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COMMITTEE AGAINST TORTURE
Thirty-third session
8 - 26 November 2004

DECISION

Communication No. 163/2000

[Original: FRENCH]

Submitted by:	H. A. S. V. and F. O. C. (represented by counsel, Mr. Oscar Fernando Rodas)
Alleged victims:	The complainants
State party:	Canada
Date of complaint:	28 February 2000
Date of present decision:	24 November 2004

[ANNEX]

*Made public by decision of the Committee against Torture.

** Re-issued for technical reasons.

ANNEX

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

Thirty-third session

Concerning

Communication No. 163/2000

Submitted by: H. A. S. V. and F. O. C. (represented by counsel, Mr. Oscar Fernando Rodas)

Alleged victims: The complainants

State party: Canada

Date of complaint: 28 February 2000

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 24 November 2004,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The complainants are Heli Arfahad S. V., born in 1973, and his wife, F. O. C., born in 1975, both Mexican nationals. They applied for asylum on 28 May 1999, five months after arriving in Canada. Their requests were rejected by the Canadian Immigration and Refugee Board on 6 January 2000. The Federal Court of Canada confirmed this decision on 26 May 2000. The complainants claim that their forced return to Mexico would constitute a violation by Canada of article 3 of the Convention.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the attention of the State party on 27 April 2000.

1.3 As it transpired from the State party's submission dated 30 July 2003, the complainants' asylum requests were rejected on 6 January 2000. They left Canada on 18 July 2000 after a removal order was issued against them[1]. Ms. Cancino returned to Canada on 8 December 2000 with a work permit. Mr. S. V. returned to Canada on 9 December 2000, without a residence permit; he did not apply for refugee status and accordingly was sent back to Mexico the following day. He returned to Canada on 24 October 2001 and applied for

[1] The exact date of the order is not provided.

refugee status on new grounds (different from those submitted for in the present communication). On 7 February 2003, the Refugee Determination Division found that he lacked credibility owing to serious contradictions in his statements, and refused to grant him refugee status. The applicant did not appeal against this decision[2].

The facts as submitted by the complainants

2.1 In November 1997, the complainants went to live in Tuxla, Las Rosas, Chiapas State, with Ms. O. C.'s uncle, O. C., who gave them work in the shop he ran. Ms. O. C. worked at the sales counter, while Mr. S. V. worked as a driver. O. C. turned the management of the business over to them after their marriage, on 19 February 1998.

2.2 O. C. left the business on 15 March 1998 and went to the capital, but asked the couple to pay him 15 per cent of each month's profits, saying that he would come and collect the money in person. The couple took care of the business, but the wife noticed that certain individuals in plain clothes were watching them. Fearing that they might be thieves, the couple requested their staff not to keep large amounts of money in the till, and the husband lodged a complaint with the police.

2.3 On 20 September 1998, O. C. returned with some unknown men, who were armed. The wife, who was on her own, told him that her husband had gone out shopping and would be back soon. O. C. told the strangers to wait, because the husband was the only one who knew where the money was. When the husband arrived, one of the men pointed a gun at him and ordered him out, whereupon O. C. struck the man's hand that was holding the gun. When the man dropped the gun, O. C. seized the opportunity to run into the house with the other two strangers in pursuit. He managed to escape. The men then turned on the complainants: one of them pointed his gun at Ms. O. C., while the others are reported to have dealt with Mr. S. V.. Ms. O. C. managed to escape, leaving her husband with the strangers.

2.4 Ms. O. C. went to the home of another uncle, who immediately set off to look for her husband. On his return, he said that he had found him unconscious in front of the shop and that he appeared to have been beaten up. He took him to a hospital to be treated and then lodged a complaint with the police. The police, however, allegedly told him that O. C. was a member of the Zapatista Army and that the complainants were his accomplices.

2.5 The complainants took refuge in Mexico City, where they were hidden by the husband's family. They claim there are rumours that their uncle went back to join the Zapatistas in the mountains.

