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REPORT N° 7/02

ADMISSIBILITY

PETITION 11.661

MANICKAVASAGAM SURESH

CANADA

February 27, 2002

I. SUMMARY

1. The present report deals only with the admissibility of this petition. Mr. Suresh arrived in Canada from Sri Lanka in 1990 and was granted refugee status. He applied for landed immigrant status (i.e. permanent residence) in 1991 but in 1995, before being granted such status, he was arrested, and the State began proceedings to deport him to Sri Lanka on the grounds that he was a member and fundraiser for an allegedly terrorist organization, the Liberation Tigers of Tamil Eelam (LTTE). He alleged that he would be tortured if he were to be deported. The case was appealed to the Canadian Supreme Court, which held on January 11, 2002, that deportation to face torture is generally unconstitutional and that Mr. Suresh was denied due process during the deportation review. The Supreme Court remanded the case to the lower court for a new hearing on the deportation issue.

2. Mr. Suresh also alleged that he was a victim of arbitrary detention, since he was in confinement for a period of 2 years and 5 months, because he was an alien without permanent residence status in Canada. He alleges that he had no access to a prompt, simple court procedure to test the legality of the detention and that this treatment deprived him of equal treatment as regards Canadian citizens with respect to the enjoyment of his liberty. The Commission, in this report, declares the petition admissible solely on the issues of Mr. Suresh's allegedly arbitrary detention, his access to a simple, brief procedure before the courts to ensure respect for his legal rights, and the alleged right to equality with Canadian citizens as regards the enjoyment of his liberty (Articles II (right to equality), XVIII (right to a fair trial) and XXV (right of protection from arbitrary arrest) of the American Declaration of the Rights and Duties of Man). The State takes the position that the detention was part of a deportation review process and that the delay was, in part, caused by the petitioner himself. The Canadian Courts have held the deportation review process and the concomitant detention to be constitutional and in lieu of a habeas corpus proceeding. The Inter-American Commission will notify the parties of this admissibility decision and continue its substantive consideration of the alleged violations of Articles II, XVIII and XXV of the American Declaration of the Rights and Duties of Man.

II. PROCEEDINGS BEFORE THE COMMISSION

3. The Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or the "IACHR") received a petition dated July 26, 1996, filed by Barbara Jackman of Jackman and Associates, a firm of Barristers & Solicitors in Toronto, Canada

(hereinafter "the petitioners"), in which it was alleged that the Government of Canada (hereinafter "Canada" or "the State") bore international responsibility for denying Mr. Manickavasagam Suresh, a Canadian refugee from Sri Lanka, certain fundamental human rights. Mr. Suresh, a Tamil, had been in detention since October 18, 1995, based on his association with a legal organization, not on the basis of any alleged unlawful conduct on his part.

4. Petitioners recognize that aliens are not entitled to all the rights of citizens, such as the right to enter and remain in the country, the right to vote and the right to participate in government, they argue, however, that the right to due process and the right to habeas corpus, are basic fundamental human rights which all people enjoy irrespective of their nationality, for the determination of the legality of their detention. Canada, they maintain, violates these rights on the basis of citizenship, thereby failing to ensure equal protection before the law. Further, petitioners allege that Canada detains persons based on "mere alleged membership" in terrorist organizations and thereby also violates their freedom of association.

5. The petitioners claim that Canada is in violation of Article I, II, XVII, XVIII, XXII, XXIV and XXV of the American Declaration of the Rights and Duties of Man (hereinafter the "American Declaration"), namely, the right to life, liberty and security (Article I); the right to equality before the law (Article II); the right to recognition of juridical personality and of civil rights (Article XVII); the right to a fair trial (Article XVIII), the right of association (Article XXII), the right to petition (Article XXIV); and the right to protection from arbitrary arrest (Article XXV).

6. On August 15, 1996, the Commission forwarded the petition to the Government of Canada and requested it to provide the Commission with its views within 45 days. A hearing on this petition was scheduled for October 8, 1996 at 3:30 pm, which was later cancelled at the request of the State. Since the State had not replied to the Commission's request for information, on February 27, 1997 the Commission reiterated its request of August 15th, and asked the State to respond within 30 days. On March 26, 1997, the Commission again reiterated its request for a response. On April 22, 1997, the State requested an extension until June 30, 1997 to supply the requested information, stating that "the issues which arise in this case require continuing consultations with a number of departments." On April 25, 1997, the Commission granted the State's request for an extension until June 30, 1997. On July 31, 1997, the State presented its submission on the admissibility of the petition. On August 6, 1997, the State's response was transmitted to the petitioners with a request that their observations be sent within 30 days of receipt. On October 23, 1997, the petitioners requested an extension until mid-November to present their observations, which was granted by letter dated November 5, 1997. The petitioners presented their observations on December 10, 1997 and they were communicated to the State on December 17th.

