L.O. (name withheld) v. Canada, Communication No. 95/1997,

U.N. Doc. CAT/C/24/D/95/1997 (2000).

Communication No. 95/1997

Submitted by: L.O. (name withheld) [represented by counsel]

Alleged victim: The author

State party: Canada

Date of communication: 23 October 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 19 May 2000,

Adopts the following:

Decision on admissibility

1.1 The author of the communication is Mr. L.O., a Ghanaian national, born on 27 December 1967, who was deported after having sought asylum in Canada. He claims that his deportation to Ghana constitutes a violation by Canada of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3 of the Convention, the Committee transmitted the communication to the State party on 19 November 1997. At the same time, The Committee requested the State party pursuant to rule 108, paragraph 9 of the Committee's rules of procedure, not to expel the author to Ghana while his communication was under consideration. In a submission of 22 January 1998, the State party informed the Committee that the author had been removed from Canada on 27 October 1997, prior to the receipt by the State party of the communication and its request for interim measures.

The facts as presented by the author

2.1 In 1987, the author, then a student, was arrested following mass protests against educational reforms. In 1990, the author began teaching at a secondary School. In 1992, he became a member of the New Patriotic Party and represented this party at a polling station during elections in November of the same year. Although he reported irregularities to the police, they were ignored.

2.2 In September 1992, the author started his studies at the University for Science and Technology in Kumasi. In January 1993, he became an active member of the National Union of Ghana Students. On 24 March 1994, he represented the University at the 24th Annual Congress of the Union and spoke out against the educational reform policy of the Government and against the frequent arrest of students. As a result of his speech, the author was expelled from the university, together with 20 others. On 31 March 1994, following a demonstration by students to protest the Chancellor's expulsion decision, the author was arrested and accused of inciting students to protest against the Government. He states that he was stripped naked, beaten and subjected to inhuman treatment by the police. After five days of custody he was released thanks to a bribe. He subsequently fled the country.

2.3 As evidence of his allegations, the refers to a letter from his father dated 10 October 1995, in which his father informed him that the police had come to the family's house to look for him. Moreover, he produces an attestation by a psychologist indicating that he suffers from severe and chronic post-traumatic stress disorder. He also states that there exists a brutal dictatorship in Ghana, where no political opposition is tolerated.

2.4 The author requested asylum in Canada in April 1994. The Immigration and Refugee Board heard his claim for refugee status on 15 December 1994. On 25 January 1995, the claim was rejected. The author applied for review before the Federal Court of Canada of the decision of the Immigration and Refugee Board, which he alleged to be manifestly unreasonable and not based on the evidence before it. On 6 September 1995, the Federal Court of Canada denied the application for judicial review. The author emphasizes that such a judicial review is a very limited review to gross errors of law rather than an appeal on the merits. Moreover, he contends that this remedy has no suspensive effect so that an applicant can be deported while his request is pending before the Court.

2.5 In December 1996, the author applied for administrative review by a "post claim determination officer" under the "post-determination refugee class in Canada" programme. This programme is an administrative review without oral hearing which, in the vast majority of cases simply reiterates the reasons given by the Immigration and Refugee Board for refusing the

claimant. On 10 January 1997, his application under the programme was rejected.

2.6 On 16 January 1997, the author applied for judicial review of the decision by the post-claim determination officer. On 8 July 1997, the Federal Court of Canada rejected his request for judicial review. The author was then taken into custody with a view to his being deported.

2.7 On 27 October 1997, the State party removed the author to Ghana. According to counsel, as of 5 November 1999, the author was residing without legal status in the Netherlands and wishes to continue with his communication against Canada.

The complaint

3.1 The author states that he would be at risk of torture upon his return to Ghana and that deportation by the Canadian authorities constitutes a violation of the Convention.

3.2 In Canada, the risk assessment is made by immigration officers who, according to the author, do not have the necessary competence in matters of international human rights law or in other legal matters and do not fulfil the basic criteria of impartiality and independence for taking such decisions. The author also refers to a case of the European Court of Human Rights (*Chahal v. The United Kingdom*) which indicates the legal guarantees that must be respected by the country that is deporting:

> "In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialized and the importance the Court attaches to article 3, the notion of an effective remedy under article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to article 3. This scrutiny must be carried out without regard to what the person may gave done to warrant expulsion or to any perceived threat to the national security of the expelling State. ... Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant to determining whether the remedy before it is effective."

