, J. Akhidenor, K. Akhidenor and W. Akhidenor [represented by counsel]*

*Alleged victim: Michael Osaretin Akhimien*

*State party: Canada*

*Date of communication: 5 December 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 1998,

Adopts the following:

#### **Decision on admissibility**

1. The authors of the communication are Ms. Elizabeth Omoaluse Akhidenor, Mr. Ezekiel Ainabe, Mr. Richard Akhidenor, Ms. Jenniffer Akhidenor, Ms. Kingsley Akhidenor and Mr. William Akhidenor, citizens of Nigeria and surviving relatives and dependants of Mr. Michael Osaretin Akhimien. The authors claim that in connection with the death in detention of Mr. Akhimien and the subsequent investigation into the causes of his death, Canada has acted in violation of articles 2, 10, 11, 12, 13, 14 and 16 of the Convention. The authors are represented by counsel.

#### Facts as submitted by the authors

2.1 Mr. Akhimien was arrested on 28 October 1995, after having filed an application for

asylum in Canada. He was held at the Canadian Immigration Detention Centre of Niagara Falls until 30 October 1995 when he was transferred to the Canadian Immigration Holding Centre Celebrity Inn in Mississauga, Ontario. Mr. Akhimien remained at the Celebrity Inn until his death, caused by pneumonia and/or untreated diabetes, on 17 December 1995.

2.2 According to counsel, on 6 December 1995, Mr. Akhimien had complained to other detainees at the Celebrity Inn that he was experiencing health problems, including blurred vision. On the same date, Mr. Akhimien made a written request to see the Celebrity Inn's medical doctor, listing his symptoms as blurred vision and headaches. The following day, on 7 December 1995, Mr. Akhimien consulted with the medical doctor who specifically ruled out diabetes as the cause of his failing health. No laboratory tests were performed.

2.3 On 13 December 1995 he made a new request to see the doctor and asked for a blood test. He added to his previously mentioned symptoms that he was experiencing dizziness, loss of appetite, lack of strength, a bitter taste in his mouth, lack of saliva and nausea.

2.4 On 13 December 1995, subsequent to his new request to see the medical doctor, Mr. Akhimien was put in solitary confinement. Counsel states that he was put in solitary confinement because he was perceived to be a troublemaker, constantly complaining about living conditions in the Celebrity Inn. He also states that Mr. Akhimien had argued with a guard who had refused him water from the kitchen and that his thirst was a symptom of diabetes. Counsel further states that the room where Mr. Akhimien was held in confinement was located only two doors away from the doctor's office and that the room was known to be very cold in wintertime. Mr. Akhimien remained in solitary confinement until his death.

2.5 On 14 December 1995, the doctor was at the Celebrity Inn, but did not examine Mr. Akhimien. On 15 December 1995, Mr. Akhimien consulted with a nurse who noted his complaints and advised him to consult with the doctor on 18 December 1995. According to counsel, the following day Mr. Akhimien requested medical assistance from the guards who ignored him, assuming that he was faking his condition. On 17 December 1995, the guards called the security supervisor of the Celebrity Inn as well as a nurse to the room in which Mr. Akhimien was held. Counsel states that he showed signs and symptoms associated with untreated diabetes. Mr. Akhimien's health condition was thereafter monitored every 30 minutes for several hours before an ambulance was eventually called. He was pronounced dead on arrival at the hospital. The autopsy identified the cause as either pneumonia or diabetic ketoacidosis arising from untreated diabetes.

2.6 Pursuant to the Coroners Act of Ontario, a coroner's inquest was held between 7 May and 6 June 1996. The jury concluded that Mr. Akhimien's death was caused by diabetic ketoacidosis and that he had died from natural causes. On 5 June 1996 an application was filed by the Nigerian Canadian Association for judicial review of the coroner's inquest, on the grounds that the inquest had been conducted in a biased and discriminatory manner. Counsel further submits that the family made attempts to file a complaint before the Canadian Human Rights Commission, but that the complaint could not be examined since the deceased had not been lawfully residing in Canada. Counsel also submits that the available domestic remedies do not comply with the requirement of the Convention that a

prompt and impartial investigation of any occurrence of torture must be undertaken. The delays inherent in a normal Canadian litigation process are not compatible with the State party's obligations under the Convention.

2.7 Counsel further draws the attention of the Committee to the fact that on at least two occasions, 30 November 1995 and 8 December 1995, Mr. Akhimien had written to the Canadian immigration authorities to withdraw his application for refugee status and requested to be released from detention.

### The complaint

3.1 Counsel claims that the treatment to which Mr. Akhimien was subjected while in detention constitutes cruel, inhuman or degrading treatment and that the State party has acted in violation of article 16 of the Convention. It is argued that Mr. Akhimien's death was preventable, that the acts and omissions of the employees of the immigration detention centre were the cause of his death and that the Government of Canada has the final responsibility for the management of detention centres and therefore bears responsibility for the death of Mr. Akhimien.

