

COMMITTEE AGAINST TORTURE

P. S. v. Canada

Communication No 86/1997

18 November 1999

CAT/C/23/D/86/1997

ADMISSIBILITY

Submitted by : P. S. (name withheld)[represented by counsel]

Alleged victim: The author

State party: Canada

Date of communication: 19 June 1997

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

Meeting on 18 November 1999,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is P. S., an Indian national born in the Punjab in 1944 and currently resident in Canada, where he is seeking asylum and faces deportation. He claims that his return to India 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.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the communication to the attention of the State party on 3 September 1997.

Facts as presented by the author

2.1 The author used to be a farmer belonging to the Bhrat Kissan Union, a trade union whose objective is to put pressure on the federal Government to improve agriculture and conditions for

farmers. He was arrested and detained for several days in 1989, 1990 and 1992. In November 1993, four Sikh militants wanted by the police hid in his sugar-cane field. The police questioned him about the militants and, not convinced that he had nothing to do with them, arrested him. He was tortured while in detention. Among other methods of torture, the police hung him from the ceiling and then abruptly released the rope holding him up, whereupon he fell to the floor, dislocating his shoulder. He was released on 29 November 1993 after his brother had handed over a sum of money and on condition that he collaborate with the police. He decided to move to Panchkula, in Haryana province, and then to New Delhi, where he obtained a passport. During his stay in Panchkula, the police harassed his wife to make her say where he was. On 5 February 1994, she too was arrested.

2.2 The author states that he paid an agent to help him obtain a Canadian visa. On 10 June 1994, he left India for the United Kingdom, where he stayed for some months before going on to Canada.

2.3 On 30 August 1994, the author applied for refugee status, but his application was rejected in February 1996 by the Immigration and Refugee Board. He then applied to the Federal Court for leave to seek judicial review of the rejection. That application was rejected on 17 June 1996. Finally, the author submitted his case to a "post-claim determination officer" at the Ministry of Citizenship and Immigration to determine whether he could settle in the country as a "non-recognized applicant for refugee status in Canada". Before granting that status, an immigration officer must determine whether repatriation would constitute a risk to the applicant's life or safety.

2.4 On 23 September 1996, the immigration officer determined that the applicant was not one of those covered by the risk of return programme. The author was therefore summoned to the Immigration Centre on 22 October 1996 so that an expulsion order could be served on him. The author claims that the post-claim determination officer's decision was illogical, since it merely repeated the decision of the Immigration and Refugee Board without taking into account the reports 1/ of two health experts (a psychologist and a doctor) who had concluded that his allegations of torture were credible. The psychologist had diagnosed "a state of chronic post-traumatic stress caused by his illegal detentions and the torture and police brutality he had been subjected to in prison, death threats, police brutality to his wife which he had witnessed, death threats and a major bout of depression caused by the loss of significant social roles".

The complaint

3. The author argued that he would be imprisoned, tortured or even killed if he returned to India, where human rights violations within the meaning of article 3, paragraph 2, of the Convention are frequent, particularly against Sikhs; he provided reports from non-governmental sources containing information to that effect. He also submits a medical certificate dated 28 August 1996, which confirms the existence of scars and conditions that may be consistent with his allegations of torture. To support his complaint he refers to other decisions on asylum in which the Canadian authorities recognize that Sikhs have been subject to persecution in India. Lastly, he claims that, if he were obliged to return to India, he would no longer be able to apply to the Committee, since India is not a party to the Convention.

State party's observations on admissibility

4.1 In its response of 26 March 1998, the State party contests the admissibility of the communication. It states that, in the first place, the author of the communication has not exhausted all available domestic remedies and secondly, the communication does not give substantial grounds for believing that the author's return to India would place him in danger of being subjected to torture.

4.2 The author has twice applied to the Federal Court for leave to seek judicial review of the post-claim determination officer's decision: on 8 October 1996 (when he represented himself) and on 11 October 1996 (through counsel). He withdrew his first application on 31 October 1996. As to the second application, since the author had not submitted the requisite documents in time and had not requested an extension in order to do so, it was rejected by the Federal Court on 31 January 1997.

4.3 On 18 October 1996, the author applied to settle in Canada as an exception to the immigration regulations requiring the application to be made abroad. This request, for what is known as a "ministerial dispensation on humanitarian grounds", was denied as unfounded. The author could have sought judicial review of the denial of ministerial dispensation on humanitarian grounds but did not do so. This remedy is still available even though the time limit has run out, since it is possible to request an extension.

4.4 The author was summoned on 22 October 1996 to the Immigration Centre in Montreal so that arrangements could be made for his departure from Canada. However, he did not appear as requested. A warrant for his arrest was therefore issued on 4 February 1997. To date, the author has neither been arrested nor returned to his country and is at an unknown address.

