

COMMITTEE AGAINST TORTURE

T.P.S. v. Canada

Communication No 99/1997

16 May 2000

CAT/C/24/D/99/1997

VIEWS

Submitted by: (name withheld) [represented by counsel]

Alleged victim: The author

State party: Canada

Date of communication: 19 September 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 16 May 2000,

Having concluded its consideration of communication No. 99/1997, 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 counsel and the State party,

Adopts its

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is Mr. T.P.S., an Indian citizen born in 1952 who was seeking asylum in Canada at the time the communication was registered. He claimed that his forcible return to India would constitute a violation by Canada of article 3 of the Convention against Torture. He is represented by counsel.

Facts as presented by the author

2.1 In January 1986, the author and four co-accused were convicted by a Pakistani court of hijacking an Indian Airlines aeroplane in September 1981 and sentenced to life imprisonment. Counsel explains that no violence was used during the hijacking and that the plane, which was on its way from New Delhi to Amritsar, landed safely in Lahore, where it was diverted. There were no reports that any passenger had been mistreated. The purpose of the hijacking was to draw attention to the general maltreatment of Sikhs by the Indian Government. The author states that he was arrested within hours of the plane landing and forced to sign a confession at gunpoint. He also states that he was held in pre-trial detention for four years without access to counsel. It is not clear whether he claims to be innocent, but he argues that his trial was unfair and the ensuing conviction unlawful.

2.2 In October 1994, the Government of Pakistan released the author and his co-accused on the condition that they leave the country. The author states that he could not return to India for fear of persecution. With the assistance of an agent and using a false name and passport, he arrived in Canada in May 1995. Upon arrival he applied for refugee status under his false name and did not reveal his true identity and history. In September 1995, the author was arrested and kept in detention by Immigration authorities. He was later released on the condition that he reports once a week to a Vancouver immigration office.

2.3 At the end of 1995, an immigration inquiry was opened against the author to determine whether he had committed an offence outside Canada which, if committed in Canada, would constitute an offence punishable by a maximum prison term of 10 years or more. His refugee application was suspended. In the beginning of 1996, an adjudicator decided that the author had committed such an offence and, as a result, a conditional deportation order was issued against him. At the same time the Canadian Minister of Immigration was requested to render an opinion whether the author constituted a danger to the Canadian public. Such a finding by the Minister would prevent the author from having his refugee claim heard and would remove his avenues of appeal under the Immigration Act.

2.4 The author successfully appealed the adjudicator's decision and a new inquiry was ordered by the Federal Court of Canada. As a result of the second inquiry the author was again issued with a conditional deportation order. No appeal against the decision was filed for lack of funds. The Minister was again requested to render an opinion as to whether the author constituted a danger to the public. The Minister issued a certificate so stating and the author was detained with a view to his removal.

The complaint

3.1 The author states that the use of torture against suspected Sikh militants in India is well documented. He provides the Committee with articles and reports in that respect. He claims that he has serious grounds to believe that he will be subjected to torture upon return to India. Moreover, there is evidence that the Indian and Pakistani Governments have been actively cooperating with Canadian enforcement officials to have the author expelled. Given that he has already served his sentence, rightfully or wrongfully, and that he faces no charges for which he could be extradited, he believes that the Indian Government's interest in having him returned is for purely extrajudicial

reasons.

State party's observations on admissibility

4.1 On 18 December 1997 the Committee, acting through its Special Rapporteur for new communications, transmitted the communication to the State party for comments and requested the State party not to expel or deport the author to India while his communication was under consideration by the Committee. On 29 December 1997 the State party informed the Committee that the author had been removed from Canada to India on 23 December 1997. In reaching that decision the authorities had concluded that there were no substantial grounds for believing that the author would be in danger of being subjected to torture in India.

4.2 In a further submission dated 11 May 1998 the State party refers to the inquiries undertaken by the Canadian authorities. The author's refugee application was referred by a Senior Immigration Officer to the Convention Refugee Determination Division of the Canadian Immigration and Refugee Board on 26 May 1995. During his first interview with immigration officers the author used a false name and stated that he had never committed nor been convicted of a crime or offence. He based his refugee claim on religious persecution and cited one incident of mistreatment by the Indian police.

4.3 Subsequently, the Department of Citizenship and Immigration Canada (CIC) discovered his true identity and a report was issued stating that the author was suspected of belonging to a category considered inadmissible under the Immigration Act because he had engaged in acts of terrorism. On 21 September 1995 he was arrested. When interviewed by a CIC Immigration Investigator and two officers of the Canadian Security Intelligence Service (CSIS), he acknowledged that he was an active member of the Dal Khalsa terrorist group and had participated in the hijacking of the Indian Airlines flight. The State party also mentions that in an article dated 19 October 1994 published in the Pakistani press the author had pledged to continue the struggle for Khalistan.

4.4 In November 1995 another report was issued stating that the author belonged to another inadmissible category, namely persons for who there are reasonable grounds to believe had been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence punishable by a term of at least 10 years' imprisonment. As a result of the two reports an adjudicator conducted an inquiry and concluded that the author had in fact been convicted of an offence that, if committed in Canada, would be punishable by a term of at least 10 years' imprisonment.

