UNITED
NATIONS

CAT

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Distr.
RESTRICTED*

CAT/C/21/D/66/1997
16 December 1998

Original: ENGLISH

COMMITTEE AGAINST TORTURE
Twenty-first session
(9-20 November 1998)

DECISIONS

Communication No. 66/1997

Submitted by:	P.S.S. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Canada
Date of communication:	5 May 1997
Date of adoption of views:	13 November 1998

[See Annex]

* Made public by decision of the Committee against Torture.

Annex

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT - TWENTY-FIRST SESSION

concerning

Communication No. 66/1997

Submitted by:	P.S.S. (name withheld) [represented by counsel]
Alleged victim:	The author
State party:	Canada
Date of communication:	5 May 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 13 November 1998,

Adopts the following:

Decision on admissibility

1. The author of the communication is P.S.S., an Indian citizen currently residing in Canada where he is seeking asylum. He claims that his forced 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 P.S.S. was born in 1963 in Chandigarh, India. In 1982, he became a member of the All India Sikh Students Federation (AISSF). On an unspecified date, P.S.S. and other men of that group were pointed out to hijack an aircraft, divert it to another country and hold a press conference in order to highlight the situation of the Sikh population in Punjab, India. The hijacking was planned in reaction to an assault by the Indian Government launched in June 1984 upon Darbar Sahib, also known as the Golden Temple in Amritsar, Punjab. On 5 July 1984, P.S.S. and the other men hijacked an Air India aircraft in Srinigar which carried about 250 passengers and diverted it to Lahore in Pakistan, where they held a press conference. Thereafter the hijackers released all the persons on board the aircraft and surrendered themselves to the Pakistani authorities. According to the author, with the exception of two minor injuries, no one was harmed or seriously injured in the course of the hijacking.

2.2 In January 1986 the author was convicted of hijacking and sentenced to death by a Pakistani court. In 1989, the death sentence was commuted to life

imprisonment. On 21 March 1994 the author was released from prison on medical grounds. He remained in Pakistan until 21 January 1995, when he was granted full parole. He and the other hijackers were given three months to leave the country.

2.3 In January 1995 the author applied to the Canadian immigration authorities for entry into the country but his application was rejected. Later on he travelled to Canada with a false Afghan passport and under the false name of B.S. In a form which he was required to fill in when entering the country he denied having been convicted of a crime. In September 1995 he was arrested by the Canadian Immigration Service and placed in custody. On 27 October 1995, a conditional deportation order was issued by the Immigration and Refugee Board. He was also given notice under section 46.01 (e) of the Immigration Act that the Minister of Citizenship and Immigration intended to certify the author as being a danger to the public in Canada. Such certification would render the author ineligible to make a refugee claim in Canada.

2.4 The author was certified as a danger to the public in June 1996. He then challenged the certification by judicial review on the basis of procedural unfairness. The Federal Court rescinded the certification on those grounds. In October 1996 a new certification process started as a result of which the Minister certified, by decision of 30 April 1997, that the author was a danger and an order was issued to remove him from Canada on 5 May 1997.

The complaint

3.1 The author argues that he would be in serious danger of being subjected to torture if he was deported to India. He submits that those persons who are known to have acted for Sikh nationalists are persecuted by the authorities in Punjab and that although violence in Punjab is said to be reduced, members of the AISSF and their families continue to be harassed in Punjab. He asserts that two of the hijackers who were released from custody and attempted to return to India were killed by the Indian Border Security Forces after they crossed the border. On 27 June 1996, K.S.S., a member of the AISSF who was involved in a second hijacking in August 1994 was found dead in a canal in Rajastan. Presumably K.S.S. either was extrajudicially executed or died as a result of torture by the Punjab police.

3.2 He states that because of his involvement in the hijacking the author's family has been persecuted by the Punjab police. They were arrested after the hijacking took place and his mother has repeatedly been harassed by the Punjab police who questioned her about other Sikh nationalists and threatened her with detention and disappearance. In October 1988 she flew to Canada where she was granted refugee status in 1992. The author also submits that his brother, T.S.S., was held in illegal detention and subjected to gross ill-treatment by the Punjab police between 26 March and 2 May 1988. During that time he was questioned about his brother and the latter's friends. He was released without charge and granted political asylum in Canada in 1992.

