



**Convention on the Elimination
of All Forms of Discrimination
against Women**

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**Committee on the Elimination of Discrimination
against Women**

Communication No. 26/2010

**Decision adopted by the Committee at its fiftieth session,
3 to 21 October 2011**

<i>Submitted by:</i>	Guadalupe Herrera Rivera (represented by counsel, Rachel Benaroch)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	15 September 2010 (initial submission)
<i>Date of the decision:</i>	18 October 2011

Annex

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (fiftieth session)

concerning

Communication No. 26/2010*

Submitted by: Guadalupe Herrera Rivera (represented by counsel, Rachel Benaroch)

Alleged victim: The author

State party: Canada

Date of communication: 15 September 2010 (initial submission)

Date of adoption of decision: 18 October 2011

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 18 October 2011,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 15 September 2010, is Guadalupe Herrera Rivera, a national of Mexico born in 1976. She claims that her deportation from Canada to Mexico would violate her rights under article 1, article 2, paragraphs (a), (b), (c), (d), article 5 (a) and article 24 of the Convention on the Elimination of All Forms of Discrimination against Women (“the Convention”). The author is represented by counsel. The Convention and its Optional Protocol entered into force for the State party on 10 December 1981 and 18 October 2002, respectively.

1.2 The author requested interim measures of protection, in accordance with article 5, paragraph 1, of the Optional Protocol.

* The following members of the Committee participated in the examination of the present communication: Ms. Ayse Feride Acar, Ms. Nicole Ameline, Ms. Magalys Arocha Domínguez, Ms. Violet Awori, Ms. Barbara Bailey, Ms. Olinda Bareiro Bobadilla, Mr. Niklas Bruun, Ms. Náela Gabr, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Ismat Jahan, Ms. Soledad Murillo de la Vega, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Maria Helena Pires, Ms. Victoria Popescu, Ms. Zohra Rasekh, Ms. Patricia Schulz, Ms. Dubravka Šimonović and Ms. Zou Xiaoqiao.

1.3 On 4 October 2010, the Committee requested the State party not to deport the author and her two minor children, K.E.R.H. and D.R.H., to Mexico while her case was pending before the Committee.

Facts as presented by the author

2.1 The author claims that she has been the victim of conjugal violence for more than 12 years. She was married on 16 August 1996, and had two children. The family came to Canada on 11 September 2006, and claimed refugee status on 21 September 2006.¹ Their claim was dismissed on 11 January 2008 on the ground that it lacked credibility. On 23 July 2008, their application for judicial review of their negative asylum decision before the Federal Court of Canada was dismissed.

2.2 In April 2008 (between the negative decision of their refugee claim and the dismissal of their application for judicial review), after an incident of conjugal violence and years of physical, psychological and sexual abuse in Mexico, the United States of America and then Canada, the author reported the incident to the police² and separated from her husband. She took refuge in a women's shelter in Montreal from 25 April to 1 August 2008. A women's association, "Assistance aux femmes", convinced of the author's suffering and danger to herself and her children at the hands of her husband, filed on her behalf a pre-removal risk assessment (PRRA) with Immigration Canada on 1 October 2008, and a humanitarian and compassionate grounds (H&C) application on 27 October 2008. With the H&C application, "Assistance aux femmes" submitted the author's declaration, describing life with her husband, and the violence she and her children endured. They also filed a social worker's report containing their observations on the author and her children and their assessment of the negative impact of the violence they suffered. Based on the author's husband behaviour, history of violence, death threats, and the fact that there is inadequate State protection in Mexico,³ "Assistance aux femmes" concluded that the author and her children were at risk in Mexico. The H&C application was dismissed on the ground that the author and her children would not face unusual and undeserved or disproportionate hardship if they were to return.