3.2 It is further stated that the conditions and rules prevailing in Canadian immigration detention centres do not comply with the standards established by the Convention, in particular by articles 10 and 11.

3.3 Finally, counsel claims that the failure of the State party to ensure a prompt and impartial investigation of allegations of torture in connection with the death of Mr. Akhimien, as well as the failure to ensure that the family of the deceased received adequate compensation, constitute violations of articles 12, 13 and 14 of the Convention.

### State party's observations

4.1 The State party recalls that pursuant to rule 107 of the rules of procedure of the Committee, the author of the communication must justify his acting on the victim's behalf. It maintains that it is unclear from the submission who the counsel represents or whether counsel has a mandate from Mr. Akhimien's family and dependants. The State party submits that the Committee cannot examine this communication before counsel produces a document indicating the persons who mandated him to act on their behalf.

4.2 The State party submits that the communication be considered inadmissible given that the authors have not exhausted all effective, available domestic remedies as prescribed in article 22, paragraph 5 (b), of the Convention. The State party recalls that in the present case a coroner's inquest was conducted into the death of Mr. Akhimien, pursuant to the Coroner's Act of Ontario. It is further recalled that the authors of the communication allege that the coroner's inquest was not conducted impartially and objectively and that the rules of evidence were not respected during the process. The State party submits that if any error was committed during the inquest, as alleged by the authors of the communication, a domestic remedy exists, in the form of a judicial review by a Canadian court. The State party further

submits that on 5 June 1996 the Nigerian Canadian Association filed an application for judicial review before the Ontario Divisional Court, seeking to quash certain rulings made by the coroner during the inquest or, alternatively, to quash the entire inquest proceedings. At the time of the State party's submission, the application for judicial review was still pending. The State party submits that domestic remedies have not been exhausted, either because the authors are the parties in the pending application for judicial review, or because the authors could have brought a similar application before a domestic court.

4.3 In response to the allegations of the authors that the available domestic remedies do not comply with the requirement of the Convention that a prompt and impartial investigation of any occurrence of torture be undertaken, the State party draws the attention of the Committee to the fact that the coroner's inquiry into the death of Mr. Akhimien was held within five months after the death and that the allegation is therefore unfounded. The State party further submits that the authors' arguments must be disregarded since the authors do not substantiate or explain in what manner the existing domestic remedies are unreasonably prolonged or in what way the authors would be prejudiced.

4.4 The State party also submits that its Criminal Code as amended prohibits acts of torture committed by officials, such as peace officers, public officers or persons acting at the instigation of, or with the consent or acquiescence of such persons. Furthermore, the Criminal Code prohibits such acts as assault, both with or without bodily harm, causing bodily harm with intent to wound or to endanger life, and intimidation. The authors of the communication could thus have asked that criminal charges be brought against the individuals who allegedly inflicted an act of torture on Mr. Akhimien, but no such action has been taken.

4.5 As to the question of compensation, the State party further states that the Crown Liability and Proceedings Act and the common law permit persons to sue public officers and/or the Government. The Government is responsible for any liability, compensation or damages assessed on account of the improper and unreasonable acts of its employees. The State party underlines that redress is available in the civil courts in respect of acts amounting to the tort of negligence, assault or battery. Such redress is available notwithstanding that the same acts may constitute a criminal offence and whether the accused was convicted or acquitted at trial.

4.6 The State party recalls that on 24 September 1996 the authors initiated an action before the Ontario Divisional Court to sue the Government, pursuant to the common law tort of negligence, for wrongful death and for violations of the Canadian Charter of Rights and Freedoms, section 12 of which states that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. The case is still pending and the State party maintains that the authors have not exhausted domestic remedies in this respect.

4.7 According to the State party, article 14 of the Convention does not require a particular or specific legal qualification that an act constitutes an "act of torture" but requires that the legal system allows for compensation to be paid to the dependants of the victim. If the Government's liability with respect to the death of Mr. Akhimien is established, a fair and

equitable compensation may be awarded to his dependants. The State party submits that, consequently, provision has been made in its domestic law for victims of torture to seek redress and fair and adequate compensation. It is the submission of the State party that the redress provided for in national law satisfies the requirements of article 14 of the Convention.

4.8 Compensation can also be sought from the Criminal Injuries Compensation Board, on the condition that criminal charges have been brought under the Criminal Code and that this has resulted in the conviction of certain individuals for having committed an act of torture. Compensation which may be awarded includes expenses incurred as a result of the injury or death, pecuniary loss, and compensation for pain and suffering. An application to the Board does not prevent a person from recovering damages by way of civil proceedings. The State party reiterates that the authors have not brought any criminal charges under the Criminal Code and that a redress before the Board is at present therefore not possible.

