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HUMAN RIGHTS COMMITTEE
Seventy-seventh session
10 March - 4 April 2003

DECISION

Communication No. 743/1997

Submitted by:	Ngoc Si Truong (represented by counsel Mr. Ian White)
Alleged victim:	The author
State party:	Canada
Date of communication:	26 April 1996
Document references:	Special Rapporteur's rule 91 decision, transmitted to the State party on 25 February 1997 (not issued in document form)
Date of adoption of decision:	28 March 2003

[ANNEX]

* Made public by decision of the Human Rights Committee.

Annex

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Seventy-seventh session

concerning

Communication No. 743/1997*

Submitted by: Ngoc Si Truong (represented by counsel Mr. Ian White)

Alleged victim: The author

State party: Canada

Date of communication: 26 April 1996

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2003,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Ngoc Si Truong, born in Viet Nam on 31 March 1964 but currently allegedly stateless, and under order of deportation from Canada at the time of submission of the communication. He claims to be a victim of a violation by Canada of articles 2, paragraphs 3 (a) and (b), 6, paragraph 1, 7, 9, 13, 17 and 23, paragraphs 1 and 2, of the Covenant. He is represented by counsel.

* The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Ms. Ruth Wedgwood and Mr. Roman Wieruszewski. Under rule 85 of the Committee's rules of procedure, Mr. Maxwell Yalden did not participate in the examination of the case.

The facts as presented

2.1 In May 1978, the author fled Viet Nam illegally for fear of being drafted into the Vietnamese armed forces in the armed conflict with Cambodia. The author's father had been a general in the former South Vietnamese forces and died in 1975. On 20 October 1980 (aged 16 years), the author arrived in Canada and was granted permanent resident status. On his immigration record and permanent residence visa documentation, he is listed as "apatride/stateless". In April 1985, the author was convicted of assault causing bodily harm and aggravated assault, and sentenced, concurrently, to nine months' imprisonment and two years' probation. In 1988, he was (i) convicted of breaking and entering and theft, as well as assault with a weapon, for which he received consecutive sentences of four months' and two months' imprisonment, (ii) convicted of assault causing bodily harm, for which he was sentenced to one year's imprisonment and probation of two years, (iii) convicted of operating a motor vehicle while impaired, for which he was sentenced to seven days' imprisonment and a fine. In June 1991, the author travelled to Viet Nam on Canadian documentation on a limited term visitor's visa, and married a Vietnamese national who applied for Canadian permanent residence on the basis of her relationship with the author.

2.2 By virtue of his criminal offences, the Canadian authorities on 8 July 1992 ordered the author's deportation pursuant to s. 27 of the Immigration Act, which requires the deportation of permanent residents who have been convicted of serious criminal offences. In 1993, he was convicted of operating a motor vehicle while impaired; he was sentenced to 14 days' imprisonment. On 15 July 1993, the author's appeal to the Appeals Division of the Immigration and Refugee Board, based on "the existence of compassionate or humanitarian considerations", was dismissed. The author then sought leave to apply for judicial review to the Federal Court. However, his counsel at the time inadvertently failed to request written reasons for decision from the Appeals Division within the 10-day limit provided, and as a result the Appeals Division refused to supply its reasons once requested thereafter. On 10 November 1993, the Federal Court dismissed the author's application for failure to supply an application record (including the Appeals Division's reasons for decision).

2.3 On 20 December 1993, the Canadian authorities refused his wife's application for permanent residence (which, according to the author, would otherwise likely have been approved) on the basis of the deportation order against the author. On 21 December 1993, the author submitted to the Federal Court a motion for reconsideration of its decision of 10 November 1993 to reject the author's application for judicial review. On 18 April 1994, the Federal Court dismissed the motion. On 4 March 1994, the author appealed against the refusal of his wife's application to the Immigration and Refugee Board.