3.3 The author further argues that there are grounds for assuming that he is wanted in India. He reports that the names of those persons who have come to the attention of the authorities are contained in a list which circulates

among the police forces in India. Persons who appear on that list are routinely taken into custody and are targets for illegal detention, torture and extortion if they are believed to have worked for armed Sikh nationalists. Notwithstanding the fact that he almost served 10 years in jail, the author believes that his name will appear on such a list. The author also notes that apparently Indian authorities monitor the return to India of those persons who failed to obtain political asylum in other countries.

3.4 The author argues that he could not escape the danger of being subjected to torture by fleeing to other parts of India. Reportedly the Punjab police has made several forays into other Indian States in order to pursue their targets. It is further stated that neither in Pakistan would he be safe.

3.5 The author claims that both the certification of his being a danger to the public and the decision on his removal from Canada constitute a violation of article 3, paragraph 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The certification renders him ineligible to make an application to the panel of the Convention Refugee Determination Division of the Immigration Review Board for refugee status under the United Nations Convention on Refugees of 1951 and as a result exposes him to the risk of removal from Canada. He further submits that there are no reasons which would justify the certification since he is no longer a member of the AISSF and, apart from the 1994 hijacking, he did not commit any other crime or criminal offence. As to the decision to remove him from Canada, the author draws attention to the fact that India has not ratified the Convention against Torture and, therefore, he would not have any possibility to apply to the Committee from India. He notes that the other convicted hijackers have been granted temporary residence in Switzerland, one was granted asylum in Germany in April 1997 and another one who went to Canada was not held in detention and certified as a danger to the public.

State party's observations on admissibility

4.1 On 5 May 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.

4.2 In its response of 15 October 1997 the State party contested the admissibility of the communication. It states that the author entered Canada illegally. He misrepresented himself at the port of entry producing an Afghan passport and claimed refugee status. In his refugee claim form, completed with his counsel, as well as in an interview with an Immigration Examining Officer on 3 February 1995 he maintained his false identity and indicated having no criminal convictions. Nor did he indicate his membership in any terrorist organization.

4.3 The author was arrested by immigration authorities on 13 September 1995, when his true identity became known. On 25 October 1995 an immigration officer, pursuant to section 27 of the Immigration Act prepared a report alleging that the author was inadmissible in Canada as a person who there are reasonable grounds to believe had been convicted outside Canada of an offence that, if committed in Canada would be punishable by a maximum term of

imprisonment of 10 years or more. After a hearing, where his lawyer and an interpreter were present, an adjudicator concluded that the report was well founded and issued a conditional deportation order.

4.4 His detention, which has been reviewed on a regular basis, was maintained pursuant to the Immigration Act, according to which a person can be detained if he/she is likely to pose a danger to the public or if he/she is not likely to appear when required by the immigration authorities.

4.5 On 21 June 1996 the Minister of Immigration signed the opinion that the author was a "danger to the public". The parties agreed to review that decision. Accordingly, he was invited to make any submissions which would demonstrate that he was not a danger to the public, the element of risk of return to India or that there were compelling humanitarian and compassionate considerations which would warrant his remaining in Canada. His lawyer sent an extensive package of material and asserted that the author is not a danger to the public and that there are compelling reasons why he should be allowed to remain in Canada.

4.6 On 16 April 1997 the Minister of Immigration issued an opinion, based on the circumstances and severity of the crime for which the author was convicted, that he constitutes a "danger to the public" in Canada. As a result, the author is not eligible to have his refugee claim determined. The decision was made with due consideration for the possible risk the author might face if returned to India, a risk which was considered to be minimal.

4.7 The author, throughout his dealings with the Canadian authorities, has never showed any contrition for his past action, nor any remorse for the harm he has caused to the victims of his hijacking. He still refuses to acknowledge that he used violence and considers that he was not the aggressor.