The author affirms that the State party's procedure of risk assessment violate this mandatory "independent scrutiny". The same authorities that study the relevance of the removal from Canadian territory proceed to the deportation itself.

State party's observations on admissibility

4.1 In a submission dated 9 November 1998, the State party submitted that the communication was inadmissible for failure to exhaust domestic remedies as required by article 22, paragraph 5 (b), of the Convention and rule 91 of the Committee's rules of procedure.

4.2 The State party underlines that it is a fundamental principle of international law that domestic remedies must be exhaust before remedy from an international body may be sought. This principle gives the State an opportunity to correct internally any wrong that may have been committed before the State's international responsibility is engaged.

4.3 The State party argues that the author has failed to seek 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 author to apply to the Minister on Immigration and Citizenship at any time for an exemption from the requirements of the immigration legislation or for admission to Canada on compassionate or humanitarian grounds. In this regard, the State party refers to the jurisprudence of the Committee in its decision *K. v. Canada* (communication No. 42/1996, 25 November 1997), where the author had been deemed not to have exhausted domestic remedies since he had not lodged a request for a ministerial waiver for humanitarian and compassionate grounds.

4.4 The State party also refers to the author's claim that the judicial review by the Federal Court of Canada has no suspensive effect and therefore entitles the State party to deport the applicant while the Federal Court is deciding whether such removal is legal. It emphasizes that in these cases there is a possibility to make an application to the Federal Court for an interim order staying removal while the decision is pending before the Court. The criteria that are applied by the Federal Court in granting such interim orders are: (a) the seriousness of the issue raised by the author; (b) the irreparable harm suffered by the author in case of removal; and (c) when the balance of convenience favours the order.

Counsel's comments

5.1 The author maintains that he has exhausted all available domestic remedies before submitting his communication. He alleges that it is illusory to believe that the ministerial review for humanitarian reasons, based solely on the risk of return, would be treated differently that the post-determination review.

5.2 It is submitted that requests for a ministerial waiver on humanitarian and compassionate grounds and post-determination review are handled by the same persons or persons at the same level in the same department. As a result, without new evidence, it is obvious that the decision will be the same.

5.3 At the Federal Court level, the same argument applies: leave having been denied for judicial review of the post-determination refusal, it could not be granted on exactly the same facts and the same points of law at a later stage.

5.4 The author underlines the illusory nature of the humanitarian and compassionate review when the Federal Court has already dealt with the issues of substance. As a consequence, and given the constant jurisprudence of the Federal Court of Canada, there is no recourse left with any real chance of success and the case clearly falls within the exception of article 22, paragraph 5 (b), of the Convention.

Issues and proceedings before the Committee

6.1 The Committee wishes to emphasize that although it had requested the State party, under rule 108 (9) of its rules of procedure, not to remove the author while his communication was pending before it, the State party was informed too late co comply with the request. The removal took place almost a month before the transmission of the communication.

6.2 Before considering any claims contained in a communication, the Committee must decide whether or not it 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. It also notes that the communication is not an abuse of the right of submission of such communications or incompatible with the provisions of the Convention.

6.3 As regards the exhaustion of domestic remedies, the Committee has taken note of the observations by the State party and by the author's counsel. Pursuant to article 22, paragraph 5 (b), of the Convention, the Committee is precluded from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not however apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the presumed victim.

6.4 In the present case, the State party argues that the author did not apply for a stay of his removal before the Federal Court and failed to apply for a ministerial exemption on humanitarian and compassionate grounds.

6.5 The author does not dispute that he did not apply for a stay of his removal and did not apply for a ministerial waiver on humanitarian and compassionate grounds. In this regard, the Committee first notes that an application for a ministerial waiver on humanitarian and compassionate grounds is a statutory remedy. Moreover, it notes that in case of refusal of the waiver by the minister, a judicial review is open to the author with the possibility of applying for a stay of removal. Finally, even if the author claims that those remedies were illusory, he has furnished no evidence that they would be unlikely to succeed. The Committee therefore considers that the conditions laid down in article 22, paragraph 5 (b), of the Convention have not been met.

7. The Committee consequently 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.]