2.4 On 5 July 1994, the author's new counsel made a further request to the Appeals Division for the written reasons his case was dismissed. On 21 July 1994, counsel was advised that the time limit for requesting reasons had passed and would not be supplied. On 12 September 1994, counsel requested from the Appeals Division an order extending the time available to request written reasons. On 5 October 1994, the Appeals Division refused the request. An application for leave and judicial review of this decision was filed with the Federal Court on 25 October 1994.

2.5 On 9 March 1995, the Federal Court dismissed the application, without reasons given. No further appeal is available, and the author submits that all effective and available domestic remedies have been exhausted. In 1995, the author was charged with breaking and entering, possession of a restricted weapon, carrying a concealed weapon, careless handling of a firearm, possession of a prohibited weapon, and various other related charges.[1]

The complaint

3.1 The author argues that his removal to a country where he allegedly has no legal status would amount to cruel, inhuman and degrading treatment contrary to article 7. He submits that as a result of his illegal departure from Viet Nam and the loss of his Canadian permanent residency status, he has become stateless. As a result, he would, upon deportation to Viet Nam, be unable to work, reside or otherwise enjoy the rights associated with employment. He points out that when he travelled to Viet Nam in 1991, he was required to obtain a visa for four months and was not allowed to engage in employment. He submits that he may be imprisoned in a "re-education camp" upon return as a result of his illegal departure and his father's involvement in the former South Vietnamese Government. The author refers to the Committee's General Comment 20 on article 7, where the Committee considered that both the "dignity and the physical and mental integrity of the individual" was protected by this article. He also refers to jurisprudence of the Committee and the European Court of Human Rights finding that psychological torture and pressure may be subsumed under this provision.[2]

3.2 He also alleges, under article 7, that his removal would amount to a destruction of his family life and that his family would suffer anguish as a result. He lists three sisters, three brothers-in-law, six nieces, three nephews and five others (of unspecified relationship) in Canada from whom he would be separated. He contends that the Committee has recognized that anguish and suffering to family members may be in violation of the Covenant.[3]

3.3 The author further alleges that, for the reasons advanced above, his deportation would violate his right to security and liberty of the person (art. 9). He argues that "liberty" includes the right to establish a home and bring up children. He further refers to the right to life, liberty and security of the person provisions contained in the Canadian Charter of Rights and Freedoms and contends that this includes the right to pursue any lawful livelihood or lawful occupation without unreasonable government interference.

3.4 The author complains that his deportation would be arbitrary and contrary to article 13, taken in conjunction with article 2, paragraphs 3 (a) and (b), as it is not in accordance with law and does not respect the safeguards contained in article 13. Referring to the Committee's General Comment 15 on article 13, he argues that the Committee has interpreted broadly the right against arbitrary expulsion. In his case, the Appeals Division's refusal to issue written reasons for its decision denied him the opportunity to challenge the legality of his deportation order in the Federal Court. He argues that the Appeals Division's decision should be subject to judicial review, given the consequences of the decision, and to ensure the objectivity and independence of the decision maker. He alleges, with reference to the Committee's jurisprudence, that he has not been afforded an effective remedy to challenge his expulsion and that there are no compelling reasons of national security to deprive him of such a remedy.[4]

3.5 Finally, the author alleges that his deportation would amount to a disproportionate interference with his right to home and family life, infringing his rights under articles 17, paragraphs 1 and 2, and 23, paragraphs 1 and 2. He alleges that his separation by deportation from close family members is disproportionate to his criminal record, and that it is unreasonable to deport someone who arrived in Canada at age 16. Referring to his wife's (refused) application for residence and the author's close family members in Canada, he contends that a situation of family dependency upon the author has been established in Canada. In these circumstances, a broad interpretation of the notion of "family" should be applied,[5] and that protection of the family outweighs the State's desire to deport him. He submits that articles 17 and 23 should also be given a broad interpretation where legal obstacles to creation of family life and a fear of persecution exist in a country a person is being returned to. Due to his statelessness, he will be unable to remain indefinitely in Viet Nam and support a family.

3.6 The author contends that jurisprudence of the European Court has prohibited the deportation of individuals with criminal convictions on the grounds of family relationships.[6] Although denial of family rights may be cruel or degrading treatment contrary to article 12 of the Canadian Charter, he contends there are no effective domestic remedies available for the rights in issue.