2.3 In November 2008, the author's husband threatened to kill the author if she failed to return to him, and he also threatened to commit suicide. The author sought assistance from the Montreal police, and, upon finding a knife in her husband's possession, they immediately detained him and sent him for psychiatric evaluation. One month later, the author's husband managed to identify the shelter in which the author and her children had taken refuge, and contacted the social worker in charge, pretending to be a family friend, and claiming that the author was lying and had never been a victim of conjugal violence, and was using the shelter to stay in Canada. All this was new information, which had not been submitted to Immigration Canada within the PRRA and H&C applications submitted in October 2008.

2.4 On 16 January 2009, the Canadian authorities deported the author's husband to Mexico. On 3 September 2009, the author divorced from her husband, and obtained legal custody of her minor children. According to family members, since his deportation to Mexico in January 2009, the author's husband was seen on many occasions watching the author's

¹ The family's claim for asylum related to allegations by the author's ex-spouse that he faced extortion by police, in connection with a snack bar he had opened, as well as additional threats from the family of an individual he had killed in a car accident.

² Without filing a complaint against him.

³ Relying on a report from Amnesty International entitled "Women's struggle for safety and justice-violence in the family in Mexico", of 1 August 2008.

house in Los Reyes de la Paz, where he also lives. The author contends that this fact, together with the prior death threats he formulated, show that he is waiting for her, and that her safety is at risk should she return to Mexico.

2.5 On 30 April 2009, the author's PRRA application, presented on the basis of conjugal violence, was rejected. The decision stressed, *inter alia*, that: (a) the author failed to establish that the Mexican authorities were unable to offer her protection; (b) she has an important family in Mexico, who could assist her and her children in resettling in a new town in Mexico, at a distance from her husband's place of residence; (c) although spousal abuse is a widespread problem in Mexico, avenues such as complaining to the police, or seeking refuge in a shelter, are open to women victims of violence.

2.6 On 27 October 2009, the author's H&C application for permanent residence based on conjugal violence was dismissed. The Immigration agent who considered her application concluded that the author and her children would not suffer unjustified or disproportionate hardship for the following reasons: (a) the author could seek protection in a shelter in Mexico; (b) she need not return to her former domicile in Los Reyes de la Paz where her husband also lives, but could choose a residence elsewhere in Mexico; (c) her children have not been affected by, and seem to cope, with the situation; and (d) State protection for victims of conjugal violence is available in Mexico, as new laws were enacted to protect women from violence. On 12 November 2009, her application for leave to initiate judicial review of the H&C decision was rejected by the Federal Court. A stay of removal was ordered by the Federal Court on 25 November 2009.

2.7 In March 2010, two Canadian social workers concerned by Canada's negative decisions in the author's and other Mexican women's cases travelled to Mexico to undertake a first-hand assessment of the situation on the ground, and concluded that there was inadequate state protection for battered women in Mexico.⁴ Findings of this report reveal, *inter alia*, that: very few shelters are available; admission is not automatic; shelters are poorly guarded and frequently attacked by husbands; the police rarely intervenes in situations of domestic violence, as it is considered a "family affair"; conjugal violence is entrenched in Mexican society, and tolerated by the Mexican authorities; perpetrators are rarely detained or punished.

2.8 On 1 June 2010, the author's application for judicial review of the H&C decision was denied. A second pre-removal risk assessment was submitted on 25 June 2010.

2.9 The author stresses that due to her limited financial means, she will have to return with her children to the family house in Los Reyes de la Paz, where her ex-husband awaits, if she were deported to Mexico. Even before her arrival to Canada, she and her husband used to live with her parents in that house. If she were forced to be relocated for her safety, she would have no choice but to live in the street with her children, as she has no relative elsewhere in Mexico. For these reasons, the author stresses that she is at serious risk if she were deported to Mexico.⁵

2.10 Regarding her two minor children, who would be removed with her to Mexico should she be deported, the author stresses that they would greatly suffer if anything happened to her, and that due attention should be given to their best interest. The two children have already witnessed years of violence against their mother, and the additional violence to which she

⁴ "Les femmes au Mexique sont toujours en attente de protection contre la violence". Field study conducted from 15 to 31 March 2010.