4.8 The author filed several applications for leave to introduce a judicial review against the decisions rendered in his case. Two substantive applications remain pending. First, an application dated 30 April 1997 to review the Minister's decision of 16 April 1997 in which the Minister determined that the applicant is a danger to the public. Secondly, an application dated 30 April 1997 to review the Immigration's decision to remove the author to India, in which the author raised arguments under the Canadian Charter of Rights and Freedoms. Joint to this application the author asked the Court to order a stay of his removal pending the consideration of the application. This stay was granted on 5 May 1997.

4.9 If the author were to succeed in his applications for leave to apply for judicial review the decision of the Federal Court Trial Division could be further appealed to the Federal Court of Appeal, if the judge of the Trial Division were to certify that the case raises a serious question of general importance. A decision of the Federal Court of Appeal can be appealed, with leave, to the Supreme Court of Canada. The author has expressed no doubts about the effectiveness and availability of those remedies. Accordingly, this communication should be dismissed for failure to exhaust domestic remedies.

4.10 The State party also argues that the communication should be declared inadmissible because the author did not establish prima facie substantial

grounds to believe that his removal to India will have the foreseeable consequence of exposing him to a real and personal risk of being subjected to torture, as stated in previous jurisprudence of the Committee. A mere possibility of torture is not in itself sufficient to give rise to a breach of article 3. While Indian authorities advised the immigration officials of the author's presence in Canada there is no indication that they are particularly interested in his return or that they are presently looking for him. The Indian authorities could have requested the author's extradition, as an extradition treaty exists between Canada and India. Their decision not to have recourse to that possibility indicates that the author is not of particular interest for them. Furthermore, the document of the Indian authorities - Central Bureau of Investigation, India Interpol New Delhi - indicates that they are not looking for him.

4.11 The author's past membership to the AISSF cannot put him at risk today since that organization, in recent years, denounced the use of violence and committed itself to pursuing a peaceful political agenda. Considering that members of the AISSF, including a convicted hijacker, are seeking election in public office, it is unlikely that the author would be subjected to persecution for his past membership in that organization.

4.12 The State party cites the United States Country Reports on Human Rights Practices for 1995 and 1996. These reports indicate that India has many of the safeguards to prevent against human rights abuses and recognizes that although significant human rights abuses do take place their severity and amount has diminished in recent years. Overall terrorist activity in the Punjab is now much reduced as are the number of disappearances and fatal encounters between Sikh militants and police/security forces.

4.13 According to the State party, the record before the Committee confirms that the article 3 standard was duly and properly considered in Canadian domestic procedures. The Committee should not substitute its own findings on whether there were substantial grounds for believing that the communicant would be in personal danger of being subjected to torture upon return, since the national proceedings disclose no manifest error or unreasonableness and were not tainted by abuse of process, bad faith, manifest bias or serious irregularities. It is for the national courts of the States parties to the Convention to evaluate the facts and evidence in a particular case. The Committee should not become a "fourth instance" competent to re-evaluate findings of fact or to review the application of domestic legislation, particularly when the same issue is pending before a domestic Court.

Counsel's comments

5.1 In his comments to the State party's submission counsel argues that the author sought a hearing in the Federal Court to obtain a stay of the deportation until the legality of the deportation order and its execution could be challenged. At the same time the author was advised that his removal would take place on 5 May 1997. The Federal Court only provided a hearing date for the day he was to be removed. Under these circumstances and given the fact that it would not be possible for the author to file any appeals and to have the matter brought before a judge within the necessary timeframes, the author sought interim measures from the Committee. At the time the Committee

assumed jurisdiction there was no assurance that an effective remedy was available. Having assumed jurisdiction the Committee ought to continue its review of the matter, despite the fact that the author was granted stay.

5.2 The author sought judicial review of the finding that he was a danger to the public but the Federal Court dismissed the application for leave on 19 January 1998. The refugee claim is barred from proceeding once the Minister certifies that the author is a danger to the public. There is absolutely no appeal from the decision of the Court denying leave. Thus, the author will not be able to have his refugee claim determined and hence there is not nor will there ever be a refugee determination for him. As a result, no risk assessment will be made since this is only conducted in the context of the refugee determination process.

