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

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COMMITTEE AGAINST TORTURE
Forty-third session
2 - 20 November 2009

DECISION

Communication No. 307/2006

Submitted by:	Emad Yassin (represented by counsel, Mr. Byron E. Pfeiffer)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	29 October 2006 (initial submission)
Date of present decision:	4 November 2009

* Made public by decision of the Committee against Torture.

Subject matter: Deportation of complainant to Iraq

Procedural issues: Exhaustion of domestic remedies – Lack of substantiation of claim

Substantive issues: Non-refoulement

Articles of the Convention: 3, 22 (5) (b)

Rules of Procedure: Rule 107 (b) and (e)

[ANNEX]

ANNEX

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

concerning

Communication No. 307/2006

Submitted by:	Emad Yassin (represented by counsel, Mr. Byron E. Pfeiffer)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	29 October 2006 (initial submission)

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

Meeting on 4 November 2009,

Having concluded its consideration of complaint No. 307/2006, submitted to the Committee against Torture on behalf of Emad Yassin under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainant is Mr. Emad Yassin, an Iraqi national born in 1964, currently facing deportation from Canada to Iraq. He claims that his return to Iraq would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Mr. Byron E. Pfeiffer.

1.2 On 30 October 2006, the complainant asked the Committee to request the State party to stay the removal order against him, pending the Committee's final decision on his complaint. On 31 October 2006, the Committee, through its Special Rapporteur on New Complaints and Interim Measures, transmitted the complaint to the State party, without requesting interim measures of protection under Rule 108, paragraph 1, of its rules of procedure.

Factual background

2.1 The complainant was conscripted into the Iraqi military service (the "Republican Guards") in 1983, when Iraq was at war with Iran. One month after his release from military service on 1 July 1990, he was again called to serve in the military, following the Iraqi invasion of Kuwait. He deserted the Republican Guards in or about April 1991 and went into hiding in Iraq. He later left Iraq for Canada, via Jordan and Morocco. On 15 February 1996, he arrived in Montreal, Canada, and immediately filed an application for refugee protection.

2.2 On 2 July 1996, the complainant submitted his Personal Information Form in support of his refugee claim. In the form, he claimed that he had deserted the Republican Guards during the war in Kuwait and returned to military service after an amnesty for deserters had been issued. However, the amnesty was not respected, and he was taken by the Military Security Police to their headquarters, where he was allegedly interrogated and tortured for one week. He was subsequently returned to his unit to await trial. Fearing that the trial would result in a death sentence, he escaped again. After learning that a verdict had been sent to his military unit to execute him, he moved from one place to another in Iraq for three years before he fled the country.

2.3 On 7 October 1996, the complainant's claim for refugee protection was heard by the Refugee Division of the Immigration and Refugee Board, which was competent only to consider whether he was a Convention refugee as defined in the 1951 Convention relating to the Status of Refugees.[1] The Board informed the Minister of Citizenship and Immigration and the complainant that he was excluded from refugee protection by virtue of Article 1 F of the Refugee Convention.[2]

2.4 On 3 September 1997, the Board determined that the complainant was not a Convention refugee, arguing that his oral testimony lacked credibility, in particular his claim that, as a member of the Republican Guards, he had never fired on the enemy, killed anyone, or dealt with prisoners of war or Iranian civilians; the contradictory description of his role in the Iraqi city of Najaf in March 1991 and of the timing of his desertion; and his implausible claim that, as a deserter sentenced to death, he was able to live with his mother in Baghdad and work for more than three years before leaving Iraq. The Board also considered that the crushing of the uprising against Saddam Hussein by Republican Guards in Najaf in 1991 amounted to crimes against humanity within the meaning of Article 1 F (a) of the Refugee Convention. Based on his rank and lengthy tenure with the Republican Guards, the complainant was aware of the Organization's methods and supported its objectives. Even assuming that he deserted after three days in Najaf, he would have participated in the indiscriminate bombing of the city. He therefore

[1] Since the entry into force of the Immigration and Refugee Protection Act in June 2002, the Board considers both whether the person is a Convention refugee or a person in need of protection, i.e. a person at risk of torture within the meaning of article 1 CAT, or at risk of his life or of cruel and unusual treatment or punishment.

