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Sixtieth session
14 July - 1 August 1997

DECISIONS

Communication No. 603/1994

Submitted by:	Andres Badu [represented by Mr. Stewart Istvanffy]
Victim:	The author
State party:	Canada
Date of communication:	11 June 1994 (initial submission)
Date of present decision:	18 July 1997

[ANNEX]

*Made public by decision of the Human Rights Committee.

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ANNEX*

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights
- Sixtieth session -

concerning

Communication No. 603/1994**

Submitted by:	Andres Badu [represented by Mr. Stewart Istvanffy]
Victim:	The author
State party:	Canada
Date of communication:	11 June 1994 (initial submission)

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

Meeting on 18 July 1997,

Adopts the following:

Decision on admissibility

1. The author of the communication is Mr. Andres Badu, a Ghanaian citizen, at the time of submission residing in Canada, where he requested recognition as refugee. He claims to be a victim of a violation by Canada of articles 2(1) and (3), 6(1), 7, 9, 13, 14(1) and 26 of the Covenant. He is represented by Mr. Stewart Istvanffy, a Montreal lawyer.

The facts as presented by the author

2.1 The author, who was born on 29 November 1960, claims that he was an active member of the Ghana Democratic Movement (GDM), a group opposed to the Provisional National Defence Council (PNDC), which formed the government in Ghana. On 14 June 1991, the author's home was allegedly searched by three

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*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Ms. Christine Chanet, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Martin Scheinin and Mr. Danilo Türk.

**Mr. Maxwell Yalden did not participate in the adoption of the decision, pursuant to rule 85 of the Committee's rules of procedure.

security agents, who found letters pertaining to GDM activities; the author was then arrested, beaten and imprisoned and charged with possession of seditious documents. On 20 June 1991, the author was admitted to hospital to recover from his ill-treatment. With the help of his family, he escaped from hospital and went into hiding. On 30 June 1991, the author learned that he had been declared a wanted person. He subsequently left the country under disguise.

2.2 The author arrived in Canada on 8 July 1991. He requested recognition as a refugee, on the grounds that he had a well-founded fear of persecution based on his political opinion and membership of a particular social group. A hearing into his claim was held on 17 February 1992 before two commissioners of the Refugee Division of the Canadian Immigration and Refugee Board, in Montreal, Quebec. On 16 September 1992, the Refugee Division dismissed the author's claim for recognition as political refugee. Leave to appeal was granted by the Federal Court, but the appeal was dismissed by judgment of 6 January 1994.[1]

The complaint

3.1 The author claims that he has not received a fair hearing of his refugee claim, in violation of article 14, paragraph 1, of the Covenant. He argues that the two commissioners at the hearing were biased against him. He claims that one of the commissioners, a Ms. Wolfe, based herself on false and misleading information which she was given outside the meeting room and to which the author had no chance to respond. The author further submits that the other commissioner, a Mr. Sordzi, is himself from Ghana, has the same ethnic origin as Mr. Rawlings, the leader of the regime in Ghana, has publicly expressed his support for the regime in Ghana, and has acted against political refugees from Ghana in the past.

3.2 In support of his claim that Mr. Sordzi was biased, the author explains that there is a very serious ethnic conflict in Ghana, and that the military regime is dominated by the Ewe tribe, to which Mr. Sordzi belongs, whereas the author himself is an Ashanti. The author states that for these reasons Ghanaian refugees are afraid to testify before a person from Ewe origin and therefore not able to tell their full story. In this context, it is submitted that Mr. Sordzi was one of the leading members of the Concerned Ghanaians' Association, until this organisation fell apart in 1988 over the issue whether or not to help Ghanaian refugees. Mr. Sordzi is said to have vehemently opposed help to Ghanaian refugees and to have opined that all so called refugees from Ghana were economic migrants. In support of his allegations, the author provides sworn statements made by Ghanaians now living in Canada.

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[1]Due to a change in the law, the author's appeal was in fact treated as an application for judicial review by the Federal Court Trial Division and denied. See further paragraphs 4.4 and 4.5.

3.3 The author further argues that the language of the decision by the Refugee Division clearly shows administrative bias against refugee claimants from Ghana. In this context, reference is made to an alleged understanding among Western nations to deny the severity of the human rights violations taking place in Ghana. In support of his claim, the author refers to a report of the Country Assessment Approach Working Group Ghana, which was the outcome of inter-governmental consultations held in Canada in 1992. Moreover, it is stated that Mr. Sordzi represented the Montreal office at a meeting of Immigration and Refugee Board's regional directors about the situation in Ghana, on 25 March 1992. The author argues that it was totally inappropriate for Mr. Sordzi to attend this meeting, in view of his personal bias. The report from that meeting is said to contain seriously wrong assessments. Commissioners allegedly have on several occasions made statements about the human rights situation in Ghana which are blatantly untrue, and regarding issues which moreover had been differently assessed by the Federal Court of Appeal.