⁵ She refers to communications No. 6/2005, *Yildirim v. Austria*, Views adopted on 6 August 2007, and No. 10/2005, *N.S.F. v. United Kingdom of Great Britain and Northern Ireland*, decision of inadmissibility adopted on 30 May 2007.

would be exposed in case of return would cause them serious prejudice, in addition to their uprooting from Canada, where they are secure, to a hypothetical insecure shelter in Mexico, assuming the family is admitted to one. The children would probably need to relocate with their mother to another city in Mexico, away from friends and relatives. The dismissal by the State party's authorities of the author's last application for judicial review on 1 June 2010 had a negative impact on her children. She contends that the State party failed to consider the best interest of her children.⁶

Complaint

3.1 The author claims that by deporting her to Mexico, the State party would allow Mexico to violate her rights under article 1, article 2 (a)-(d), article 5 (a), and article 24 of the Convention.

State party's observations on admissibility

4.1 By its submission of 6 December 2010, the State party challenges the admissibility of the communication, arguing that the author's communication seeks to apply the obligations under the Convention in an extraterritorial manner. According to the State party, the author's allegations of violation relate to Mexico and not to Canada. As a consequence, the Committee lacks jurisdiction over the claimed violations in respect of Canada and the communication is incompatible with the provisions of the Convention.

4.2 The State party further submits that the author bases her communication on the same story, evidence and facts that were previously presented to the Canadian officials, and that were determined by risk assessment experts and an independent court, in each case, not to support a finding of a substantial personal risk to the author if returned to Mexico, and also taking into account the best interests of the author's children. The State party stresses that in Canada, persecution based on gender, including domestic violence, can sustain a claim to refugee status, and that PRRA Officers are specifically trained on how to identify and assess the risks specific to victims of domestic violence as a protected social group, relying on gender guidelines which have been developed by the Immigration and Refugee Board for assessing gender-based claims of persecution, including for the assessment of "internal flight alternative",⁷ as in the author's case.

4.3 The author's PRRA application on behalf of herself and her two children, and which was based on the risk of domestic violence that the author would face if returned to Mexico, was turned down on 30 April 2009, as the author failed to establish, on a balance of probabilities, that she and her children faced a risk of persecution, torture, threats to their lives or cruel and unusual treatment if returned to Mexico. In arriving at this conclusion, the PRRA Officer considered the possible protection offered in Mexico and found that the author had failed to provide clear and convincing evidence that the available protection was not adequate. In assessing the lack of a risk of torture, persecution or threats to the lives of the author and her children if returned, the Officer also highlighted the strong family network available to the

⁶ She refers to article 24 of the International Covenant on Civil and Political Rights, as well as to Human Rights Committee communication No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003.

⁷ The various instances which examined the author's applications highlighted her strong family network available in Mexico, and her possibility to establish herself in another part of the country, or even another part of the Mexico City area, where she had not previously lived, so as to avoid the threat of her husband.

author in Mexico – notably five brothers and sisters in addition to her parents – and the possibility that the author could establish herself in another part of the country, or even another part of the Mexico City area than where she had previously lived, in order to avoid the threat of her husband. The Officer also highlighted that although violence persisted, and that according to statistics, 50 per cent of women in Mexico faced violence, various measures are available to affected women, notably, bringing complaints to the police or seeking refuge in shelters for battered women. The State party is of the view that the author’s communication appears to be based primarily on her disagreement with the findings of fact, and recalls that it is not the role of the Committee to re-evaluate such facts and evidence unless it is manifest that the domestic tribunal’s evaluation was arbitrary or amounted to a denial of justice. According to the State party, the material submitted by the author cannot support a finding that domestic decisions suffered from any such defects.