7. On January 8, 1998, Mr. Suresh was informed that he would be returned to Sri Lanka. On January 10, 1998, the petitioners informed the Commission of the imminent possibility of Mr. Suresh's deportation. The petitioners sought the appropriate judicial review at the national level and noted that the remedy being sought before the Commission would be rendered illusory if Mr. Suresh were returned to Sri Lanka. The Canadian Federal Court, on January 16, 1998, denied the application for a stay of the deportation order on the grounds that Mr. Suresh was found to be a danger to the security of Canada and because the judge did not find that Mr. Suresh would suffer irreparable harm "in light of the assurance given by the High Commissioner of Sri Lanka, the highest ranking Sri Lankan official in Canada" that Mr. Suresh "would not be tortured or killed if returned to Sri Lanka." Following this ruling, the petitioners requested precautionary measures from the Commission.

8. On January 16, 1998, the Commission granted the request for precautionary measures and requested the State to stay the pending deportation of Mr. Suresh from Canada until it had an opportunity to investigate the claims raised in the petition, pursuant to Article 29(2) of its Regulations. A hearing on the petition was held on February 23, 1998 at 10:00 a.m.

during the Commission's 98th period of sessions.

9. By note dated August 7, 1998, Canada informed the Commission of the current status of the various proceedings instituted by Mr. Suresh and requested the Commission to withdraw its precautionary measures to stay Mr. Suresh's removal, arguing that Mr. Suresh had withdrawn the issue from consideration. Mr. Suresh was released from detention on March 23, 1998 in exchange for agreed compliance with various conditions, which had been included in a judgment rendered on March 19th by the Canadian Federal Court. Canada stated that the only remaining issue in the case was Mr. Suresh's detention, pursuant to the *Immigration Act*, and the review of the detention. The issue of Mr. Suresh's detention, it was pointed out, was still the subject of an action filed with the Canadian Federal Court attacking section 40.1 of the *Act*. Consequently, since domestic remedies were pending, the Commission should declare the petition inadmissible for failure to exhaust domestic remedies. The additional information submitted by Canada was transmitted to the petitioners on August 12, 1998 and their observations requested within 30 days. On October 7, 1998, the petitioners filed their observations.

10. Mr. Suresh applied to the Federal Court for judicial review, alleging that the Minister's decision that he was a danger to the security of Canada was unreasonable, that the procedures under the *Immigration Act* were unfair and that the Act violated sections 7 and 2 of the *Canadian Charter of Rights and Freedoms* (hereinafter, "*Canadian Charter*"). The judge dismissed the application on all grounds. The Federal Court of Appeal upheld that decision. Petitioners appealed to the Supreme Court of Canada.

11. On January 11, 2002, the Canadian Supreme Court held that Mr. Suresh was entitled to a new deportation hearing and that the impugned legislation was constitutional. It found that Mr. Suresh had made a *prima facie* case that he might be subject to a risk of torture upon deportation to Sri Lanka. The Court held that once a *prima facie* case had been made that he was entitled to present evidence and make submissions, and that the procedures followed in Mr. Suresh's case did not meet the required constitutional standards. In fact, Mr. Suresh had not been provided with an opportunity to respond orally or in writing to the submissions and documentary evidence provided by the Minister.

12. The issue of whether Mr. Suresh can be deported back to Sri Lanka if he might be subject to risk of torture is not before the Commission since due to the Canadian Supreme Court's holding that Mr. Suresh is entitled to a new deportation hearing it is clear that domestic remedies have not been exhausted on that issue. The issue before the Commission is only whether Mr. Suresh has the right to have the legality of his detention ascertained without delay, by a simple, brief procedure before a court (Article XVIII) and whether his detention for 2 years and 5 months as a non-resident alien violated (Articles II and XXVI) the American Declaration. The Canadian *Immigration Act* sets out a scheme for the removal from Canada of persons who are not citizens or permanent residents for reasons of national security.

III. POSITIONS OF THE PARTIES

A. The petitioners

13. In order to make a determination on the admissibility of the petition it is important to understand the factual context and the facts relating to the deportation review proceedings will be set forth following the positions of the parties. Mr. Manickavasagam Suresh is a Sri Lankan citizen of Tamil origin. He was born in 1955 and entered Canada in October 1990. He was recognized as a Convention refugee in April 1991, and in early summer 1991, he applied for landed immigrant status. As a consequence of his refugee status, Mr. Suresh is protected by the principle of *non refoulement* which means that he cannot be returned "to a country where [his] life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion." Mr. Suresh is unmarried with no

dependents and his closest family members live in England.