3.4 As to the author's hearing before the two commissioners, it is alleged that he was interrogated in a very aggressive fashion and that he was frequently interrupted. He was allegedly questioned about articles in a magazine which he had never read, and which related to events of which he had no knowledge. This is said to show that the commissioners acted in bad faith.

3.5 The author further argues that the above mentioned events and facts also amount to a violation by Canada of articles 2, paragraphs 1, and 26 of the Covenant, since he was treated in a discriminatory fashion because of his ethnic origin and political opinions.

3.6 The author further argues that many political opponents in Ghana are being sentenced to death, and that the State party, by returning him to Ghana, would place the author in a very dangerous situation which may lead to a violation of his right to life, in violation of article 6 of the Covenant. The author also contends that the deportation of an individual who has not had his claim to refugee status heard by an impartial tribunal, but by a biased one, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 as well as to a violation of article 9, paragraph 1, of the Covenant. It is moreover argued that the author's expulsion would not be in pursuance of a decision reached in accordance with the law, as required by article 13 of the Covenant, because commissioner Sordzi has exceeded his jurisdiction by making decisions on the credibility of refugee claimants from Ghana.

3.7 The author claims that the Federal Court, by dismissing his appeal, has misapplied the Canadian law and thereby eliminated the only effective recourse available to the author, in violation with article 2, paragraph 3, of the Covenant.

3.8 The author states that Canadian legislation provides for a Post-Determination Review and for a Humanitarian and Compassionate Review, but

claims that these remedies are devoid of substance and illusory. He claims therefore that he fulfils the requirement of article 5, paragraph 2 (b), of the Optional Protocol.

State party's submission

4.1 By submission of 16 October 1995, the State party argues that the communication is inadmissible and provides information with regard to its refugee determination process.

4.2 The State party recalls that the author arrived in Canada on 8 July 1991 and indicated his intention to seek refugee status. He was not in possession of a valid visa, nor did he possess a valid passport, identity or travel document. On 22 August 1991, the author was found to have a prima facie claim under the Refugee Convention, and a conditional exclusion order was issued.

4.3 On 17 February 1992, two Commissioners of the Refugee Division of the Immigration and Refugee Board heard the author in order to determine whether he met the definition of Convention refugee under the Immigration Act. The State party explains that a claim succeeds if either member of the panel is satisfied that the claimant meets the definition. At the hearing, the author was represented by counsel, evidence on country conditions was presented, the author gave oral testimony and a number of exhibits were filed.

4.4 On 16 September 1992, the panel decided that there was no serious possibility that the author would be persecuted if returned to his country of nationality. The author then applied for leave to appeal to the Federal Court of Appeal. Leave was granted on 21 January 1993. On 1 March 1993, the law was changed, and the author's appeal accordingly was treated as an application for judicial review by a judge of the Federal Court Trial Division. The author based his application on errors of law and fact, including allegations of institutional bias and personal bias of the panel members who had heard his claim.

4.5 On 6 January 1994, the Judge dismissed the application for judicial review. The Judge found that the Board's finding on the author's credibility was within the Board's field of discretion or judgement-making. He further found that there was no evidence of partiality on the part of the members of the panel. In particular, with regard to Mr. Sordzi, the judge found that the affidavit evidence against Mr. Sordzi provided no objective corroboration or support for the allegations of bias. The judge added: "It is an aberration to suggest that Mr. Sordzi, who arrived in Canada in 1968 and became a Canadian citizen in 1976, cannot, by reason of ancestral warfare and conflict, carry out properly, objectively and judicially the duties and responsibilities which Parliament has imposed upon him."

4.6 The State party points out that the author could have appealed the judge's decision to the Federal Court of Appeal, but failed to do so.

4.7 The State party notes that other review processes were available to the author after his asylum request had been denied. He could have sought a humanitarian and compassionate review of his case under section 114(2) of the Immigration Act[2], which he failed to do.

4.8 Under the post-determination refugee claimants in Canada class (PDRCC) review process, established in February 1993, individuals determined not to be Convention refugees can apply for residency in Canada if upon return to their country they would face a risk to their life, of extreme sanctions or of inhumane treatment. On 5 April 1995, the author was informed that the post-claim determination officer had concluded that the author did not belong to that class of individuals.