[2] Article 1 F of the Convention relating to the Status of Refugees (1951) reads: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes […]."

was complicit in the crimes against humanity committed by the Guards and excluded from refugee protection.

2.5 The complainant's application dated 22 September 1997 for leave to apply for judicial review was denied by the Federal Court on 22 January 1998.

2.6 On 17 August 1998, the complainant applied for permanent residence on the basis of humanitarian and compassionate grounds, alleging that his life and physical security would be in danger if was returned to Iraq. His application was examined by a specialized officer for risk assessment under the former Post-Determination Refugee Claimants in Canada (PDRCC) class. The officer determined that the complainant would not be at risk of life, extreme sanctions or inhuman treatment upon return to Iraq. On 28 June 1999, the complainant's application was dismissed.

2.7 The complainant did not request leave to apply to the Federal Court for judicial review of the decision on his humanitarian and compassionate application.

2.8 On 14 August 1999, the complainant married a Canadian citizen, who filed an application to sponsor his immigration to Canada on 20 August 1999. On 6 March 2002, Citizenship and Immigration Canada informed the complainant that his sponsored application for permanent residence had been refused on the basis that he was inadmissible to Canada, since there were reasonable grounds to believe that he had participated in crimes against humanity. His wife's appeal to the Immigration Appeal Division was dismissed on 5 July 2004, under Section 64 of the Immigration and Refugee Protection Act, for lack of jurisdiction to hear her spousal sponsorship appeal with respect to a person found to be inadmissible in Canada.

2.9 On 18 November 2004, the complainant filed an application for a Pre-Removal Risk Assessment (PRRA) pursuant to Section 112 of the Immigration and Refugee Act. In his PRRA application form, he claimed that after the change of regime in Iraq, he was no longer at risk of life and cruel or unusual treatment upon return to Iraq because he had deserted the military, but because he was a Sunni Muslim who had served in the Republican Guards under Saddam Hussein. Abu Ghraib prison in Baghdad was full of former members of the Republican Guards.

2.10 On 21 January 2005, the complainant was informed that his PRRA application had been rejected, since he had been determined not to be at personal risk to his life or of torture or cruel and unusual treatment or punishment if returned to Iraq. The PRRA officer observed that the complainant's name did not appear on the list of most wanted persons in Iraq. His fear of return based on his desertion from the army no longer had an objectively identifiable basis after the fall of Saddam's regime. That the complainant was a Sunni Muslim and former member of the Republican Guards was not by itself a reason that the Coalition forces would consider him an enemy or a terrorist to be imprisoned. On the contrary, former members of the Republican Guards were permitted to work in the civil service or to join the armed forces of the new government. Given his low profile, there were no grounds to believe that the complainant would be the victim of acts of vengeance. The general instability in Iraq affected all Iraqis and was not personal to the complainant.

2.11 The complainant did not request leave to apply to the Federal Court for judicial review of the PRRA decision.

2.12 On 11 February 2005, a removal order was issued against the complainant. On 19 October 2006, he was informed that his deportation to Iraq via Jordan had been scheduled for 31 October 2006. On 29 October 2006, the complainant requested the enforcement officer to defer his removal until the Committee has taken a final decision on his complaint. By fax dated 30 October 2006, the Canadian Border Services Agency notified the complainant that his request for deferral had been denied.

2.13 On 30 October 2006, the complainant applied for leave to apply to the Federal Court for judicial review of the decision not to defer his removal. However, he did not submit additional documents required to complete his application. The application was still pending at the time of submission of the complaint. He also applied for a stay of removal. On 31 October 2006, the Federal Court dismissed the motion for a stay.

2.14 The complainant failed to appear for his removal from Canada on 31 October 2006. Accordingly, an arrest warrant was issued against him under Section 55 (1) of the Immigration and Refugee Protection Act. The complainant's current whereabouts are unknown.

The complaint

3.1 The complainant claims that his forcible removal to Iraq would constitute a violation by the State party of article 3 of the Convention, as there are substantial grounds for believing that he would be tortured and even killed in present-day Iraq for having been a member of Saddam Hussein's Republican Guards and because he is a Sunni Muslim.

3.2 The complainant contends that the human rights situation is so critical in Iraq that even ordinary people are being tortured and killed. By reference to a report by the United Nations Assistance Mission to Iraq covering the human rights situation between 1 July and 31 August 2006, he submits that torture is widespread in Iraq and that revenge killings continue to take place against those associated with the former regime.