4.5 The Convention provides for two exceptions to the requirement that all available domestic remedies must have been exhausted. An individual does not need to resort to remedies whose application is unreasonably prolonged or which are unlikely to bring effective relief. The remedy of judicial review of the immigration official's decision to deny the author the status of "non-recognized applicant for refugee status" is not covered by either of these exceptions.

4.6 This remedy could be applied within a reasonable period. Although the law does not provide for automatic suspension, the Federal Court is by definition competent to suspend an expulsion order while an application for judicial review is processed. In order to obtain such a suspension, the applicant must show: (i) that the application concerns an issue of substance to be resolved by the Court; (ii) that he would suffer irreparable damage if the suspension was not granted; and (iii) that the balance of disadvantages favours him. Such a request can, if necessary, be submitted and heard as a matter of urgency, sometimes within a few hours.

4.7 Moreover, this remedy would in all likelihood have given the author some relief. If the Federal Court had been satisfied that an error had been made by the administrative authorities, it could have ordered a new inquiry to be held. Any fresh consideration of the case based on the Federal Court's Guidelines would have been likely to grant the author the right to settle in Canada. In addition, an application for judicial review of the denial of ministerial dispensation might ultimately have made it possible for him to settle in the country on humanitarian grounds.

4.8 For a communication to be admissible, it must provide at least some backing for the allegations

it makes about violations of the Convention by the State concerned. If this is lacking, the communication does not comply with article 22 of the Convention and is therefore inadmissible. In the present case, the author has not established substantial grounds for believing that he personally would be in danger of being subjected to torture if he returned to India.

4.9 The State party recognizes that India's human rights record has given rise to considerable concern. Nevertheless, the situation in India and, in particular in the Punjab, has significantly improved in recent years, as shown in the United States Department of State Country Report on Human Rights Practices for 1997 concerning India, published on 30 January 1998. Since the new Government took office in June 1996, a number of steps have been taken to ensure greater respect for human rights in India. For example, the Government signed the Convention on 14 October 1997 and announced its intention to take steps to prevent and punish acts of torture on its territory.

4.10 In February 1997, four experts on the Punjab provided information to the Immigration and Refugee Board on various issues relating to human rights, peace and order in India. According to these experts, the central Government has for several years been trying to bring the Punjabi police, who have been responsible for many extrajudicial executions and disappearances during the fight against insurgents, to heel. While in the late 1980s and early 1990s a blind eye was turned to police abuses, it is now recognized, particularly by the Ministry of the Interior and the Supreme Court in New Delhi, that the Punjabi police need to be brought under control. As a result, many cases against Punjabi police officers have been reopened. However, the experts say that the climate of impunity that protects the Punjabi police will change only slowly, because the problem is a long-standing one, rooted in firmly entrenched attitudes.

4.11 According to one of the experts, the use of force is part of the culture of the Punjabi police, who still have the power to commit many unacceptable acts without being held accountable. For example, they still have the power to take people to the police station and mistreat them. Police torture is endemic in India. Another of the experts emphasized that, although the ill-treatment meted out to detainees in Punjab is serious, it is no worse than elsewhere in India today. The experts also pointed out that those who are not suspected of being leading activists are not at risk in Punjab today, and have considerably better access to the legal system if they do suffer ill-treatment.

4.12 As regards the possible risks faced by those returned to India by Canada, one of the experts stated that representatives of the Canadian High Commission in New Delhi regularly observed the arrival of persons deported from Canada at the airport. There have been eight or ten such cases in recent years and the Indian authorities have left all these people alone, apart from one leader of the Khalistan Commando Force, who was arrested. The expert also stated that in the last few years, Canadian High Commission staff in New Delhi have held immigration interviews with many dependants of people from the Punjab to whom Canada has granted refugee status. In the overwhelming majority of cases, the dependants do not corroborate their relative's statements, indicating that the relative went to Canada for economic reasons.

4.13 According to the State party, neither the Immigration and Refugee Board nor the reviewing official found the author's allegations credible, because of the numerous inconsistencies they discovered in the course of their inquiries. They also noted that the author's behaviour between the time of his release in November 1993 and his application for refugee status in Canada in August

1994 was inconsistent with fear of persecution by the police. As a farmer, the author was hardly likely to be considered a "leading activist". He would therefore not be in any danger of torture if he returned to his country.

4.14 The State party therefore concludes that the author's communication demonstrates no special circumstances in support of the allegation that he would face a real and personal risk of being subjected to torture. Although the author alleges that he was tortured by the Indian authorities between 25 and 29 November 1993 and says he fears police persecution, there is no indication that the Indian authorities have been looking for him since that time. He makes no claim to be an opposition activist and his behaviour since his release is inconsistent with a reasonable fear of being imprisoned, tortured or killed, or even of being wanted by the Indian authorities.