4.5 The author applied for leave for judicial review of this decision. The Government of Canada consented to his application after it was determined that the adjudicator had erred in the process of determining that the author was inadmissible. The Federal Court Trial Division ordered that a new inquiry be held. The adjudicator in charge of the second inquiry found, in a decision dated 30 May 1997, that the author was known for criminality and terrorism. As a result, a conditional deportation order was issued. The author did not seek leave for judicial review of this decision.

4.6 By letter dated 5 June 1997 the author was informed that CIC intended to request an opinion from the Minister of Citizenship and Immigration to the effect that it would be contrary to the public interest to have his refugee claim heard. The author was also apprised that as part of this procedure

the Minister would consider any humanitarian and compassionate circumstances pertinent to his situation, including any possibility that he would be at risk should he be removed to India. The author was required to present submissions to the Minister, which he did.

4.7 On 3 December 1997 CIC addressed a memorandum, to which the author's submissions were attached, to the Minister, evaluating the risk of returning him to India in the light of the documentary evidence of the human rights situation in India and the personal circumstances of the author. It was concluded that the author might face a minimal risk upon return to India, but that this minimal risk needed to be weighed against the impact of Canada providing refuge to an individual who had been convicted of hijacking, a terrorist act. On 8 December 1997 the Minister rendered her opinion that it would be contrary to the public interest to have the author's refugee claim heard.

4.8 On 18 December 1997 the author applied for leave for judicial review of the Minister's decision. He also applied for an interim order staying the execution of the deportation order. On the same day the Government of Canada became aware, through a conversation with the author's counsel, that the author had filed a communication in September 1997 with the Committee and that the Committee had requested on 18 December 1997 that the author not be expelled pending its consideration of the communication. The Committee's letter informing the State party of the author's communication and the request for interim measures was received on 19 December 1997.

4.9 On 22 December 1997 the Federal Court Trial Division dismissed the author's application regarding the deportation order. The Court emphasized that the author would be excluded from Convention refugee status owing to his past terrorist activities and that Canada should not be nor be seen to be a haven for terrorists. It noted that the author had had ample opportunity to suggest another country of removal than India, that India did not have a policy of or encourage police brutality, and that the author's high profile would provide him with protection against any alleged possible ill-treatment by Indian authorities.

4.10 On 23 December 1997 the Court issued a supplementary decision with respect to the author's request that the Court certify the question whether a person's rights under the Canadian Charter of Rights and Freedoms are infringed in case of removal to a country where there is a reasonable possibility that the individual would be subjected to torture, pursuant to an opinion by the Minister that it would be contrary to the public interest to have the individual's refugee claim heard. The Court determined that the author's question should not be certified. In rendering its decision the Court found that the author had not shown that it would be demonstrably probable that he would face torture upon return to India.

4.11 On 23 December 1997 the author was removed from Canada. He was escorted to New Delhi by one CIC officer and one police officer. Upon arrival the author was dealt with in a normal fashion and was not treated by the Indian police any differently from other individuals removed to India.

4.12 On 9 March 1998 the author's application for leave for judicial review of the Minister's opinion concerning his refugee claim was dismissed by the Federal Court Trial Division for failure of the author to file an application record within the prescribed period.

4.13 The State party argues that the communication before the Committee is inadmissible for failure

to exhaust domestic remedies. First of all, the author did not seek leave for judicial review of the 30 May 1997 decision of the adjudicator that he was inadmissible on the basis of terrorism and criminality under the Immigration Act. If leave had been sought and granted, that decision would have been reviewed by the Federal Court Trial Division. A successful review application would have resulted in an order that a new inquiry be held and a decision rendered consistent with the reasons of the Court. If it was determined that the petitioner did not fall within an inadmissible category, there would be no basis for excluding him from the refugee determination process and he would not have been removed from Canada pending consideration of his refugee claim. Moreover, the author could have sought an extension of the time required for the filing of the application for leave for judicial review. Such extensions are frequently granted and would have allowed the author to file a late application.

4.14 The author alleges that he did not appeal or seek judicial review for lack of funds. In fact, there is no charge for submitting an application for leave for judicial review and it is a comparatively inexpensive procedure. The author clearly found the financial means to retain counsel - or his counsel had acted pro bono - with respect to several previous and subsequent proceedings, including proceedings before the Committee. The author has not provided any evidence that he had sought legal aid or that legal aid had been denied.

4.15 Secondly, the author did apply for leave for judicial review with respect to the Minister's opinion that it would be contrary to the public interest to allow the author's refugee claim to be heard. However, the author failed to perfect this application by filing an application record within the prescribed period. As a result, the author's application was dismissed. If the author had filed an application record and leave had been granted, the Minister's opinion would have been scrutinized by the Federal Court Trial Division. If the application had been successful the Court would have returned the matter to the Minister for a decision in accordance with the reasons of the Court.