14. Mr. Suresh's application for landed immigrant status was not finalized because in 1995 the Solicitor General of Canada and the Minister of Citizenship and Immigration commenced proceedings to deport him to Sri Lanka on security grounds. The first step in the procedure was a certification under section 40.1 of the *Immigration Act* alleging that Mr. Suresh was inadmissible to Canada on security grounds. The Solicitor General and the Minister filed the certificate with the Federal Court of Canada on October 17, 1995, and Mr. Suresh was detained the following day.

15. The certificate was based on the opinion of the Canadian Security Intelligence Service (CSIS) that Mr. Suresh is a member of the Liberation Tigers of Tamil Eelam (LTTE). Petitioners allege that the CSIS considers the LTTE to be a terrorist organization which operates in Canada under the auspices of a front organization, the World Tamil Movement (WTM), for the purpose of fundraising, propaganda and procurement of material. Mr. Suresh was the coordinator for the WTM in Canada. The Tamil minority is in rebellion against the democratically elected government of Sri Lanka for violation of their basic linguistic, cultural and political rights. The Minister's counsel at the hearing into the reasonableness of the issuance of the certificate conceded that there are no allegations of criminal misconduct or criminal activity against Mr. Suresh either in Canada or Sri Lanka. Mr. Suresh was detained from October 18, 1995 until his release on March 23, 1998, for approximately 29 months.

16. Specifically, the petitioners claim that Mr. Suresh was being detained in violation of Articles I, II, XVII, XVIII, XXII, XXIV and XXV of the American Declaration, and that:

- a. He was detained by Canadian Immigration Authorities under a legislative provision which provides for indefinite, mandatory detention without review;
- b. He was detained on the basis of his association with an organization, not on the basis of any alleged unlawful conduct on his part;
- c. *Habeas corpus* was not available to him, as a non-citizen detained under the *Immigration Act*, even though it is constitutionally entrenched in section 10 of the *Canadian Charter of Rights and Freedoms*;
- d. He had no effective remedy to challenge his detention.

B. The State

17. The State's position is that the petition of Mr. Suresh was manifestly inadmissible as the petitioner had failed to exhaust available domestic remedies and that the record as a whole did not disclose a violation of any article of the American Declaration. The State argued that Mr. Suresh was detained pursuant to valid legislation which had been found, [by Canadian Courts], not to violate Canadian constitutional rights to liberty and freedom from arbitrary detention.

18. At the time of the Canadian Government's first response, on July 31, 1997, Mr. Suresh was still exhausting domestic remedies by testing the validity of his detention in two cases before the Federal Court of Canada. As mentioned above, the first was a test of the reasonableness of the certificate authorizing his detention and the second was an action challenging the constitutionality of his detention on allegations that the statutory provision which authorized it infringed his constitutional rights to freedom of expression, freedom of association and equality.

19. The State maintains that Mr. Suresh was detained for immigration purposes and that Section 19 of the *Immigration Act* lists classes of aliens who are inadmissible because they are involved in espionage, subversion of democratic governments or terrorism. The *Act* permits

the detention of aliens in the immigration context, to achieve two purposes: to ensure the effective removal of inadmissible individuals who may resist removal and to protect Canadian society from persons who are considered dangerous.

20. Following the exhaustion of Mr. Suresh's domestic remedies, the State emphasized that the only issue properly before the Commission is Mr. Suresh's detention and that due to his release from detention that issue has been rendered moot.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission *ratione personae, ratione loci, ratione temporis* and *ratione materiae*

21. The petitioner claims that Canada has violated Mr. Suresh's rights under the American Declaration of the Rights and Duties of Man. The Declaration became a source of legal norms for application by the Commission upon Canada when it became a member State of the Organization of American States. Canada deposited its instrument of ratification to the OAS Charter on January 8, 1990. Article 20 of the Commission's Statute, and the Rules of Procedure of the Commission, authorize the Commission to entertain the alleged violations of the Declaration raised by the petitioners against the State, which relate to acts or omissions that transpired after the State joined the Organization of American States.

1. *Ratione personae*

22. The alleged victim is a natural person, and the petition was lodged by Barbara Jackman, a lawyer authorized to lodge petitions with the Commission under Article 28 of the commission's Rules of Procedure. Accordingly, the Commission is competent *ratione personae* to examine the petition.

2. *Ratione loci*

23. The Commission is competent *ratione loci* to take cognizance of the petition, as it alleges violations of rights protected in the American Declaration of the Rights and Duties of Man within the territory of a State subject to the Commission's jurisdiction under that instrument.