4.4 The State party’s second argument in support of its contention that the communication should be declared inadmissible relates to the inapplicability of the Convention extraterritorially. The author has alleged that Canada is in violation of the Convention by “allowing Mexico to violate the author’s rights”. According to the State party, Canada cannot be held responsible for any violation of her rights under the Convention, which might occur in Mexico once removed to that country, as this would otherwise imply that Canada has a positive obligation under the Convention not to remove her to a serious risk of discrimination in her country of origin, an obligation which is not contemplated under the Convention. Referring to the Committee’s general recommendation No. 19 (1992),⁸ which highlights that gender-based violence is a form of discrimination, which could impair or nullify the enjoyment by women of human rights and fundamental freedoms, such as the right to life, the right to security of the person or the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the State party nevertheless stresses that it is solely responsible for obligations vis-à-vis individuals under its jurisdiction, and cannot be held responsible for discrimination in the jurisdiction of another State, even if the author could establish that she would be subject to discrimination contrary to the Convention due to gender-based violence in Mexico. Legal obligations against removal to serious violations of human rights are found explicitly in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in articles 6 and 7 of the International Covenant on Civil and Political Rights. While the latter provisions have been interpreted by the Human Rights Committee to protect implicitly against removal to the death penalty and to torture or other similarly serious threats to life and security of the person, the Convention on the Elimination of All Forms of Discrimination against Women does not deal directly (or indirectly) with removal to torture or other serious threats to life and the security of the person. The author may only bring a communication concerning Canada related to alleged violations under the Convention committed by and under the jurisdiction of Canada (Optional Protocol, art. 2). In the present case, neither a Canadian official, nor any private person, organization or enterprise under Canada’s jurisdiction has committed a violent act, gender-based or otherwise, against the author. Nor for that matter has the author made any allegation against Canada to that effect. Consequently, the State party contends that the author’s communication is incompatible with the provisions of the Convention and should thus be declared inadmissible by virtue of article 4, paragraph (2) (b), of the Optional Protocol.

4.5 The State party further stresses that the author’s allegation of discrimination is manifestly ill-founded and not sufficiently substantiated, as she failed to show that the decision in her case was due to a failure to pursue a policy of eliminating discrimination against women in Canada (art. 2 of the Convention) and, more specifically, due to a failure to

⁸ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38)*, chap. I.

embody the principle of equality of men and women in Canada's constitution (art. 2 (a)); to adopt appropriate legislative and other measures prohibiting all discrimination against women (art. 2 (b)); to establish the legal protection of the rights of women on an equal basis with men (art. 2 (c)); or to refrain from engaging in any act or practice of discrimination against women (art. 2 (d)). Similarly, the author has provided no evidence that the processing of her immigration case was in any way shaped by, or the result of, a failure by Canada "to modify the social and cultural patterns of conduct of men and women" in order to eliminate prejudices and practices based on discriminatory ideas against women (art. 5(a)) or of a further failure to adopt all necessary measures at the national level aimed at achieving the rights in the Convention (art. 24). According to the State party, the communication should as such be declared inadmissible by virtue of article 4, paragraph 2 (c), of the Optional Protocol.

4.6 Finally, the State party claims that the author failed to exhaust domestic remedies. She had the opportunity, but did not seek leave to apply for judicial review of the negative decision in her PRRA application dismissed on 30 April 2009. At the same time that the author applied for a PRRA, she also made a separate H&C application on 27 October 2008 for permanent residence, which was dismissed on 27 October 2009. She subsequently obtained leave to apply for judicial review of her failed H&C application before the Federal Court of Canada. Her removal was stayed in the meantime. In a written judgment dated 1 June 2010, the Federal Court dismissed the author's appeal. On 25 June 2010, the author submitted an application for a second PRRA, in which she highlighted a number of changes in her situation, since the decision in her first PRRA and H&C applications in 2009.⁹

4.7 A decision has yet to be provided on the author's second PRRA application.¹⁰ As such, the risks faced by the author, especially the new elements cited, and the supporting evidence and reports not previously provided, have not yet been assessed under the PRRA procedure. The State party stresses that judicial review is an effective remedy,¹¹ recalling that both the Human Rights Committee and the Committee against Torture have previously found that the PRRA is an effective remedy, which must be exhausted for the purposes of admissibility.¹² The author has provided no explanation as to why she failed to pursue this effective domestic