Counsel's comments

5.1 In a submission of 20 January 1998 counsel claimed that the State party, in its response of 29 December 1997, failed to indicate how the Canadian authorities arrived at their conclusion regarding the risk facing the author. The author was never afforded an opportunity to have his refugee claim heard, nor was he ever afforded the benefit of an oral hearing before an independent tribunal where he could give his personal testimony concerning his fears. The only opportunity that the author had to provide documentation regarding the risk he faced was when the Minister of Immigration was requested to render an opinion as to whether it would be contrary to the public interest to allow the author to proceed with his refugee claim. Once that documentation had been provided, the entire decision-making process was conducted by the immigration officials. Counsel was not even advised of what other materials the authorities would be considering; consequently, he never had an opportunity to comment upon or respond to all materials that might have been before the Minister.

5.2 Counsel refers to the memorandum to the Minister which she purportedly relied upon in rendering her decision that it would be contrary to the public interest to allow the author to proceed with his refugee claim. According to counsel, the memorandum was evidence that there was absolutely no analysis of the particular risk facing the author in India given his past and current profile. It mainly focused on the author's past history and Canada's international obligations

regarding the treatment of so-called terrorists; however, there was little reference to Canada's numerous international obligations under human rights treaties, including the 1951 Convention relating to the Status of Refugees.

5.3 Counsel also provided an affidavit by the author's niece who was in India when the author arrived from Canada. She states that upon his arrival, the author was subjected to interrogation for about six hours and that he was verbally threatened by officers from the Central Bureau of Investigation. She expressed concern that he would eventually be subjected to torture or extrajudicial execution. Further information submitted to the Committee by the niece indicates that the intimidation of the author and his family by the police has continued and that the author has informed the Human Rights Commission of Punjab about it.

5.4 With respect to the admissibility of the communication, counsel argues, in a submission of 11 June 1998, that at the time the decision of the adjudicator was rendered, it was not absolutely necessary for the author to seek leave for judicial review in order for him to be able to proceed with a refugee claim. The cost of the legal proceedings was only one factor, which guided the author's decision not to seek review. His main interest was to avoid any further delays in proceeding with his refugee claim. He had been in Canada for almost two years and was anxious to present his refugee claim to the Canadian authorities. He did not wish to delay this process by launching another judicial review. Secondly, there was little likelihood of success at any judicial review.

5.5 The State party stated that if it had determined that the petitioner did not fall within an inadmissible category, there would be no basis for excluding him from the refugee determination process and he would not have been removed pending consideration of his refugee claim. This statement is extremely misleading. In fact, the finding of the adjudicator resulted in the issuance of a conditional deportation order. This result does not necessarily mean that an individual will not be afforded the opportunity to proceed with his refugee claim; it provides that the deportation is conditional upon the outcome of the refugee claim.

5.6 Although it is acknowledged that the adjudicator's finding does provide immigration authorities with an avenue to seek the Minister's opinion with respect to whether the refugee process should remain open to such a person, there is no guarantee that such an avenue will be pursued. There was no obligation on the part of Canadian immigration authorities, or even the Minister, to prevent the author from proceeding with his refugee claim. The author's access to the refugee process was halted for political, not judicial or quasi-judicial, reasons. His refugee claim could have proceeded in spite of the adjudicator's finding.

5.7 The State party seems to be arguing that due diligence requires that a person ought to protect himself from every eventuality that might occur. Counsel argues that this is not the standard required by article 22 (5) of the Convention. A person who is anxious to proceed with telling his life story to authorities in order to secure their protection should not be blamed for not wishing to extend his agony by undertaking yet another judicial review when the refugee process remains open to him.

5.8 Regarding the author's failure to perfect an application for leave for judicial review of the Minister's opinion, counsel contends that the deadline would have been near the end of January

1998. However, the author was removed on 23 December 1997. This damage could not be undone regardless of the outcome of any judicial review application. The author had every intention of proceeding with an application for judicial review of the Minister's decision and counsel appeared in Federal Court on 20 December 1997 to seek a stay of the removal pending the outcome of this application. Unfortunately, the Federal Court chose to render a decision on what counsel views as the merits of the author's claim to refugee status. The result was that the author was deported three days later. The State party has failed to mention what procedure would be used to bring the author safely back to Canada had the Minister been compelled by the Court to render another decision.

Further observations from the State party on admissibility

6.1 In a further submission dated 9 October 1998 the State party contends that upon receiving a decision like that of the adjudicator in the instant case, a refugee claimant represented by counsel would not have assumed that he could proceed with his refugee claim. The adjudicator determined that the author was a person who had been convicted outside of Canada of an offence that if committed in Canada would constitute an offence punishable by a maximum term of imprisonment of 10 years or more and was also a person for whom there were reasonable grounds to believe had engaged in terrorism. A reasonable person represented by counsel receiving such a determination would have anticipated that action would be taken to have the individual excluded from the refugee determination process. Indeed, such a determination would suggest that the claimant might be excluded from the definition of a Convention refugee in section F of article 1 of the Convention relating to the Status of Refugees, which was incorporated by reference into the Canadian Immigration Act.

