BS v Canada, Merits, Communication No 166/2000, UN Doc CAT/C/27/D/166/2000, IHRL 3361 (UNCAT 2001), 14th November 2001, United Nations Committee Against Torture [UNCAT]

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Parties: BS (Iran [ir])
Canada

Judges/Arbitrators: Guibril Camara; Sayed Kassem El Masry; Felice Gaer; Alejandro González-Poblete; Andreas Mavrommatis; Ole Vedel Rasmussen; Alexander M. Yakovlev; Yu Mengjia

Procedural Stage: Merits

Subject(s):

Torture — Non-refoulement

Core Issue(s):

Whether the deportation of an individual to a country where he allegedly faced a substantial risk of being subjected to torture violated the deporting state's obligations under Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').

Whether an obligation of non-refoulement was part of a State's obligation not to perpetrate cruel, inhuman, or degrading treatment or punishment under Article 16 of the CAT.

Whether the prohibition on refoulement in Article 3 extends to situations where a person foreseeably faces ill-treatment which does not constitute torture, but which constitutes cruel, inhuman, or degrading treatment or punishment.

Facts

F1 BS was living in Canada at the time of the complaint where he was the subject of a deportation order for his forcible return to Iran.

F2 BS alleged that while he was a student in Iran, he was involved in political debates which attracted the attention of the state security forces. He alleged that he was tortured on a number of occasions in 1985. In 1989 he was held by the Revolutionary Guards for a month, during which he was beaten. He was arrested again in 1990. He was constantly frightened that the police would kill or torture him.

F3 He was eventually able to flee the country and arrived in Canada where he was granted asylum on 11 January 1996.

F4 However in 1992 he was tried and convicted on a range of criminal offences. As a result the Minister for Citizenship and Immigration considered him to be a danger to the public. Accordingly he was earmarked for deportation. Appeals against that deportation order failed.

F5 BS submitted that his forced return to Iran would breach Article 3 and Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987 ('CAT').

F6 Canada argued that his allegation of torture dated back to 1984 and there was no evidence he was still at risk of torture if deported back to Iran. BS's claims had been thoroughly examined by its immigration authorities.

F7 BS responded that the decision to deport him was undertaken without allowing him any opportunity to make submissions or otherwise participate in the process.

Held

H1 The allegations were admissible. (para 6.3)

H2 BS may have been tortured during his detention in 1985. However, he did not allege that he was tortured during his subsequent detentions up to 1990. (para 7.3)

H3 BS was unlikely to be persecuted or tortured by the Iranian authorities because of his past political activities or criminal conviction in Canada. (para 7.3)

H4 The non-refoulement obligation in Article 3 did not extend to cases where a person faced ill-treatment short of torture in the country of destination. (para 7.4)

H5 Accordingly the deportation of BS from Canada to Iran would not breach Article 3 of the CAT. (para 8)

Date of Report: 23 November 2009

Reporter(s): Alexander Pung; Castan Centre for Human Rights Law

Analysis

A1 The UN Committee Against Torture found that BS did not claim that he was tortured after 1985. He did claim that he was beaten in custody in 1989. Therefore, beatings per se do not equate with torture, according to this case.

A2 The Committee confirmed that the prohibition on refoulement only extends to cases where a person foreseeably faces torture in the country of destination rather than forms of ill-treatment (such as those covered by Article 16) which fall short of torture. In this respect, the International

Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR') offers more comprehensive protection against refoulement. It seems that a State cannot deport a person to another State if that person faces foreseeable breaches of Article 7 of the ICCPR. Article 7 prohibits torture *and* the forms of ill-treatment covered by Article 16 of CAT. See General Comment 20, UN Doc A/47/40 (1992), Annex VI, para 9. See also TM v Sweden, CAT/C/31/D/228/2003.