4.9 The State party submits that the author voluntarily left Canada for Ghana on 8 June 1995.

4.10 The State party argues that the author's communication is inadmissible for failure to exhaust domestic remedies. First, because he failed to appeal the Federal Court Trial Division's decision of January 1994, in which the court dismissed his application for review based on bias of the commissioners, to the Federal Court of Appeal. Second, the author failed to seek a humanitarian and compassionate review under section 114(2) of the Immigration Act. Third, the author failed to file an application for judicial review in the Federal Court of Canada, Trial Division, of the negative PDRCC decision; the State party explains that on an application for judicial review the author could have made arguments under the Canadian Charter of Rights and Freedoms similar to the arguments made in his communication to the Committee. The author could also have challenged the constitutionality of any provision of the Immigration Act by way of declaratory action.

4.11 The State party further claims that the communication is inadmissible for failure to substantiate violations of Covenant rights. As regards the author's claims under article 6, the State party argues that the author's exclusion from Canada does not constitute a prima facie violation of his right to life, as his claims were rejected by the competent authorities and he did not make use of the possibility of judicial review against these negative decisions.

4.12 As regards the author's claims under articles 9 and 13, the State party argues that these articles do not grant a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in

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[2]Under section 114(2) of the Immigration Act a refugee claimant may request a humanitarian and compassionate review, to see whether extraordinary circumstances warrant landing. The review includes a risk assessment and the test is one of disproportionate hardship. Judicial review of a negative decision may be sought before the Federal Court Trial Division, with leave.

Canada for the purpose of having his refugee claim determined and left voluntarily following the rejection of his claim after a full hearing with possibility of judicial review. In this context, the State party refers to the Committee's Views in Maroufidou v. Sweden[3].

4.13 As regards the author's claim under article 14, paragraph 1, of the Covenant, the State party argues that refugee proceedings are in the nature of public law and as such are not encompassed by the phrase "suit at law" in article 14 of the Covenant. In this context, the State party refers to its submissions in respect of communication No. 236/1987 (V.R.M.B. v. Canada)[4].

4.14 Moreover, the State party argues that, even if Immigration and Refugee Board proceedings are held to constitute a "suit at law", sufficient guarantees of independence[5] exist so that it can reasonably be said to be an independent tribunal within the meaning of article 14, paragraph 1. The State party further submits that the two member panel which decided the author's claim was impartial. In this respect, the State party notes that neither the author nor his counsel raised the issue of a reasonable apprehension of bias during the Refugee Division hearing itself. The State party also refers to the rejection by the Federal Court Trial Division of the author's allegations of bias. As regards the author's allegations of institutional bias, the State party submits that the author's case was decided on the basis of the evidence produced in the proceedings, and this evidence did not include the reports referred to by the author. The State party further argues that sufficient legal guarantees exist to exclude any legitimate doubt of the tribunal's institutional impartiality.

4.15 As to the author's claim under article 7, that his deportation amounts to cruel, inhuman or degrading treatment, because his claim had not been heard by an impartial tribunal, the State party refers to its argument above and argues that the tribunal was impartial and that the author's claim is thus inadmissible.

4.16 As regards the autnor's claims that he was denied equality before the law because one of the members of the panel was of Ewe ancestry, the State party submits that the allegations of denial of equality rights are without any factual or legal basis and should thus be declared inadmissible.

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[3]Communication No. 58/1979, Views adopted on 9 April 1981.

[4]Declared inadmissible on 18 July 1988.

[5]Members are appointed by the Governor in Council for terms of up to seven years and drawn from all segments of Canadian society. They may only be removed on limited grounds by an inquiry procedure presided over by a judge, supernumerary judge or former judge of the Federal Court of Canada. The Immigration and Refugee Board operates autonomously and has its own budget. Decisions of the Refuge Division can be overturned in a court of law.

4.17 The State party finally argues that the Human Rights Committee is not a "fourth instance" competent to reevaluate findings of fact or to review the application of domestic legislation, unless there is clear evidence that the proceedings before the domestic courts were arbitrary or amounted to a denial of justice. In the absence of such evidence, the State party argues that the author's claims are inadmissible.

Issues and proceedings before the Committee

5. The deadline for counsel's comments on the State party's observations was 27 November 1995. By letter of 29 May 1997, counsel was informed that the Committee would examine the admissibility of the communication at its sixtieth session, in July 1997. No submission has been received.

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

6.2 The Committee notes that the State party has argued that the communication is inadmissible for non-exhaustion of domestic remedies. It has also noted the contention of counsel that the post-determination review and the humanitarian and compassionate review are devoid of substance. In this context, the Committee recalls its jurisprudence that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them. Further, the Committee notes that it was open to the author to appeal the decision of the Federal Court Trial Division to the Federal Court of Appeal and that judicial review was available to the author against the negative post-claim determination decision, but that he failed to avail himself of these avenues. The communication is therefore inadmissible for non-exhaustion of domestic remedies.

7. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 5, paragraph 2(b), of the Optional Protocol;

(b) that this decision shall be communicated to the State party and to the author's counsel.

[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.]