5.3 At the same time the Federal Court - Trial Division, by decision dated 29 June 1998 quashed the decision of the immigration officer to execute the removal order. However, the Court did not conclude that a risk assessment had to be done. It stated that removal officers do not have jurisdiction to conduct risk assessments and make risk determinations in the course of making destination decisions. However, under section 48 of the Immigration Act removal officers have a discretion to delay the execution of a deportation order. In the Court's opinion the removal officer's failure to consider whether or not to exercise his or her discretion under section 48 of the Immigration Act, pending the conducting of an appropriate risk assessment and the making of an appropriate risk determination constituted a reviewable error. An appeal against that decision was filed by the Minister before the Federal Court of Appeal. No hearing date has been set yet. If the Minister is not successful in the appeal the matter is merely referred back to the expulsions officer for his determination as to whether or not the author's removal should be deferred pending a risk assessment. However, since the author has already been certified as a danger to the public there is no statutory requirement for a risk assessment. Therefore, this remedy cannot be considered as effective. It would then be open to the author to make an application on humanitarian and compassionate grounds. Such an application is a request for the exercise of special discretion before an immigration officer who can nevertheless consider risk.

5.4 Although the author was held in detention for a period of over two years he was ordered released by an immigration adjudicator in July 1998. Since then he has complied with all conditions for his release, has not committed any criminal offence and has not posed a danger to the public in any way.

5.5 With respect to the substantial grounds counsel argues that section 46.01 (e) (i) of the Immigration Act allows the Minister to certify a person as a "danger to the public in Canada". However, it does not require that the Minister assess risk. Although it is true that the author did make submissions with respect to risk there is no indication in any of the material that the author saw from the Minister that risk was in fact assessed. The author has not seen any documentation which would support the bare assertion by the Minister that there was a "minimal risk". If this is in fact the case it is clearly a matter that was not relevant to the certification process. In that context counsel submits that it is extremely important that the Committee make a determination as to whether or not the certification process engaged

prior to the decision to execute the removal order conforms with the requirements of international law, in ensuring that persons not be sent back to situations where there are substantial risks of torture.

5.6 The author has asserted that he always was remorseful for any harm that was caused during the hijacking and denies that he himself used any violence in the attack. He submits that he voluntarily surrendered and that none of the passengers were subjected to any harm other than minor injuries from which they quickly recovered.

5.7 Counsel insists that there is a substantial risk that the author would be exposed to torture based upon the deplorable human rights record of the Indian Government, his high profile as someone who is known to have been involved in an organization which has been strongly supportive of an independent Sikh State, the fact that he engaged in the hijacking as a means of protest and the fact that other high profile persons like the author have been detained and extrajudicially killed by the Indian authorities. The mere fact that the Central Bureau of Investigation affirms that they are not looking for him does not provide any assurance to the author that he would be safe upon return. Many innocent persons have been arrested and killed extrajudicially based upon suspicion of past connection to the militant movement.

5.8 Finally, it is not possible for the Government of India to request the extradition of the author, given that he was tried and convicted of the offence in Pakistan and that under the Indian Constitution he cannot be tried twice for the same offence.

Issues and proceedings before the Committee

6.1 Before considering any claim in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

6.2 Article 22, paragraph 5 (b), of the Convention precludes the Committee from considering any communication, unless it has been ascertained that all available domestic remedies have been exhausted. In the instant case the Committee notes that the author was granted temporary stay and that the Federal Court - Trial Division quashed the decision of the immigration officer to execute the removal order. The Committee also notes that an appeal filed by the Minister of Immigration against that decision is still pending before the Federal Court of Appeal. If not successful the matter would be referred back to the expulsions officer and the possibility of an application on humanitarian and compassionate grounds would be open to the author. There is nothing to indicate that the procedures still pending cannot bring effective relief to the author. The Committee is therefore of the opinion that the communication is at present inadmissible for failure to exhaust domestic remedies. In the circumstances the Committee does not consider it necessary to deal with other issues raised by the State party and the author. That will be done, if required, at a later stage.

7. The Committee therefore decides:

(a) That the communication is inadmissible;

(b) That this decision may be reviewed under rule 109 of the Committee's rules of procedure upon receipt of a request by or on behalf of the author containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the State party, the author and his representative.

[Done in English, French, Russian and Spanish, the English text being the original version.]