6.2 Moreover, the author had been advised, subsequent to the first inquiry held, that CIC intended to seek the Minister's opinion that the author constituted a danger to the public, the consequence upon issuance of such opinion being that he would be excluded from the refugee determination process. The author sought judicial review of this earlier determination and was therefore aware of the potential consequences of an adjudicator's finding that he was inadmissible.

Counsel's comments

7.1 Counsel argues that the adjudicator's finding was very specific (i.e. that the author had been convicted of an offence and that there were reasonable grounds to believe he had engaged in acts of terrorism). The scope for judicial review of such a finding is limited to whether the adjudicator made an error in law or whether his findings of fact were perverse, capricious or patently unreasonable. Whether or not the author agreed with the decision, it was not possible to attack it on any of these grounds based on the evidence presented. Counsel's duty is to determine whether it is in the client's best interest to pursue an appeal when there is little merit in doing so. Counsel would hesitate to launch a frivolous application before the courts simply to delay further proceedings.

State party's comments on the failure to observe the Committee's request under rule 108 (9) of its rules of procedure

8.1 On 24 June 1998 the Committee invited the State party to submit written comments on the failure to observe the request not to expel the author to India while his communication is under

consideration by the Committee.

8.2 In its response to the Committee the State party indicates that an interim measures request is a recommendation to a State to take certain measures, not an order. Support for this proposition may be found not only in the word employed ("request") in rule 108, paragraph 9, but also in the European Court of Human Rights decision in *Cruz Varas and Others v. Sweden*. The Court stated the following with respect to the legal status of an interim measures request: "Firstly, it must be observed that Rule 36 [regarding interim measures] has only the status of a rule of procedure drawn up by the Commission ... In the absence of a provision in the Convention for interim measures an indication given under Rule 36 cannot be considered to give rise to a binding obligation on Contracting Parties."

8.3 Pursuant to rule 108, paragraph 9, an interim measures request may be issued in order to avoid "irreparable damage" to an author. The State party submits that the examination of possible irreparable harm should be a rigorous one, particularly when the individual concerned was found to represent a danger to the public or, as in the author's case, whose continued presence in the State was determined to be contrary to the public interest. On the basis of the documentary evidence submitted by the author as well as their own evidence regarding the author's risk upon removal to India, the authorities concluded that the risk was minimal. Moreover, a judge of the Federal Court Trial Division determined that the risk to the author was not sufficient to justify a stay of his removal.

8.4 The Government of Canada first became aware that the petitioner had submitted a communication, including a request for interim measures, when the author's counsel alluded to the Committee's granting of the request during a discussion with a CIC official on 18 December 1997, three months after the Committee had received the author's communication and request for interim measures. The record before the Committee reveals that the interim measures request was issued, after several appeals by the author's counsel to the Committee, a few days before his scheduled removal. The Government of Canada was not aware of these appeals nor was it given the opportunity to comment on these *ex parte* communications with the Committee.

8.5 In summary, irrespective of their legal status, interim measures requests received from the Committee are given serious consideration by the State party. However, the State party determined that the present case was not an appropriate one for a stay to be granted in light of the above-mentioned factors and in particular: (a) the *prima facie* absence of substantial personal risk to the author, as determined by the risk assessment conducted; (b) the fact that the continued presence in Canada of a convicted terrorist would be contrary to the public interest; and (c) the non-binding nature of the Committee's request.

Counsel's comments

9.1 Counsel contends that it has never been his position that the State party was legally obliged to comply with the Committee's interim measures request. He does argue, however, that the Canadian public would normally expect its Government to comply with a request from the United Nations. This is consistent with convention, past practice and the State party's self-image as a humanitarian member of the international community.

9.2 The State party could not possibly have given serious consideration to the interim measures request, in view of the fact that after learning of the request on 18 December 1997 it continued to act single-mindedly to effect the author's removal by opposing an application for a stay of deportation pending a review of the Minister's finding that it would be contrary to the public interest to allow the author to proceed with his refugee claim. The State party chose to rely on its position that the Minister had already conducted a risk assessment with respect to the author and that nothing further was required. The author was not able to do anything but make preliminary written submissions. There was no oral hearing, no ability to call or cross-examine witnesses, no proper disclosure of "internal State documents", and so on. The State party justifies its actions on the basis that the Federal Court dismissed the author's application for a stay of removal. However, the Federal Court's finding with respect to the stay application was not subject to review. It is the finding of one judge, with whom the author disagrees. If the author had appeared before any number of other judges in the Federal Court the result of the stay application might have been different.