⁹ As proof in support of her claim that her ex-spouse is very unstable, the author provided records from the Montreal police from 23 November 2008, when she had made an emergency call to the police to complain that her ex-spouse had made death threats against her and had threatened to commit suicide. She also provided letters dating from June 2010 from her mother and sister in Valle de los Reyes, Mexico claiming that they had spotted the ex-spouse on a number of occasions hanging around the author's parents' house. In addition, the author provided copies of the non-governmental reports examining the protection offered to victims of domestic violence in Mexico, intended to respond directly to the findings in the author's negative H&C application, arguing that, contrary to such findings, protection available to victims of domestic violence in Mexico is not adequate.

¹⁰ At the time of the State party's submission. A negative decision on her second PRRA application was adopted of 7 December 2010.

¹¹ The State party refers to *N.S.F. v. United Kingdom of Great Britain and Northern Ireland* (note 5 above); Committee against Torture communications No. 304/2006, *L.Z.B. v. Canada*, decision of inadmissibility adopted on 8 November 2007, para. 6.6, No. 183/2001, *B.S.S. v. Canada*, Views adopted on 12 May 2004, para. 11.6 and No. 95/1997, *L.O. v. Canada*, decision of inadmissibility adopted on 19 May 2000, para. 6.5; and Human Rights Committee communications No. 982/2001, *Bhullar v. Canada*, decision of inadmissibility adopted on 31 October 2006, para. 7.3 and No. 939/2000, *Dupuy v. Canada*, decision of inadmissibility adopted on 18 March 2005, para. 7.3.

¹² The State party refers to Human Rights Committee communication No. 1302/2004, *Khan v. Canada*, decision of inadmissibility adopted on 25 July 2006, para. 5.5 and Committee against Torture communication No. 273/2005, *T.A. v. Canada*, decision of inadmissibility adopted on 15 May 2006, para. 6.4.

remedy in respect of her first PRRA application. The State party also stresses that if the author is successful in her second PRRA application, which remains pending, she would become a protected person, and could apply for permanent residence status and ultimately citizenship. If she were unsuccessful, she could then seek leave to apply for judicial review of the negative decision, and raise more fully any arguments that immigration officers erred by failing to take into account the appropriate factors such as, for instance, those raised in the March 2010 and May 2010 reports of non-governmental organizations. The author could also, at that point, more appropriately raise any argument that the risks of domestic violence she faces if removed to Mexico are serious enough to threaten her constitutional right to life, liberty and security of the person (section 7 of the Canadian Charter on Rights and Freedoms). In conclusion, the State party contends that there are still effective domestic procedures available to the author, and that the Committee should thus find that her communication is inadmissible by virtue of article 4, paragraph 1, of the Optional Protocol.

Author's comments on the State party's observations on admissibility

5.1 In a submission dated 27 March 2011, the author reiterates her initial claims and challenges the State party's argument that the communication should be declared inadmissible.

5.2 Regarding the State party's argument that the State party does not hold responsibilities vis-à-vis acts contrary to the Convention, which may occur in Mexico after her deportation, the author stresses that the State party does have responsibilities, under the Convention, regarding the direct and foreseeable consequences of her potential deportation to Mexico.¹³ She adds that the harm she is alleging amounts to a threat to life, given her abusive ex-spouse's threat to kill her. She further alleges that the gender-based violence which she has suffered, and at which she would be at serious risk if deported to Mexico, also constitutes a form of cruel and unusual punishment or treatment, which amounts to discrimination, within the meaning of article 1 of the Convention.¹⁴ The author also contends that contrary to the State party's assertion, the Human Rights Committee's jurisprudence has established that States have responsibilities, in deportation contexts, which go beyond the risk to the right to life, or risk to face cruel, inhuman or degrading treatment or punishment.¹⁵

5.3 With regard to the State party's argument that her allegations are ill-founded and insufficiently substantiated, the author stresses that her communication before the Committee is not based on the same facts and evidence, which were reviewed by the State party's decision-makers during her initial PRRA and H&C applications. The new evidence she submitted (non-governmental reports assessing the availability of State protection for women victims of domestic violence in Mexico) were not available at that time, and thus never submitted to the State party's relevant jurisdictions. When her H&C application was considered in October 2009, the general law adopted by Mexico on women's access to a life free from violence (2007) was still very new and lacked implementation.