The State party's submissions on the admissibility of the communication

4.1 By submissions of 4 July 1997, the State party contested the admissibility of the communication, arguing that the author had failed to demonstrate, on the facts, that he would prima facie be a victim of a violation by Canada of any of the provisions of the Covenant if he were to be returned to Viet Nam. It is therefore unsubstantiated, incompatible with the provisions of the Covenant and inadmissible.

4.2 The State party points out that, while 200,000 people are granted permanent residence each year, there is no right to the grant or retention of such status, and conditions of compliance may be set. These conditions, for the most part, reflect the State party's concerns for the health and safety of its citizens, the security of its institutions, and the administration of its law. As to the author's personal circumstances in Canada, the State party points out that the author has been living with one of his sisters and her family, while his employment history has been erratic. The State party observes that it has requested travel papers for the author from Viet Nam, with which it concluded a Memorandum of Understanding, on 4 October 1995, to accept the return of Vietnamese citizens without any other citizenship who violated Canadian law and are subject to deportation. At the time of submission, Viet Nam had accepted 15 such persons, and the author's return is under active consideration by that country.

4.3 As to the author's claims under article 7, the State party argues that the scope of this provision is not as broad as claimed. Reasoning by analogy with *Vuolanne v. Finland*,[7] the State party argues that the treatment complained of must amount to more than deportation or its natural consequences. There must be substantial grounds for believing that the author's rights under article 7 would be violated in the receiving country. In this case, the author has given no evidence to refute UNHCR claims that Vietnamese returnees are well treated,[8] nor is his claim that he might be imprisoned in a re-education camp more than pure speculation. The State party

points out that the author did not hesitate to return to Viet Nam several years ago to marry, and it does not appear that at that time, he was subject to any discriminatory action by the Vietnamese authorities, much less action that would trigger the article 7 threshold.

4.4 The State party rejects that the author is stateless, pointing out that in four documents placed before the Committee by the author, he is identified as a Vietnamese national (in his Vietnamese marriage certificate, his affidavit to the Immigration and Refugees Board, his memorandum of argument to the same Board and his memorandum of argument before the Federal Court). He has provided no evidence that he has lost Vietnamese citizenship, or that he could not work in Viet Nam and support a family. Indeed, he has recently married a Vietnamese national, whose right of abode there would enable the author to enjoy family life there. While the author would be inconvenienced in terms of his relationships with his sisters in Canada, his mother and, apparently, two brothers also continue to reside there, further reducing the negative impact of his removal.

4.5 Concerning article 9, the State party argues that the author would not be deprived in Viet Nam of any of the rights that he identifies as inherent in that article. As a citizen of Viet Nam, he would be entitled to all the rights of that country if returned. While the valid removal of an alien affects the removal of an alien to move freely within the removing State, there is no violation of article 9 where the removal is otherwise lawful and consistent with the Covenant.

4.6 As to the author's claims under articles 13 and 2 concerning arbitrary expulsion, the State party recalls that the author was convicted of serious criminal offences, thereby breaching an important condition attached to his continued residence as an alien. He was ordered removed following an oral hearing with full procedural safeguards. The decision by the Appeals Division to reject his appeal was taken in accordance with law and having regard to all the circumstances of the case, and cannot be said to be arbitrary or inconsistent with the Covenant. The author had multiple legal opportunities to obtain the Appeals Division's reasons, and failed to do so either through inadvertence or due process of law.

4.7 The State party points out that the Appeals Division hears too many cases to make it practicable to issue written reasons for its decision automatically. If requested within a certain time frame, however, they must be supplied. The time limit is to ensure an accurate rendition of the decision, and to be consistent with the time frames for further appeals from the Appeals Division's decisions and for other decisions under the Immigration Act. At each stage of the process, the author was represented by counsel, while the adjudicators, Appeals Division members and Federal Court judges deciding in the author's case were all independent. Thus, the deportation decision was reached in accordance with the law, and the author had ample opportunity to seek review of that order, as required by article 13. The State party submits that the judicial review available to the author satisfied its obligations under article 2, and that any violation of Covenant rights would have found an effective remedy before competent judicial authorities.