2.6 The complainants left Mexico on 12 December 1998 and arrived in Canada the same day. They applied for refugee status on 28 May 1999. On 6 January 2000, the Convention Refugee Determination Division of the Canadian Immigration and Refugee Board found that

[2] The State party declares however that Mr. S. V. will not be deported from Canada without having had an opportunity to request an assessment of the risks involved in returning to his country.

the complainants were not "refugees within the meaning of the Convention". After the hearing, the complainant Ms. O. C. was found to lack credibility, while her husband did not make a statement because of memory problems ostensibly arising from the incidents described above. The complainants then decided to request leave to apply for a judicial review of the decision of the Refugee Determination Division. On 26 May 2000, the Federal Court of Canada denied the request. On 9 December 2000, the complainant Mr. S. V. returned to Canada without a residence permit. He did not apply for refugee status and accordingly was sent back to Mexico the following day.

The complaint

3.1 The complainants maintain that their removal to Mexico would constitute a violation by Canada of article 3 of the Convention. They claim that their rights were seriously violated in Mexico and believe that they would be persecuted again if they returned there.

3.2 In support of these allegations, Mr. S. V. submits a medical certificate stating that he would not be competent to testify on his own behalf to the Refugee Determination Division. According to the certificate, this complainant has no memory of the assault he suffered in Mexico or of his life prior to the assault. He is incapable of recognizing familiar faces, and a psychologist has recommended that his wife should represent him in his application.

The State party's submission on admissibility

4.1 In a note verbale dated 30 July 2003, the State party maintains that, in respect of the complainant Ms. O. C., the communication is inconsistent with article 22, paragraph 5, of the Convention, since she had legal temporary worker status in Canada.

4.2 The State party contends that the communication does not present the minimum grounds requested in support of the complainants' allegation that their return to Mexico would constitute a violation of article 3 of the Convention. The facts and allegations presented to the Committee are said to be identical as those submitted to the national authorities. These authorities concluded that these facts and allegations were incoherent and revealed the existence of significant gaps in relation to essential and determinant aspects of the complainants' contentions, in particular with regard to their stay in Chiapas and the identity of Mr. V.'s aggressors. Invoking a loss of memory, he refused to testify before the Immigration and Refugee Board.

4.3 The State party further asserts that the communication is inadmissible since the complainants did not exhaust the available domestic remedies before applying to the Committee. They did not apply for exemption from the normal application of the Immigration Act on humanitarian grounds.[3]

4.4 According to the State party, the determination of humanitarian considerations is a statutory administrative procedure by which the complainants could have submitted new facts

[3] Article 114 (2) of the Immigration Act, 1976: "The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person ... owing to the existence of ... humanitarian considerations."

or new evidence in their favour to an immigration official. In such a submission, the complainants could have referred to any personal circumstances of a humanitarian nature, not only to the risks involved in their removal to Mexico. Had their application been turned down, the complainants could have requested leave to apply for judicial review of the decision. For the Federal Court to grant leave, they would only have needed to show that they had a "fairly arguable case" that would warrant remedial action if the request were granted.[4]

4.5 The State party argues that the complainants could have applied to the Federal Court for a stay of removal until completion of the judicial review process. This decision can in turn be appealed before the Federal Court of Appeal if the lower court judge certifies that a serious question of general importance is involved and states that question. The Federal Court of Appeal ruling may be appealed in the Supreme Court of Canada.

4.6 The State party further argues that an application for permanent residence in Canada based on the existence of humanitarian considerations is another remedy that might have brought relief to the complainants.

4.7 The State party recalls that, in *L.O. v. Canada*,[5] the Committee found the communication inadmissible because the complainant had not made such an application on humanitarian grounds and had thus not exhausted domestic remedies.