5.4 Regarding the State party's argument that she has failed to exhaust domestic remedies with respect to her initial PRRA application, the author notes that she subsequently submitted

¹³ The author refers to *N.S.F. v. the United Kingdom of Great Britain and Northern Ireland* (note 5 above), para. 7.3.

¹⁴ The author refers to the Committee's general recommendation 19, paras. 6 and 7.

¹⁵ The author refers to Human Rights Committee communications No. 930/2000, *Winata et al v. Australia*, Views adopted on 26 July 2001, para. 7.3, and No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.8.

an H&C application based on conjugal violence, in which the same risk was alleged, and which was dismissed. An appeal lodged against this decision was also dismissed. Regarding the latest proceedings, she refers to her last PRRA application, which was denied on 7 December 2010. She stresses that according to Canadian law, a second PRRA application does not have a suspensive effect vis-à-vis deportation, and that removal arrangements were undertaken immediately after the negative decision, but interrupted after the Committee's request for interim measures to prevent a deportation to Mexico. The author claims that she has therefore exhausted domestic remedies.

Issues and proceedings before the Committee concerning admissibility

6.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible under the Optional Protocol to the Convention.

6.2 In accordance with rule 66 of its rules of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

6.3 The Committee notes the State party's argument that the communication should be declared inadmissible under article 4, paragraph 1, of the Optional Protocol for non-exhaustion of domestic remedies, because the author submitted on 25 June 2010 an application for a second PRRA, in which she highlighted a number of changes in her situation, and which had not been examined at the time of the State party's observations on the admissibility of the present communication. In accordance with article 4, paragraph 1, of the Optional Protocol, the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. The Committee recalls its jurisprudence, according to which the author must have raised in substance at the domestic level the claim that he/she wishes to bring before the Committee,¹⁶ so as to enable domestic authorities and/or courts to have an opportunity to deal with such a claim.¹⁷ In this respect, it notes that at the time of consideration of the communication, the author's second PRRA application has been dismissed on 7 December 2010.¹⁸ The Committee further notes the State party's argument that the author could seek leave to apply for judicial review of the negative PRRA decision before the Federal Court. The author has not contested this, nor has she substantiated why she did not seek judicial review or sought a stay of deportation before the Federal Court until a decision was issued on the request for leave to appeal and, if leave was granted, until completion of the judicial review. The Committee observes that a favourable decision by the Federal Court could effectively stop her deportation to Mexico, which in turn would render her communication moot before the Committee. The Committee therefore finds that the author should have availed herself of this remedy, and finds the present communication inadmissible under article 4, paragraph 1, of the Optional Protocol.

6.4 Having found the communication inadmissible on the ground that the author failed to exhaust domestic remedies, the Committee does not consider it necessary to examine other inadmissibility grounds invoked by the State party.

7. The Committee therefore decides:

¹⁶ See communication No. 8/2005, *Kayhan v. Turkey*, decision of 27 January 2007, para. 7.7.

¹⁷ See *N.S.F. v. United Kingdom of Great Britain and Northern Ireland* (note 5 above), para. 7.3.

¹⁸ At the time of the initial submission of her communication by the author (15 September 2010), her second PRRA application, filed on 25 June 2010 was still pending. A decision was adopted on 7 December 2010 on this application.

- (a) That the communication is inadmissible under article 4, paragraph 1 of the Optional Protocol on the basis that all available domestic remedies have not been exhausted;
 - (b) That this decision shall be communicated to the State party and the author.
-