4.8 As to the author's claims under articles 17 and 23, the State party repeats that he is a Vietnamese national with corresponding rights, and that a number of close family members, including his wife, mother and two brothers, live in Viet Nam. He has demonstrated no family

dependency on him in Canada - indeed, he lives in the home of a sister and her family. The State party submits that the scope of the Covenant's protection of the family in the immigration context is defined by articles 13, 17 and 23 read together, such that a State, when considering removal of aliens, should balance the individual's family interests against the interests of the State. To that end, full consideration was given to the author's family circumstances throughout the entire decision-making process. Considerations such as age, length of time spent in Canada, presence of close family members in Canada and abroad, degree of integration into Canadian society and successful establishment in Canada are mandatory in the decision-making. The decisions made were not arbitrary and procedural guarantees were fully met. The State party submits that the same considerations were applied in the present case as in the case of *Stewart v. Canada*,[9] where the Committee found no violations of articles 17 and 23 of the Covenant, and that in fact the present facts show a far weaker family connection with the removing country than was the case in *Stewart*.

4.9 As to the author's claim under article 6, paragraph 1, the State party contests the relevance of this provision to the case. The author has not suggested that his case falls into the categories of death penalty, infant mortality, deaths at the hands of State authorities or similar circumstances that the Committee has previously examined in relation to article 6. The author's right to life is not threatened in either Canada or Viet Nam.

The author's comments

5.1 By letter of 27 October 1997, the author responded to the State party's submissions, pointing out that in the State party's immigration documentation he is identified as "apatride/stateless". It is thus not open to the State party to contend that he possesses Vietnamese citizenship when its documentation acknowledges him as stateless. He also points out that when he travelled to Viet Nam in 1991, he was first required to obtain a visitor's visa for a four-month period only and was not allowed to pursue employment during his stay.

Supplementary submissions

6.1 By submissions of 16 March 1998, the State party responded to the author's comments, pointing out that the author does not deny that he remains a citizen of Viet Nam, and that the Vietnamese Government would not accept him unless he was a citizen. The 1995 Memorandum of Understanding only requires Viet Nam to accept its citizens, if they have been convicted in Canada of criminal activity. Viet Nam would not issue a passport or other documentation to the author if he were not a citizen.

6.2 The State party points out that the designation "apatride/stateless" is typically used in its immigration documentation to indicate that the person concerned is outside his/her State of nationality, is not carrying a travel document issued by that country, and is unwilling to return to that country. The officials completing such documentation do not have the capacity to determine whether the individual in question is, in law, stateless. The State party continues to consider the author a Vietnamese citizen, and conducts discussions with Viet Nam about the author's return on that basis.

6.3 The State party recalls that the author's marriage certificate, issued by the Vietnamese authorities, identifies him as a Vietnamese national. Indeed, the author swore in his affidavits before the Immigration and Refugee Board and before the Federal Court that he was Vietnamese.

6.4 On 22 April 1998, the State party's supplementary submissions were transmitted to the author's counsel, with an invitation to comment. Despite being further invited by reminders of 25 September 2000 and 12 October 2001, no further comments were received from the author's counsel.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee observes that the State party objects to the admissibility of the communication solely on the ground that it is unsubstantiated and/or that the author's claims fall outside the scope of the Covenant. At the outset, the Committee notes that it does not need to determine whether the author is, in fact, stateless or not. If he is not a Vietnamese citizen, then, on the basis of the information before it, he is not liable to removal to Viet Nam under the terms of the Memorandum of Understanding and, at least at the present time, his communication would be moot and devoid of object. The Committee therefore proceeds, for the sake of argument, on the basis most favourable to the author, namely that the author <u>is</u> liable to deportation to Viet Nam.

7.3 As to the claim under article 6, the Committee notes that the author has not advanced any argumentation whatsoever in support of his claim under this provision, and accordingly finds this claim inadmissible as manifestly unsubstantiated.