4.15 Although the author submitted medical reports to the Canadian authorities, including one by an orthopaedist who noted injuries that were not inconsistent with the allegations of torture, the injuries did not substantiate the medical reports since the reports were based on information supplied by the author himself, whom the authorities do not find credible.

4.16 In the light of the foregoing, the State party argues that the author has not established prima facie grounds for believing that returning him to India would expose him to a personal risk of torture and that the communication should therefore be declared inadmissible.

Author's comments

5.1 As regards the State party's objection that domestic remedies have not been exhausted, the author states that, as far as immigration is concerned, all remedies in the Federal Court are in practice illusory, since they are discretionary and only very rarely granted. The Federal Court rarely intervenes in matters of fact such as the author's case. All the case law shows that the Federal Court has consistently exercised judicial restraint in such cases.

5.2 Given that the Federal Court almost never intervenes and that when it does it upholds 98 per cent of the Immigration and Refugee Board's decisions, including subsequent reviews (risk of return), it would be highly unusual - not to say quite improbable - for the Court to intervene in the author's case. Moreover, the fact that a case has been brought before the Federal Court in no way prevents the Canadian authorities from expelling someone, and this is in fact common practice. And since the authorities have already issued an arrest warrant, the author can be arrested at any time and sent back to India without further ado.

5.3 In its comments, the State party states that the author neglected his appeal options (judicial review). In fact, the remedy exists only on paper since, in practice, it hardly ever affords the relief sought.

5.4 The State party also criticizes the author for not applying for ministerial dispensation on humanitarian grounds. Such applications are, however, subject to a fee. Moreover, as the author had an expulsion order hanging over him, the application would have afforded him no protection.

5.5 The same comments apply to the application under what is known as the risk of return

programme. The mechanisms established by Canada under the risk of return programme are farcical, since less than 3 per cent of cases are approved.

5.6 The author does not share the State party's opinion that the communication does not establish substantial grounds for believing that he would be in danger of being subjected to torture if he returned to India. He emphasizes the importance of the results of the medical examinations, which give every reason to believe that he has been subjected to torture in the past. Under the circumstances, there is more than a risk that the author would again be subjected to torture if he were obliged to return to India.

5.7 The author finds it paradoxical that over the last few years Canada has allowed in a great many other applicants facing exactly the same problems as those he describes. The only difference seems to be that the Board did not consider him credible. This finding, if that is what it can be called, relies to a very large extent on subjective judgement and does not take proper account of the objective dangers the individual concerned may face.

5.8 Lastly, the author argues that the State party has never fulfilled its obligations under the Convention. Domestic legislation does not embody the main articles and remedies set forth in the Convention. No law has been enacted to establish mechanisms to enable persons such as himself to address the competent authorities in case of need. The Immigration and Refugee Board has always argued that it is not competent to implement the Convention, merely saying that that is the prerogative of the Minister for Employment and Immigration. However, the Minister has never issued any guidelines or amended immigration law to incorporate the Convention. It is therefore impossible to say who is responsible for implementing the Convention or what steps have been taken to ensure that Canada fulfils its obligation not to deport a person who is in danger of being subjected to torture in his country of origin.

Admissibility considerations

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. In the case under consideration the Committee notes that the communication is not anonymous and that the same matter has not been, and is not being examined under another procedure of international investigation or settlement. It also notes that the communication is not an abuse of the right of submission of such communications or incompatible with the provisions of the Convention.

6.2 The State party contends that the author has not exhausted domestic remedies. The Committee notes in this respect that the author tried the following remedies:

- application for refugee status to the Immigration and Refugee Board (rejected in February 1996);
- application for leave to seek a judicial review of the rejection (rejected in June 1996);
- application before a post-claim determination officer of the Ministry of Citizenship and Immigration (rejected on 23 September 1996);

- two applications for leave to seek a judicial review of the decision of the "rejected claims review officer" to the Federal Court (the first one was withdrawn and the second one was rejected in January 1997 for not having been submitted on time);

- application for "ministerial dispensation on humanitarian grounds" (denied as unfounded).

6.3 The State party claims that the author should have completed his application for judicial review of the decision of the "post-claim determination officer" and that he could still try to apply for judicial review of the denial of ministerial dispensation on humanitarian grounds. The Committee considers that even if the author claims that these remedies are illusory, he has furnished no evidence that they would be unreasonably prolonged or unlikely to bring effective relief. The Committee therefore notes that the conditions laid down in article 22, paragraph 5 (b), of the Convention have not been met.

The Committee consequently decides:

(a) That the communication 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 author 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.]

Notes

1/ These reports are dated 23 June 1995 and 17 July 1995, respectively. According to the doctor's report, the author stated that he had also been tortured in detention in December 1990 and July 1992.