The Committee's decision on admissibility

10.1 At its twenty-first session, the Committee considered the question of the admissibility of the communication and ascertained that the same matter had not been and was not being examined under another procedure of international investigation or settlement. With regard to the exhaustion of domestic remedies, the Committee noted that the author applied for an interim order staying the execution of the deportation order which was dismissed by the Federal Court Trial Division on 22 December 1997. As a result of a further request from the author the Court issued a supplementary decision according to which the author had not shown that it would be demonstrably probable that he would face torture upon return to India. The author also applied for leave for judicial review of the Minister's decision that it would be contrary to the public interest to have his refugee claim heard. However, the author was expelled before the deadline for perfecting the application. The Committee also noted that the author failed to seek leave for judicial review of the adjudicator's decision that he belonged to an inadmissible category. However, the Committee was not convinced that this remedy would have been an effective and necessary one, in view of the fact that the other remedies, mentioned above, were available and, indeed, utilized.

10.2 The Committee therefore decided that the communication was admissible.

State party's observations on the merits

11.1 In its submission of 12 May 1998, the State party states that according to the principle laid down in the case *Seid Mortesa Aemei v. Switzerland*,¹ the Committee has to determine "whether there are substantial grounds for believing that [the author] would be in danger of being subjected to torture [in the country to which he is being returned]" and "whether he would be personally at risk". It also recalls that the burden of proof is on the part of the author to establish that there are substantial grounds to believe that he or she would be personally at risk of being subjected to torture.

11.2 The State party submits that since the protection provided by article 3 is, according to the Committee's jurisprudence, absolute, irrespective of the author's past conduct, the determination of risk must be particularly rigorous. To that purpose, reference is made to a decision of the European Court of Human Rights (*Vilvarajah and others v. United Kingdom*), where it is stated, with regard

to article 3 of the European Convention on Human Rights, that "the Court's examination of the existence of a risk of ill-treatment in breach of Article 3 at the relevant time must necessarily be a rigorous one in view of the absolute character of this provision".

11.3 In order to assess the risk of torture faced by the author, the State party contends that the following factors are pertinent: (a) whether the State concerned is one in which there is evidence of a consistent pattern of gross, flagrant or mass violation of human rights; (b) whether the author has been tortured or maltreated by or with the acquiescence of a public official in the past, (c) whether the situation referred to in (a) has changed; and (d) whether the author has engaged in political or other activity within or outside the State concerned which would appear to make him particularly vulnerable to the risk of being tortured.

11.4 The State party acknowledges that the human rights record of India is of concern but underlines that the situation, particularly in the Punjab, has improved significantly over the two years preceding the State party's submission.

11.5 According to the State party, several measures have been taken to ensure greater respect for human rights in India since the Government took office in June 1996. The signing by India of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 14 October 1997, indicates its intention to take steps to prevent and sanction any acts of torture occurring in the territory. Even though the State party acknowledges the human rights abuses, including "disappearances", perpetrated by the Punjab police between 1984 and 1995, reliable sources of information attest to significant progress since 1995 in "reigning in" the Punjab police and providing redress to victims of earlier abuses. According to the United States Department of State, "the pattern of disappearances prevalent in the early 1990s appears to be at end" and action has been taken against several of the police officials implicated.²

11.6 The State party also refers to other documentation supporting the contention that while in the late 1980s and early 1990s human rights violations by the police were tolerated and overlooked by the Government, steps have since been taken to ensure that perpetrators do not go unpunished.³ An indication of this change is the revival of many cases against Punjab police officers which had been pending before the Supreme Court for many years and the initiation of recent investigations led by the Central Bureau of Investigation (CBI). These actions confirm that impunity for the Punjab police has come to an end and although some violations might still occur, the probability of future cases of disappearances involving the Punjab police is very small.⁴ It is finally noted that judicial protection for detained or arrested persons has improved. A person who claims to have been arrested arbitrarily will be able to inform a lawyer and have access to the courts.

11.7 With reference to the above-mentioned sources, the State party considers that torture is not currently prevalent in Punjab. The same documentary evidence also demonstrates that torture is not practised in all parts of India and that the author would therefore not be at risk.

11.8 The State party further argues that there is no evidence that the author has been tortured by Indian authorities in the past or since his return to India. It refers to press articles stating that the author has not been subjected to torture during questioning, Indian authorities being very conscious of the international scrutiny of their treatment of the author.⁵

11.9 It is also submitted by the State party that Indian authorities would not have any opportunity to torture the author since he has already been convicted and served his sentence. India has indeed assimilated the principle of non bis in idem both in its Constitution and by adhering to the International Covenant on Civil and Political Rights which contains the principle in its article 14 (7). The fact that there are no new charges against the author is also consistent with the fact that India has not requested the author's extradition. Finally, the State party mentions that the Deputy Commissioner of Police has confirmed in the press that no action could be taken against the author since he has already been convicted and served his sentence.

11.10 With regard to the affidavit of the author's niece, the State party claims that it constitutes hearsay in that she repeats statements she believes the author made. Furthermore, the statement of the niece that "the CBI investigator then threatened [her] uncle that they would stay around him", even if true, would not be totally unreasonable given the past history of the author and does not demonstrate a risk of torture. Moreover, the State party argues that the facts presented in the affidavit do not amount to "mental torture" as they do not meet the requirements of article 1, paragraph 1, of the Convention. The Indian authorities have indeed not committed any act with the intention of causing the author severe mental pain or suffering.