7.4 As to the claims under articles 2, 7, 9, 13, 17 and 23, the Committee observes that the author's arguments fall into two categories. Firstly, he argues that his removal would separate him from family in Canada, render him, partly due to his being a non-citizen, unable to pursue his own family life in Viet Nam and expose him to deprivations of other rights there. Secondly, he argues that the deportation process in Canada was flawed. On the first point, the Committee notes that, as a Vietnamese citizen, the author would be entitled to reside, work and support a family in Viet Nam; indeed, he married a Vietnamese citizen there without any difficulty in 1991. Given the presence of his wife, mother and two brothers, the author has failed to demonstrate that his removal would, in terms of articles 17 and 23, raise arguable issues of family life under the Covenant. In the light of the Committee's decision in *Stewart*, where, in a case concerning the removal of an individual who had been in Canada for a longer period and from a younger age, and where apart from a single brother the individual's entire family resided in Canada, the Committee found no violation of (inter alia) articles 7, 9, 13, 17 and 23, the author has failed to substantiate his claims on the facts.

7.5 As to the claim under article 7 of the Covenant, the Committee considers that the author has not substantiated, beyond a simple allegation, that he faces a real risk of abusive treatment by the Vietnamese authorities that would raise additional issues under article 7. In this connection,

the Committee notes (i) that the author's comments on the State party submissions did not respond to its contention that he was not at risk of such treatment, and (ii) that despite repeated invitations to comment on the State party's supplementary submissions, the author did not take those opportunities to further substantiate this claim. In the light of the preceding paragraphs, the Committee accordingly concludes that the author has failed to substantiate, for purposes of admissibility, his claims of a violation of articles 7, 9, 17 and 23 of the Covenant.

7.6 As to the processes before Canadian immigration and judicial authorities, the Committee notes that the author, aided by counsel, had a full and independent review by the Appeals Division of the decision to deport him. Even if article 13 was to be interpreted to require the possibility of a further appeal, the Committee notes that this was available under the State party's law, provided that the author lodged a timely request for the full decision. The Committee recalls its jurisprudence pursuant to which failure to adhere to procedural time limits for the filing of complaints amounts to failure to exhaust domestic remedies,[10] and concludes that, as a consequence, it would be inappropriate for the author to raise on the merits his subsequent inability, due to inadvertence, to pursue an effective appeal. The Committee accordingly concludes that the author has failed to substantiate, for purposes of admissibility, his claim of a violation of articles 2 and 13 of the Covenant.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That this decision shall be communicated to the author and to the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Notes

[1] These charges were still outstanding at the time of the State party's submission.

[2] *Miguel Angel Estrella v. Uruguay* Case No. 74/1980, Views adopted on 29 March 1983; *Soering v. United Kingdom* Series A, vol. 161 (1989).

[3] *Almeida de Quinteros et al. v. Uruguay* Case No. 107/1981, Views adopted on 21 July 1983.

[4] *Hammel v. Madagascar* Case No. 155/1983, Views adopted on 3 April 1987.

[5] *Aumeeruddy-Cziffra v. Mauritius* Case No. 35/1978, Views adopted on 9 April 1981.

[6] *Abdulazis et al. v. France*, *Beldjoudi v. France*, *Djeroud v. France*, *Moustaquim v. France.*

[7] Case No. 265/1987, Views adopted on 7 April 1989.

[8] The State party refers to a three-page facsimile message, dated 4 may 1995, from the Deputy Representative of the UNHCR Branch Office for Canada to an IRB Research Officer on the subject of "Return of Vietnamese asylum-seekers", which concluded that: "From six years of experience in visiting many thousand returnees in over 300 districts and city-wards all throughout Viet Nam, we may state that they are generally treated well with no discriminatory measures taken against them."

[9] Case No. 538/1993, Views adopted on 1 November 1996.

[10] See, for example, *A.P.A. v. Spain* Case No. 433/1990, Decision adopted on 25 March 1994.