3. *Ratione temporis*

24. The Commission is competent *ratione temporis*, insofar as the obligation to respect and ensure the internationally protected rights was already in force for the State as of the date of the facts alleged in the petition under the American Declaration.

4. *Ratione materiae*

25. Finally, the Commission is competent *ratione materiae*, because the petition alleges violations of human rights protected by the American Declaration of the Rights and Duties of Man. Both the petitioner and the state are in agreement that the only issue before the Commission is with regard to Mr. Suresh's detention and the lack of remedies available to him to have the legality of his detention reviewed by a competent State authority, by means of a simple and prompt procedure. The larger issue presented is whether international human rights law requires states to grant not only citizens, but also aliens, the right to habeas corpus, to determine the legality of their detention in status proceedings.

B. Other admissibility requirements of a petition

1. Exhaustion of domestic remedies

26. On the issue of detention, which the parties agree is the only issue before the Commission, Mr. Suresh filed an action in Federal Court claiming that the detention provisions of section 40.1 of the *Immigration Act* violated the *Charter of Rights and Freedoms*. The Canadian courts in *Ahani v Canada* (1996) have already determined the detention provisions of Section 40.1 to be constitutionally valid. The Federal Court Trial Division rendered judgment that there was no breach of the principles of fundamental justice under Section 7 of the *Charter* in relation to the process and the detention, nor any breach of the right to be free from arbitrary detention under Section 9 of the charter. This judgment was upheld by the Federal Court of appeal and leave was denied by the Supreme Court of Canada. Mr. Suresh was permitted to proceed on his challenge to the detention provisions only on the grounds of discrimination and breach of expression and association, because the issue of arbitrary detention and lack of fair process have already been determined by the Canadian Courts. In 1999, the Federal Court dismissed Mr. Suresh's application on all grounds. The Court found that Mr. Suresh's activities as a fundraiser could not be considered "expression" under Section 2(b) of the Charter since those activities were conducted in the service of a violent organization. He also found that his activities were not protected under Section 2(d), since the association in question existed to commit acts of violence. Mr. Suresh appealed to the Federal Court of Appeal, it too dismissed his application.[1] The State recognizes that the petitioner has no further domestic remedies to exhaust on the detention issue.

2. Time period for submission

27. Article 32 of the Commission's Rules of Procedure indicates that the petition must be presented within six months from the time the petitioner is notified of the final decision that has exhausted domestic remedies, or if the exhaustion requirement is not relevant, due to one of the exceptions set forth in Article 31 of the Commission's Rules, then it shall be filed within a reasonable period of time.

28. The petitioner sent his complaint to the Commission on July 26, 1996, long before domestic remedies were exhausted. The petitioner had resided in Canada from October 1990, but an arrest warrant was issued for his detention five years later, and he was detained on October 18, 1995. Since the issue concerns the lack of a simple and prompt judicial remedy to challenge what is alleged to be an arbitrary detention, the presentation of the case in July 1996, after Mr. Suresh had spent nine months in detention, is a reasonable time to wait to file a petition. Since this petition was submitted nine months after Mr. Suresh was placed in detention, the Commission considers it in keeping with Article 32 of the Commission's Rules of Procedure.

3. Duplication of procedure and *res judicata*

29. The Commission is of the view that the subject matter of the petition is not pending settlement before any other international organization, nor does it reproduce a petition already examined by this or any other international organization. Therefore, the requirements established at Article 33 of the Commission's Rules of Procedure are also satisfied.

4. Characterization of the facts alleged

30. The Commission considers that the petitioner's complaint refers to facts which, if true, tend to establish a violation of the rights guaranteed by Articles II, XVIII, and XXV of the American Declaration, thus the requirements of Article 47(b) of the Convention have been met.

V. CONCLUSION

31. Based on the foregoing considerations of fact and law, the Commission concludes that this case meets the admissibility requirements set forth at Articles 46 and 47 of the American Convention, and, without prejudging on the merits,

DECIDES:

1. To declare this case admissible with respect to Articles II, XVIII and XXV of the American Declaration.
2. To transmit this report to the petitioner and to the State.
3. To continue with the analysis of the merits.
4. To make this report public and to include it in the Annual Report of the Commission to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in the city of Washington, D.C., on the 27 day of the month of February in the year 2002.
(Signed) Juan Mendez, Chairman; Marta Altolaguirre, First Vice-President; Jose Zalaquett Daher, Second Vice-President; Comissioners: Robert K. Goldman, Julio Prado Vallejo and Clare K. Roberts.

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[1] [2000] 2 F.C. 592.