11.11 Concerning the reference in the original communication to the 1990 killing of two acquitted hijackers who attempted to enter India, the State party does not see the relevance of this event to the present case and does not see any similarity between them. The State party emphasizes the absence of similarity between the cases in that the author has not presented evidence of any risk to his family members whereas in the other case, the family had suffered continuous harassment by the Indian authorities. The author quotes a Canadian CIC case officer according to whom the author would be "dealt with harshly, possibly because of hijacking of the Indian plane" if he were to return to India. The State party states that the comment was made in the context of a decision review hearing in which it was the officer's duty to raise concerns about the potential risk that the author would flee, but she was not commenting nor had she sufficient information to determine the level of risk run by the author in case of return.

11.12 Finally, the State party underlines that the evidence of risk that the author could face when returning to India has been carefully reviewed by the Minister of Citizenship and Immigration and that the risk has been deemed minimal. That assessment was confirmed by the Federal Court Trial Division. It is submitted that the Committee should give considerable weight to the findings of the Minister and the Court.

11.13 For the above reasons, the State party is of the opinion that there is no element showing that the author would be put at risk of torture should he return to India.

Comments submitted by the author on the merits

12.1 In a submission dated 11 June 1998, the author argues that the assessment made by the State party of the human rights situation in India on the basis of the documentation submitted to the Committee ⁶ is misleading. The State party cites remarks out of context but fails to mention information from the same sources which confirm that abuses continue to occur.

12.2 The author also draws the attention of the Committee to the fact that one of the supporting documents referred to by the State party states: "I began by asking if someone who had fled India during the early 1990s, at the height of the troubles, would have reason to fear returning to Punjab now. I also asked if it was possible for someone on the run to hide within an existing community of Sikhs in a city or region outside the Punjab. The answer to both these questions, and a constant theme of the interview, was that only the highest profile fugitives, which they said would number a handful, would have reason to fear, or to be pursued outside the Punjab."⁷ The author also draws attention to the fact that these comments were made prior to the elections of February 1997, before the human rights situation degenerated.

12.3 To support his statements on the current human rights situation in Punjab, the author refers to information from the Research Directorate of the Immigration and Refugee Board in Ottawa which reports that torture in custody remains a problem in India, and particularly in Punjab. Moreover, it asserts that the recent prosecutions against police officers are not indicative of a real change in the respect for human rights and constitutional guarantees. Finally, it states that the persons who are in danger are those who are still part of active nationalist groups or who refuse demands imposed by the State, including police pressure to become an informant, which, the author observes, is exactly what happened in his case. The author also refers to the Response to Information request from the Research Directorate of the Immigration and Refugee Board prepared for the United States Immigration and Naturalization Service on the situation in Punjab in 1997, indicating that despite a general improvement over the years and "although militants and close affiliates of militants are the key category of individuals at risk, political activists and also human rights activists may also have well founded fears of persecution in India".⁸

12.4 In the light of the above, the author draws the attention of the Committee to the inconsistency of the State party in its assessment of the risk run by the author of being subjected to torture in India. The author argues that when deciding that the author would be denied refugee status, the Canadian authorities portrayed him as a high-profile militant terrorist and Sikh nationalist. However, when considering the author's return to India and the risks he would run, the State party no longer portrayed him as such.

12.5 Regarding the risk of being subjected to torture, it is noted that ascertaining a risk of torture in the future does not require evidence of torture in the past, particularly since the author has not been in India since his imprisonment in Pakistan. At this stage, the only evidence of risk available is the author's niece's affidavit. As was underlined by the author, although there was no evidence of actual torture, the affidavit should be considered as demonstrating the risk of such treatment. Moreover, the fact that there is no legal basis to arrest the author at present is of even more concern since the human rights record of India is filled with examples of extrajudicial behaviour.

12.6 The author further insists on the similarity between his case and that of Gurbinder Singh, referred to in the initial communication. The latter was tried with eight other persons and acquitted of a 1984 hijacking of a plane travelling from India to Pakistan. He was later shot at the border with Pakistan while he was trying to return to India. The author was tried with four others for a 1981 hijacking. In all, 14 persons have been labelled by Indian authorities as terrorists and have consistently been linked together, regardless of the differences between the circumstances of the hijackings or whether they were acquitted or convicted. This is illustrated by a letter from the Indian

CBI to the Canadian High Commission in New Delhi dated 24 July 1995 referring to a collection of photographs of each of the alleged hijackers. This is not only an indication that these 14 persons are regarded in the same way, but also that the Indian authorities are particularly interested in their return in India and that the State party has cooperated with the Indian Government since at least 1995. The Committee should therefore take into consideration anything that has happened to any of the 14 persons in its assessment of the author's risk.

Additional comments by the State party

13.1 In its submissions dated 9 October 1998, 7 June 1999, 30 September 1998 and 28 February 2000, the State party transmitted additional observations on the merits.