Date of Analysis: 18 February 2010
Analysis by: Sarah Joseph; Castan Centre for Human Rights Law

Instruments cited in the full text of this decision:

International

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) 1465 UNTS 85, entered into force 26 June 1987, Articles 1, 3, 3(1), 3(2), 16, 22, 22(3), 22(5)(a), 22(5)(b), 22(7)

Domestic

Immigration Act (Canada), Sections 53(1), 70(5), 114(2)

Immigration Regulations (Canada), Section 2(1)

Cases cited in the full text of this decision:

UN Committee Against Torture

X v Netherlands, UN Doc CAT/C/16/D/36/1995

RK v Canada, UN Doc CAT/C/19/D/42/1996

PQL v Canada, UN Doc CAT/C/19/D/57/1996

PSS v Canada, UN Doc CAT/C/21/D/66/1997

LO v Canada, UN Doc CAT/C/24/D/95/1997

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Decision - full text

1.1 The petitioner is B.S., an Iranian national, currently residing in Vancouver, Canada. He claims that his removal to the Islamic Republic of Iran would entail a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Canada. 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 21 July 2000. At the same time, acting under rule 108, paragraph 9, of its rules of procedure, the Committee requested the State party not to expel the petitioner to the Islamic Republic of Iran while his communication was being considered. The State party acceded to this request.

The facts as submitted by the petitioner

2.1 On 2 August 1990, the petitioner arrived in Canada. He was granted refugee status by decision of the Immigration and Refugee Board on 11 January 1996.

2.2 Since 1992, the petitioner was convicted of various criminal offences, including theft, uttering threats, assault, will to cause personal injury, false pretences, sexual assault, obstructing a peace officer and altering a forged document. Restraining orders were issued against the petitioner in 1997 and 1998. On 15 January 1999, the Minister of Citizenship and Immigration's delegate issued an opinion pursuant to sections 70 (5) and 53 (1) of the Immigration Act that the petitioner constitutes a danger to the public in Canada due to the number and nature of criminal convictions acquired by the applicant in Canada since 1992. A deportation order was issued against the petitioner on 1 March 1999.

2.3 On 15 April 1999, the petitioner filed an application for leave and judicial review of the decision to remove him to Iran. The Federal Court dismissed the application on 12 July 2000. The Federal Court had denied his application for leave and for judicial review of the decision that he constituted a danger to the public on 14 July 1999. Counsel submits that all effective domestic remedies have been exhausted and that the petitioner expects his deportation any time.

2.4 The petitioner alleges that he fled persecution in Iran in July 1990. He submits that, in early 1985, while in high school, he had been arrested and questioned by Revolutionary Guards about his participation in political discussions. The Petitioner was held for eight days during which he was beaten, punched, kicked, and tortured. In September 1984, the petitioner's family home was raided by Revolutionary Guards after siblings left Iran because of perceived involvement with the pro-monarchist movement. The petitioner alleges that he was held for 18 days and that his sister, his mother, and he himself were beaten. In January 1985, while serving in the military, the petitioner was suspected of political activity and detained and questioned by an officer of the Ideological/Religious Department of the Army for two days. The petitioner submits that he was forced to witness the execution of six soldiers convicted of opposing the regime and its war efforts. In April 1985, the petitioner was wounded by a grenade and released from the army, after treatment in a military hospital, in February 1986. In October 1989, the petitioner was arrested by Revolutionary Guards, handcuffed and taken to the offices of the branch of police that deals with anti-revolutionary offences (Komiteh), where he was allegedly beaten and held for one month. In March and April 1990, the Komiteh again detained the petitioner for 24 hours each time. After the second arrest, the petitioner was ordered to report daily to the Komiteh office. The petitioner submits that every time he reported to the office, he was afraid that the police officers would kill or torture him. After four or five days, the petitioner fled to Bandar Abbas, obtained a false passport and fled Iran by plane. In 1993 a summons was published in the Iranian newspaper Khabar Find it in your Library indicating that the petitioner had been charged with escape and was requested to report to the Investigation Branch of the General Prosecutor's Office in Shiraz.

2.5 The petitioner submits that he fears for his life and safety if he is returned to Iran. Furthermore, the Iranian authorities would be alerted to his return, because the petitioner would require travel documents issued by Iran. The petitioner alleges that the State party did not assess the risks he faced upon his return. The petitioner alleges also that he has never been assessed for determining the likelihood that he will commit more crimes.

The complaint

3 . The petitioner claims that his forced return to Iran would violate articles 3 and 16 of the Convention against Torture and Other Inhuman or Degrading Treatment or Punishment. He argues that there are substantive grounds for believing that he would be in danger of being subjected to torture when deported, because he had been tortured before he left Iran and because he would probably be detained and severely punished for his refusal to comply with the daily reporting obligations of the Komiteh. The petitioner claims further that refugees and refugee claimants are at risk of torture upon their return to Iran.