3.3 The complainant emphasizes that he never committed any war crimes or crimes against humanity.

3.4 He submits that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement, and that there are no further remedies available in the State party to prevent the Canadian authorities from returning him to Iraq. He explains that he did not file an application for leave to apply to the Federal Court for judicial review of the PRRA decision of 21 January 2005 because his Canadian lawyer had advised him that his legal remedies were exhausted. He had four different lawyers before current counsel started to represent him.

State party's admissibility and merits observations

4.1 On 27 March 2007, the State party challenged the admissibility of the complaint for non-exhaustion of domestic remedies and because it was manifestly unfounded, pursuant to article 22 (5) (b) and Rule 107 (b) and (e) of the Committee's rules of procedure. Subsidiarily, it argues that the complaint is without merit.

4.2 The State party recalls the Committee's jurisprudence[3] that it can only consider complaints that allege, in a substantiated manner, violations of rights protected by the Convention, and submits that the complainant has not substantiated his allegations on even a *prima facie* basis. The allegations made by him before the Committee were substantially the same as those presented to the Canadian authorities in his application for refugee protection. The State party argues that it is not the Committee's role to weigh evidence or re-assess findings of fact made by domestic courts, tribunals or decision makers,[4] unless it can be demonstrated that such findings are arbitrary or unreasonable.[5] The complainant did not claim that the domestic proceedings constituted a denial of justice or were arbitrary or unfair or in any other way deficient, and the material submitted did not support a finding that the decisions of the Canadian authorities suffered from such defects. Rather, the complainant was simply dissatisfied with the outcome of his domestic proceedings and the prospect of his potential deportation from Canada. Accordingly, there were no grounds on which the Committee could consider it necessary to re-evaluate findings of fact, evidence and credibility made by domestic tribunals.

4.3 On domestic remedies, the State party submits that the complainant did not apply for leave to apply for judicial review with respect to the decision dated 28 June 1999 on his humanitarian and compassionate application and the PRRA decision dated 21 January 2005. Moreover, he had failed to submit the required documents to complete his application for leave with regard to the decision dated 30 October 2006 refusing to defer his removal. The State party emphasizes that judicial review is an effective remedy. It concludes that the complainant's failure to seek judicial review with respect to the humanitarian and compassionate and PRRA decisions, or to pursue his current leave application with due diligence, makes his complaint inadmissible for non-exhaustion of domestic remedies.

5.1 On the merits, the State party recalls that article 3 of the Convention places the burden upon the complainant to establish substantial grounds, which must go beyond mere theory or suspicion, for believing that he would be personally at risk of being subjected to torture upon return to his country of origin.[6] The general human rights situation in a country was insufficient to establish such a personal risk. It submits that the inconsistencies undermining the credibility of his claim, the lack of evidence that he has been tortured in the past, and his low personal profile as a member of the Republican Guards lead to the conclusion that there are no substantial grounds for believing that the complainant would be personally at risk if he returned to Iraq.

5.2 With regard to the complainant's credibility, the State party argues that his testimony before the Immigration and Refugee Board that he never fired on the enemy, killed anyone or dealt with prisoners of war or Iranian citizens during his eight years with the Republican Guards is implausible, given that he claims to have been promoted three times during that time.

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[3] Communication No. 163/2000, *H.A.S.V. and F.O.C. v. Canada*, at para. 6.3; Communication No. 236/2000, *A.T.A. v. Switzerland*, at paras. 4.2.-4.3; Communication No. 243/2004, at paras. 4.2-4.3.

[4] The State party refers to Communication No. 148/1999, *A.K. v. Australia*, at para. 6.4.

[5] *Ibid.* The State party also refers to Communication No. 135/1999, *S. G. v. The Netherlands*, at para. 6.6; Communication No. 223/2002, *S. U. A. v. Sweden*, at para. 6.5.

[6] The State party refers to CAT, General Comment No. 1: *Implementation of article 3 of the Convention in the context of article 22* (1997), at paras. 6-8; Communication No. 36/1995, *X. v. The Netherlands*, at para. 7.2.