13.2 The State party argues that although high-profile militants may be at risk in India, the author does not fall within this category, which would include a perceived leader of a militant organization, someone suspected of a terrorist attack, or someone suspected of anti-State activities. The author cannot be characterized as any of these. Although he committed the hijacking of 1981, he was convicted for his crime, served his sentence, and was presumably not involved in militant activities during his time in prison nor is he currently involved in such activities. In a further submission, the State party states that it has never disputed that the author could be considered as "high-profile". However, it does not consider that the author falls into the small category of "high-profile militants" at risk.

13.3 The State party requests the Committee to give little weight to the "section 27 report" (see para. 14.8) because it is a document prepared by a junior immigration officer which only indicates that the person may be inadmissible to Canada. The definitive decision is going to be taken by a senior immigration officer and only that is subject to judicial review. Furthermore, the "section 27 report" merely mentions that the author is a member of the Dal Khalsa. It is submitted that the mere membership of a terrorist organization does not make a person a "high-profile militant".

13.4 The State party strongly denies that it has cooperated with the Indian authorities in the search for the author and confirms that it did not receive any request from India to return the author. The correspondence mentioned by the author in its previous submission does not indicate that the Indian authorities were searching for the latter but rather that the State party was concerned by the possible arrival of released hijackers on its territory and wanted to identify them. Contrary to the assertions of the author that India was interested in his return, the State party has never received any indication of such interest. Even if India had shown interest in the return of the author, that would not have proved that he was at risk of torture.

13.5 With regard to the arrival of the author at the airport in Delhi, where it was stated that there were over 40 police and army officers waiting, the State party reiterates that the accompanying officer confirmed that the author was dealt with in a normal fashion.

13.6 The State party argues that the letter presented by the author to the Committee referring to his experience in India since his arrival is only an expression of his views and does not therefore constitute sworn or tested evidence. The Committee should give little weight to this document. It is also submitted that the alleged harassment endured by the author does not constitute evidence that

he is at risk of torture. Moreover, at the time of the submission, the author had been back in India for almost two years and it seems that there was no change in the manner in which he had been treated by the authorities.

13.7 The State party notes that the author alleges that he is at risk of "persecution". Even though this expression may be a simple oversight on the part of the author, the State party recalls that the issue before the Committee is whether the author is at risk of "torture", not "persecution". It is contended that the risk of torture as defined in the Convention imposes a higher and more precise standard than the risk of persecution as defined in the 1951 Convention relating to the Status of Refugees. In the present case, the State party reiterates its view that the author is not at risk of torture.

Additional comments made by the author

14.1 In further submissions dated 28 October 1998, 30 May 1999, 14 July 1999 and 26 November 1999, the author states that it is the policy of the State party to restrict the number of refugees entering its territory, so that since 1996 the rates of acceptance of refugee claimants has dropped dramatically, particularly for asylum-seekers from Punjab. Even though the author acknowledges the need to combat abuse from economic migrants and fraudulent claimants, that does not justify the unrealistically favourable portrayal of the situation in Punjab.

14.2 The author's counsel requests the Committee to consider a letter, dated 2 December 1998, written by the author, revealing the difficulties he has experienced since his return to India. The author states that he received threats from the police upon arrival from Canada for not having given them the information they wanted. He and his family have been harassed by the police so that he is not able to see them anymore. After he filed a complaint with the Punjab Human Rights Committee, he was forced to sign a statement absolving the police of any wrongdoing. According to counsel, these acts constitute "slow, methodical mental torture" and there is no need to wait for evidence of physical torture.

14.3 It is also disputed by counsel that the actions of the Indian CBI on his return to India do not constitute "mental torture". It is argued that the State party has to consider these actions together with the other difficulties faced by the author and his family since his arrival and the general human rights situation in India. Secondly, it is inappropriate for the State party to use ex post facto elements, i.e. that the author has not been tortured since his return to India, to justify its decision to expel the author. Counsel contends that the author is currently a victim of torture; but that even if that were not the case, the Committee should determine if the author was at substantial risk of torture at the time of his deportation from Canada.

14.4 Counsel argues that the author has provided enough evidence by his letter and his niece's affidavit that he has been at substantial risk of torture since he arrived in India and that the Indian authorities maintain a high level of interest in him. It is reaffirmed that the deportation of the author was a disguised extradition even though there was no request for one.

14.5 Counsel draws the attention of the Committee to additional sources that dispute the State party's assertion that the human rights situation in Punjab has improved.⁹ Counsel submits that the sources confirm that the situation of human rights activists deteriorated at the end of 1998. Counsel also

refers to information indicating that persons who have presented complaints before the People's Commission have been visited by the police and threatened with death or arrest on false charges.