State party's observations on admissibility and merits

4.1 The State party submits that the petitioner has not exhausted all effective domestic remedies. The State party argues that the petitioner has failed to seek a ministerial exemption on humanitarian and compassionate grounds under subsection 114 (2) of the Canadian Immigration Act and section 2.1 of its Immigration Regulations. This remedy would have enabled the petitioner to apply to the Minister on Citizenship and Immigration at any time for an exemption from the requirements of the immigration legislation or for admission to Canada on compassionate or humanitarian grounds. The State party recalls the earlier findings of the Committee that humanitarian and compassionate applications are an available and effective domestic remedy[1].

4.2 The State party submits further that the petitioner's claim of violations of his rights established by articles 3 and 16 of the Convention are not substantiated. The petitioner did not establish prima facie that there are substantial grounds for believing that his deportation would have the foreseeable consequence of exposing him to a real and personal risk of being tortured if returned to Iran. The isolated past incident of torture does not establish such a risk of torture upon his return. The State party argues that the petitioner has only alleged to have been tortured on occasion of his first detention in 1984, but not in any of the subsequent detentions. His last two detentions lasted only for 24 hours and the petitioner was released with only an obligation to report daily. The State party concludes that the treatment of the petitioner followed a pattern of decreasing severity and that today he is not of interest for the authorities in Iran.

4.3 The State party submits that given the Committee's interpretation of article 3 as offering absolute protection irrespective of an individual's past conduct, the determination of the risk must be particularly rigorous. In this regard, the State party submits that a risk assessment was conducted when the Minister of Citizenship and Immigration's delegate considered whether the petitioner was a danger to the public and should be removed from Canada. A new assessment by the Department of Citizenship and Immigration in preparation of the response of the State party to the Committee confirmed the earlier finding that the petitioner is not at risk of torture if removed to Iran. The State party argues, in this regard, that the Committee should not substitute its own findings for those of the national proceedings since they did not disclose abuse of process, bad faith, manifest bias or irregularities. It is for the national courts of the States parties to evaluate the facts and evidence in a particular case and the Committee should not become a "fourth instance" competent to re-evaluate findings of fact or review the application of domestic legislation.

4.4 With regard to the risk of being tortured upon his return, the State party submits that the facts in the present petition are similar to those in communication No. 36/1995, *X. v. The Netherlands*. The petitioner has not provided any medical evidence with regard to the alleged ill-treatment in

1984. The State party argues further that the petitioner did not indicate that, after September 1984 or because of his departure, any member of his family in Iran were victims of retribution by Iranian authorities because of the petitioner's alleged political opinion. The State party submits, in addition, that the summons in itself does not establish that the petitioner would be at risk of being tortured. The "notice to appear" acts, in criminal cases, as an official notification that the participation of the person named is required in an investigation, either as a witness or an accused. Nothing supports the conclusion that the summons was issued for alleged political crimes. Furthermore, the petitioner has not provided any evidence that the Iranian authorities have issued a warrant for his arrest due to his failure to respond to the summons, nor did he indicate that he is still obligated to report under the summons.

4.5 With regard to the general situation in Iran, the State party submits that important changes have occurred since 1984, including the establishment of a Department of Human Rights within the Ministry of Foreign Affairs and of the Islamic Human Rights Commission and the election of Mr. Khatami as President. Furthermore, the latest Canadian Immigration and Refugee Board's publication on Iran has explained that the safety of return depends on the interpretation of general governmental policy by local authorities and, therefore, the mere allegation of a risk of torture because the petitioner is a refugee is insufficient to establish that he would personally face a risk of torture. The State party argues that the existence of a pattern of human rights violations in a country is not sufficient to determine that a particular person would be in danger of being subjected to torture.

Comments by the petitioner

5.1 The petitioner submits that a decision to grant a minister's permit or an exemption under section 114 (2) of the Immigration Act is entirely discretionary and executive. He would not be eligible for landing in Canada or given the required minister's permit because of his convictions for sexual assault. The petitioner submits that the State party would not exercise its discretion in his favour. The only decision the petitioner could apply to review would be the decision to remove him to Iran. He filed a judicial review on this very issue, but the Federal Court denied his application. Therefore, counsel argues that the remedies suggested by the State party cannot be regarded effective domestic remedies.