Similarly, it was unlikely that, as a Sergeant, he could have abstained from participating in any of the indiscriminate artillery attacks on Najaf, house-to-house arrests, round-ups of clerics, public executions, and massacres of civilians during the three days before he allegedly deserted the army. The date of desertion given before the Board did not coincide with his statement, in his Personal Information Form (PIF), that he deserted during the 1990 Gulf War, since the Najaf uprising occurred after the war. Lastly, the State party reiterates that it was implausible that a deserter who had allegedly been sentenced to death would be able to live with his mother and work in Baghdad for more than three years without facing problems. If in fact he was a "wanted" man, it was implausible that he would be able to obtain a passport issued in his name in 1995 and an exit visa in 1996, as stated in his PIF.

5.3 The State party submits that the complainant has not provided any details or corroborating evidence such as medical reports or scarring of his alleged torture by the Military Security Police in 1992, and thus certainly not in any recent past. Furthermore, torture under the former Saddam Hussein regime could not be taken to suggest that the complainant would still be at risk of torture in present-day Iraq.

5.4 While acknowledging that the human rights situation in Iraq is poor, the State party argues that the pervasive violence and instability alone are insufficient to substantiate the complainant's allegation that he would face a foreseeable, real and personal risk of torture upon return to Iraq. It cites a similar case,[7] in which the Committee did not consider that the individual's prospective removal to Iraq would violate article 3 of the Convention, in the absence of additional grounds beyond the problematic country conditions to show that that individual would be personally at risk. The report of the United Nations Assistance Mission to Iraq referred to by the complainant only mentions high-ranking military personnel and air force members as targets of extra-judicial killings. The complainant himself did not have the profile of someone who would be personally at risk in Iraq. Furthermore, he had not shown that he would be at risk in all parts of the country. The mere fact that he might not be able to return to his hometown does not as such amount to torture.[8] Lastly, it was unclear whether the complainant feared torture from State or non-State agents or both.

Complainant's comments

6.1 On 30 May 2007, counsel informed the Committee that the complainant had not been in contact with him since 31 October 2006. On the issue of exhaustion of domestic remedies, he submits that he cannot comment on the domestic proceedings relating to the complainant's refugee claim, humanitarian and compassionate application, spousal sponsorship and PRRA application, as he only represented him in the proceedings concerning the deferral and stay of his removal. After the Federal Court had refused to entertain the complainant's motion, and no order staying removal had been granted, "there was no rationale for continuing the application in the Federal Court […]," and no other remedy was available to him. No further explanations on exhaustion of domestic remedies and their availability or effectiveness are offered.

[7] Communication No. 286/2006, *M.R.A. v. Sweden, passim*.
[8] The State party refers to Communication No. 183/2001, *B.S.S. v. Canada*, at para. 11.5; Communication No. 245/2006, *S.S.S. v. Canada*, at para. 8.5.

6.2 Counsel submits that it was common knowledge that hundreds of thousands of Iraqis have fled Iraq, "and that the breakdown of civilized life in Iraq is accompanied by horrific violence from not just foreign soldiers, Iraqi police and outside armed men, but from Iraqi privately armed groups and individuals." Moreover, the situation in Iraq had deteriorated since the complainant's PRRA in 2004.

6.3 Counsel rejects the State party's argument that "instability in Iraq affects all Iraqis and all persons present in Iraq, and is not personal to the [complainant]" and that "the pervasive violence and instability in Iraq are not, in and of themselves, sufficient to substantiate the [complainant's] allegation that he would face a foreseeable, real and personal risk of torture upon being returned to Iraq". If everyone present in Iraq was affected by such pervasive violence and instability, no person should be returned to that country. Moreover, if violence was pervasive, "it is being experienced in every part of the country."

6.4 Given the complainant's past employment in the armed forces of Saddam Hussein, his risk was arguably higher than that of someone unrelated to the former regime. In light of the serious human rights situation in Iraq, any person previously associated with Saddam Hussein would be at substantial risk if returned to Iraq, including the complainant.

State party's additional observations

7.1 On 24 September 2007, the State party reiterated that the complaint is inadmissible because of non-exhaustion of domestic remedies and because it is manifestly unfounded, and in any event without merit. The fact that the complainant's previous counsel failed to advise him to apply for leave to apply for judicial review with respect to the humanitarian and compassionate decision of 28 June 1999 and the PRRA decision of 21 January 2005 did not absolve him from the requirement to exhaust domestic remedies, as errors committed by his privately retained lawyer cannot be attributed to the State party.