14.6 Counsel develops the argumentation that the State party has not been consistent in its risk assessment. While it is currently portraying the author as a person of no interest to the Indian authorities, it has previously qualified him as a high-profile militant, including pointing to his links with the Dal Khalsa, a known pro-Khalistan organization, the fact that he had intimated to the immigration authorities that he could "crush anyone with his thumb", as well as evidence of him having made pro-Khalistan, anti-Indian Government statements. The present contention of the State party that the author is not a high-profile militant is, therefore, fallacious. Counsel further presents additional information demonstrating that the author is indeed a "high-profile militant" One is a comment made by the BBC in May 1982 characterizing the Dal Khalsa, as an anti-national, secessionist, extremist organization. The other is an article from The News International of October 1994 on the author himself, qualifying him clearly as a militant. Counsel finally refers to information contained in the Canadian Government's own file relating to the removal of the author from Canada ("section 27 report"), dated 30 November 1995, indicating that the author "is a member of the Dal Khalsa, a known terrorist organization". Counsel emphasizes the use of the present tense in the sentence to demonstrate that neither the existence of the Dal Khalsa nor the affiliation of the author belongs to the past. According to counsel, these elements are a clear indication that the State party was indeed considering the author as a high-profile militant and therefore knew of the risk of returning him to India.

Issues and proceedings before the Committee

15.1 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to India. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, 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 a sufficient ground 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.

15.2 The Committee first notes that the author was removed to India on 23 December 1997 despite a request for interim measures pursuant to rule 108 (9) of the rules of procedure according to which the State party was requested not to remove the author while his communication was pending before the Committee.

15.3 One of the overriding factors behind the speedy deportation was the claim by the State party that the "author's continued presence in Canada represents a danger to the public". The Committee, however is not convinced that an extension of his stay in Canada for a few more months would have

been contrary to the public interest. In this regard, the Committee refers to a case before the European Court of Human Rights (*Chapel v. United Kingdom*) in which the Court maintained that scrutiny of the claim "must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling state".

15.4 As for the merits of the communication, the Committee notes that the author has been living in India for more than two years. During this time, although he claims to have been harassed and threatened, along with his family, on several occasions by the police, it seems that there has been no change in the manner in which he has been treated by the authorities. In these circumstances, and given the substantial period of time that has elapsed since the author's removal, giving ample time for the fears of the author to have been realized, the Committee cannot but conclude that his allegations were unfounded.

15.5 The Committee is of the opinion that after a period of nearly two and a half years, it is unlikely that the author is still at risk of being subjected to acts of torture.

15.6 The Committee considers that the State party, in ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with it in good faith in applying the procedure. Compliance with the provisional measures called for by the Committee in cases it considers reasonable is essential in order to protect the person in question from irreparable harm, which could, moreover, nullify the end result of the proceedings before the Committee. The Committee is deeply concerned by the fact that the State party did not accede to its request for interim measures under rule 108, paragraph 3, of its rules of procedure and removed the author to India.

15.7 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 author's removal to India by the State party does not constitute a breach of article 3 of the Convention.

Individual opinion of Committee member Guibril Camara

16.1. Under rule 108, paragraph 9, of its rules of procedure, the Committee against Torture may take steps to avoid a violation of the Convention and, therefore, an irreparable damage. This provision is a logical attribute of the competence bestowed on the Committee under article 22 of the Convention, concerning which the State party has made a declaration. By invoking article 22, the author of a communication submits an enforceable decision to the Committee's judgement, with due regard to the requirement for the exhaustion of domestic remedies. Therefore, if such decision is enforced despite the Committee's request for suspension, the State party renders article 22 meaningless. This particular case is basically a matter of lack of respect, if not for the letter, then at any rate for the spirit of article 22.

16.2. Moreover, it is clear from the terms of article 3 of the Convention that the time to assess whether "there are substantial grounds for believing that [the author] would be in danger of being subjected to torture" is at the moment of expulsion, return or extradition. The facts clearly show that,

at the time of his expulsion to India, there were substantial grounds for believing that the author would be subjected to torture. The State party therefore violated article 3 of the Convention in acting to expel the author.

16.3. Lastly, the fact that in this case the author was not subsequently subjected to torture has no bearing on whether the State party violated the Convention in expelling him. The question of whether the risk - in this case, of acts of torture - actually materializes is of relevance only to any reparation or damages sought by the victim or by other persons entitled to claim.

16.4. The competence of the Committee against Torture should also be exercised in the interests of prevention. In cases relating to article 3, it would surely be unreasonable to wait for a violation to occur before taking note of it.

Notes

1/ Views, Communication No. 34/1995, CAT/C/18/D/34/1995, 9 May 1997.

2/ United States State Department, India-Country Report on Human Rights Practices for 1996.

3/ Documentation, Information and Research Branch, Immigration and Refugee Board, "India: Information from Four Specialists on the Punjab", Ottawa, 17 February 1997.

4/ Ibid.

5/ "Hijacker OK in the old country: An Indo-Canada newspaper reports an assurance that Tejinder Pal Singh will be safe in India", Vancouver Sun, 5 January 1998.

6/ United States State Department, *op.cit.*; Human Rights World Report 1997.

7/ See *supra*, note 3.

8/ Documents IND26992.E of the Research Directorate of the Immigration and Refugee Board in Ottawa, p. 3.

9/ Documents IND30759.EX and IND26992.E of the Research Directorate of the Immigration and Refugee Board in Ottawa.