5.2 The petitioner further submits that the cases referred by the State part are either easily distinguishable from the present case or entirely off the point. He submits that in *P.Q.L. v. Canada*[2], the Committee found that all domestic remedies had been exhausted despite the fact that the petitioner could have made an application for humanitarian and compassionate relief.

5.3 The petitioner submits that he satisfies the factors listed in the Committee's general comment on article 3. Furthermore, the Committee should have no confidence in the accuracy of the original risk assessment as the process did not involve an independent decision-maker, an oral hearing, rules of evidence or, at the time of the decision in the present case, written reason. The second risk assessment was made without the knowledge or participation of the petitioner and relies almost entirely on the research conducted by another office of the State party's immigration office.

5.4 The petitioner submits that the Convention Refugee Determination Division accepted the allegations of torture set out in the petition. The petitioner is a Convention refugee and was found to have a well-founded fear of persecution in Iran. The conclusion that the summons was, in fact, a "notice to appear" is unreliable, since the State party relies on information obtained during a telephone interview with an unnamed lawyer in Tehran, who, apparently, did not see the summons. The petitioner further asks the Committee to consider what treatment he will receive should the Iranian authorities discover that he was convicted of sexual assault in Canada.

5.5 With regard to the general situation of human rights in Iran, the petitioner points to reports by

Human Rights Watch in 1999 and the United States Department of State in 2000 and submits that while there have been some potentially positive developments, little has changed to date and human rights conditions may have actually deteriorated.

Issues and proceedings before the Committee

Examination of admissibility

6.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee notes that the State party considers the communication inadmissible for lack of exhaustion of domestic remedies. In its risk opinion of 11 August 2000, the Department of Citizenship and Immigration denied a risk of torture if the petitioner is removed to Iran; the Committee notes that the same governmental body would determine a decision on a humanitarian or compassionate application or a minister's permit. The Committee notes further that the petitioner's applications for leave and judicial review of the decisions to remove him to Iran and that he constitutes a danger to the public had been denied by the Federal Court; the same could would be responsible for reviewing a decision on a humanitarian or compassionate application or a minister's permit. Therefore, the Committee finds that, in the petitioner's situation, a humanitarian or compassionate application under section 114 (2) of the Immigration Act or a minister's permit would not constitute a remedy likely to bring relief, which should still be exhausted for purposes of admissibility. The Committee, therefore, considers that the conditions laid down in article 22, paragraph 5 (b), of the Convention have been met.

6.3 The Committee notes that the State party considers the communication inadmissible for lack of sufficient substantiation. The Committee is of the opinion that the State party's arguments raise only substantive issues, which should be dealt with at the merits and not the admissibility stage. Since the Committee sees no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

7.1 The issue before the Committee is whether the removal of the petitioner to the Islamic Republic of Iran would violate the obligation of Canada under article 3 of the Convention not to expel or return a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

7.2 The Committee must decide, pursuant to article 3, paragraph 1, of the Convention, whether there are substantial grounds for believing that the alleged victim would be in danger of being subjected to torture upon return to Iran. 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 termination, 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.

7.3 In the present case, the Committee notes that the petitioner has claimed that, during his first

detention in early 1985, he was tortured. Although not explicitly corroborated by medical evidence or detained submission by the petitioner, the Committee is prepared to consider that the petitioner may have been maltreated during his first detention. The Committee also notes that the petitioner has not claimed that he was tortured during his subsequent detentions. Finally, the Committee notes that the periods of the two latest detentions in 1990 were short, that the petitioner has not claimed that he was ever an active political opponent and that there is no indication that he is being sought by the authorities in Iran at the present time or would be at a particular risk of being tortured for reason of his Canadian criminal record. Therefore, the Committee considers that the petitioner has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Iran.

7.4 With regard to the alleged violation of article 16 of the Convention, the Committee notes that article 3 of the Convention does not encompass situations of ill-treatment envisaged by article 16, and further finds that the petitioner has not substantiated a claim that he would face such treatment upon return to Iran as would constitute cruel, inhuman or degrading treatment or punishment with the meaning of article 1 of the Convention.

Conclusions

8 . 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 removal of B.S. to the Islamic Republic of Iran, on the basis of the information submitted, would not entail a breach of articles 3 and 16 of the Convention.

Footnotes:

1 The State party makes reference to *P. S. S. v. Canada*, case No. 66/1997; *R. K. v. Canada*, case No. 42/1996; *L. O. v. Canada*, case No. 95/1997.

2 Case No. 57/1996.