4.8 In the case of the complainant Mr. S. V., the State party notes, with regard to his second asylum request, that he did not request leave to apply for judicial review of the negative decision of the Refugee Determination Division. This remedy is still available to the complainant, even though the 15-day period established by the Immigration and Refugee Protection Act for the filing of such an application has in fact elapsed. If the complainant can demonstrate that there were special reasons for the delay in filing, a Federal Court judge may allow an extension of the deadline. The State party points out, however, that the complainant had an obligation to observe the time limits, and cites a European Court of Human Rights case[6] in which the Court found that, even in cases of removal to a country where there might be a risk of treatment contrary to article 3 of the European Convention on Human Rights, the formalities and time limits established in domestic law must be observed. That complaint had been rejected on grounds of non-exhaustion of domestic remedies.

4.9 The State party notes that in *R.K. v. Canada*[7] the Committee found that the complainant had not exhausted domestic remedies if he had not pursued a request for judicial review of a

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[4] The Federal Court may intervene if it is satisfied that an administrative body has made an error of jurisdiction; erred in law in making a decision or an order, whether or not the error appears on the face of the record; based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it; or acted in any other way that was contrary to law.

[5] *L.O. v. Canada*, communication No. 95/1997; Views adopted on 5 September 2000.

[6] *Bahaddar v. Netherlands*, communication No. 145/1996/764/965.

[7] *R.K. v. Canada*, communication No. 47/1996.

negative decision by the Refugee Determination Division and had not lodged a request for a ministerial waiver. In *P.S. v. Canada*[8] the Committee had found the communication inadmissible on the grounds that the complainant had not applied for judicial review of a decision denying his request for a ministerial waiver.

4.10 According to the State party, Mr. S. V. will not be deported from Canada without having had an opportunity to request an assessment of the risks involved in returning to his country. The Immigration and Refugee Protection Act provides that persons in Canada may apply for protection if they are subject to a removal order and fear that their removal would expose them to the risk of persecution on one of the grounds established in the Convention relating to the Status of Refugees or to the risk of being subjected to torture within the meaning of article 1 of the Convention against Torture, or would put their life at risk or expose them to the risk of cruel treatment. In the event of a negative decision regarding the pre-removal risk assessment, an application for judicial review may be made to the Federal Court.

4.11 Lastly, the State party argues that the complainant may apply for permanent residence on humanitarian grounds.

4.12 As to the complainant Ms. O. C., the State party emphasizes that she had temporary worker status in Canada until 8 December 2003. After that date she could apply for refugee status if she was afraid to return to Mexico, and if a removal order was issued against her she could apply for pre-removal risk assessment. She could also apply for permanent residence under the Live-in Caregiver Programme. Lastly, she could apply for permanent residence in Canada on the basis of humanitarian considerations. In each case, the decision would be subject to judicial review.

4.13 The State party maintains that the complainants have not exhausted the domestic remedies available to them and have not demonstrated that such remedies would be unreasonably prolonged or unlikely to bring effective relief. The complaint should therefore be found inadmissible.

The author's comments on the State party's submission

5. The State party's observations were transmitted to the complainants for comments on 19 August 2003. A reminder was sent on 2 October 2003, but no response has been received.

Issues and proceedings before the Committee

6.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. The Committee has ascertained that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the individual has exhausted all

[8] *P.S. v. Canada*, communication No. 86/1997.

available domestic remedies; this rule does not apply where it has been established that the application of the remedies has been unreasonably prolonged, or that it is unlikely, after a fair trial, to bring effective relief to the alleged victim.

6.3 The Committee has noted the State party's explanation made on 30 July 2003 that the complainants left the State party on 18 July 2000, in compliance with a removal order against them. Meanwhile, the State party has indicated that subsequent to their expulsion in July 2000, the authors returned to Canada – the complainant's wife in December 2000, with a valid work permit, and the complainant in October 2001, after seeking asylum on grounds that differ from the allegations that are in the present communication. In the light of the above, and in absence of any observations from the complainants on the State party's submission or any further information on their current situation, the Committee considers that the complainants have failed to sufficiently substantiate their claim for purposes of admissibility. Therefore, it considers that the communication is manifestly unfounded.

7. The Committee consequently decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the authors of the communication and to the State party.

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