4.9 Finally, the State party submits that the communication should be considered inadmissible as the authors have not substantiated their allegations against the Government. In particular, the State party states that the authors have failed to establish that the alleged acts could be characterized as "torture" as defined in article 1 of the Convention or as "cruel, inhuman or degrading treatment or punishment" as defined in article 16. The essence of the communication is that the medical care at the immigration detention centre was inadequate. The communication alleges that Mr. Akhimien did not receive or was denied adequate medical care in that the medical staff did not diagnose that he had a diabetic condition of which he was not aware. The State party submits that the negligence alleged does not constitute torture or cruel, inhuman or degrading treatment or punishment. Even though, in some cases, omissions could be considered torture or inhuman treatment, what is alleged is negligence in the provision of medical care to a person already suffering from a disease unknown to him. The State party submits that this cannot be considered an "act" of torture or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention and that the Convention was not intended to nor does it apply to such circumstances.

#### Counsel's comments

5.1 In his reply to the State party's submission, counsel states that the purpose of the exhaustion of domestic remedies rule is not to ensure that domestic remedies are not superseded by an international authority, but rather to give the national authority the opportunity to remedy the wrong suffered by the victim. Further, the remedies must not only be theoretically available, but there must also be a realistic chance that the redress would be effective.

5.2 Counsel submits that subsection 31 (2) of the Coroners Act explicitly forbids the inquest jury from making "any finding of legal responsibility" or from expressing "any conclusion of law" regarding the circumstances that are the subject of the inquest. Consequently, it is erroneous to say that the coroner's inquest held into the circumstances of the death of the victim in the present case obviates the necessity of an independent review. Further, counsel

submits that the authors were not parties to the application for judicial review made by the Nigerian Canadian Association to the Ontario Divisional Court. It should be noted that the family and dependants of the deceased lacked the necessary resources to pursue and bring to timely conclusion an application for judicial review. If the authors would at present file for a judicial review it would be dismissed for delay.

5.3 Counsel states that theoretically and practically, criminal prosecutions are strictly matters between the State and the accused. The complainant is not a party to such actions nor can the victim exercise any control over the prosecution process. The possibility of filing a complaint with the consequence that the culprits might be prosecuted and/or convicted cannot be considered a remedy.

5.4 With regard to domestic remedies for compensation, counsel confirms that the authors have filed an application under the Crown Liability and Proceedings Act and that the case is pending at present. However, counsel adds that although the action is currently pending before a Canadian court, the action has been stalled and the case has not progressed since November 1996 due to circumstances not attributable to the authors.

5.5 Counsel further submits that the State party's reference to the Criminal Injuries Compensation Board as a domestic remedy is purely speculative, since an application cannot be filed until after prosecution, trial and conviction of the culprit.

5.6 Counsel explains that he submits the communication on behalf of the family and the dependants of the deceased, in his capacity as their counsel. It is incumbent upon counsel, in that capacity, to pursue all possible institutional remedies, national and international, for the purpose of redressing the wrongs, injuries and damage suffered by his clients. Counsel refers to enclosed affidavits authorizing counsel to represent the victim's family and dependants in national proceedings.

#### Issues and proceedings before the Committee

6.1 Before considering any claim in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

6.2 The Committee notes that the State party challenges the admissibility of the communication on the grounds that counsel has not justified acting on the victim's behalf; that domestic remedies have not been exhausted; and that the communication is not sufficiently substantiated to serve as a basis for the Committee's examination. The Committee, however, considers that the documentation before it shows that counsel is acting on behalf of the family and dependants of Mr. Akhimien. It also considers that the information before it is sufficient to establish a prima facie case that the communication may raise an issue under the Convention.

6.3 Pursuant to article 22, paragraph 5 (b), of the Convention, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not, however, apply if it is established

that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the presumed victim. In the case under consideration, the Committee notes the information from counsel that due to the time elapsed, it is no longer possible for the authors to file for judicial review of the coroner's inquest. However, the Committee also notes that the authors have not filed criminal charges under the Criminal Code and that an application for compensation is currently pending before the Ontario Divisional Court. The Committee has considered whether the compensation procedure has been unduly prolonged or unlikely to bring effective relief and concluded, in view of the information provided by the authors, that this is not the case for the time being. Thus, the Committee finds that the requirements under article 22, paragraph 5 (b), of the Convention have not been met.

7. The Committee therefore decides:

- (a) That the communication as it stands is inadmissible;
- (b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the authors containing information to the effect that the reasons for inadmissibility no longer apply;
- (c) That this decision shall be communicated to the State party, the author and his representative.

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