7.2 By reference to a decision of the Human Rights Committee[9] that failure to pursue a leave application with due diligence rendered a communication inadmissible, the State party challenges counsel's argument that "there was no rationale for continuing the application" after the Federal Court had dismissed the complainant's motion to stay his removal.

7.3 The State party recalls that counsel misconstrues the requirement for a complainant to establish that he is at personal risk of torture, by arguing that everyone in Iraq, including the complainant, is at risk of torture, since the human rights situation is so poor in Iraq. The Committee's jurisprudence[10] and General Comment on article 3 established that poor country conditions are not, in and of themselves, sufficient to substantiate the allegation that a complainant would face a foreseeable, real and personal risk of torture upon return to his or her country of origin.

[9] Human Rights Committee, Communication No. 982/2001, *J.S.B. v. Canada*, at para. 7.3.

[10] The State party refers to Communication No. 286/2006, *M.R.A. v. Sweden, passim*; Communication No. 282/2005, *S.P.A. v. Canada*, at para. 7.7.

Complainant's additional comments

8. On 1 October 2008, counsel informed the Committee that he had contacted the complainant through a relative, since the complainant was still hiding and did not want to disclose his whereabouts. The complainant was depressed; his former Canadian wife had divorced him. His mother and sister had left Iraq for Egypt and were afraid to return. His only brother who had stayed in Iraq was assassinated on 3 February 2008 because of his Sunni adherence and name. The complainant therefore had no siblings or parents remaining in Iraq.

Issues and proceedings before the Committee

9.1 Before considering any claim contained in a communication, the Committee against Torture 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.

9.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any complaint, unless it has ascertained that the complainant has exhausted all available domestic remedies; this rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged, or that it is unlikely, after a fair trial, to bring effective relief to the alleged victim.

9.3 The Committee takes note of the State party's argument that the complaint should be declared inadmissible under article 22, paragraph 5 (b), of the Convention, as the complainant failed to apply for leave to apply for judicial review of the decision dated 28 June 1999 on his humanitarian and compassionate application and of the PRRA decision dated 21 January 2005, as well as to submit the required documents to complete his application for leave with regard to the decision dated 30 October 2006 refusing to defer his removal. It also notes that the complainant does not challenge the effectiveness of the remedy of judicial review, although he had an opportunity to do so. In this regard, the Committee recalls that when judicial review is granted by the Federal Court in cases concerning pre-removal risk assessment or humanitarian and compassionate decisions by Citizenship and Immigration Canada, the Federal Court refers the matter back to a different immigration officer of the same decision-making body.[11] However, the Committee also observes that this does not imply that applications for leave or for judicial review are mere formalities that, as a general rule, need not be exhausted by a complainant for purposes of article 22, paragraph 5 (b), of the Convention.[12] Rather, the Federal Court may, in appropriate cases, look at the substance of a case.[13] It may in this context indicate the reasons for which it remits a case back to the body which took the original decision and for which it deems that said decision needs to be reconsidered.[14] The Committee recalls that, while according to its jurisprudence an appeal against a negative decision on a humanitarian and compassionate application is not a remedy that needs to be exhausted,[15] the complainant failed to diligently

[11] See Communication No. 133/1999, *Falcon Ríos v. Canada*, at para. 7.3.
[12] See Communication No. 273/2005, *T.A. v. Canada*, at para. 6.3.
[13] *Ibid.*
[14] See, e.g., Communication No. 183/2001, *B.S.S. v. Canada*, at para. 11.6.
[15] *Falcon Ríos v. Canada*, loc. cit.; Communication No. 232/2003, *Mabrouki v. Canada*, at para. 6.3.

exhaust remedies with respect to two other negative decisions. In the present case, the Committee does not consider that applications for leave to apply for judicial review of the PRRA and humanitarian and compassionate decisions would have been ineffective remedies in the complainant's case, in the absence of any particular circumstances adduced by him in support of such an assumption.

9.4 As regards the complainant's explanation that he did not file an application for leave to apply for judicial review of the PRRA decision of 21 January 2005 because his then lawyer had advised him that domestic remedies were exhausted, the Committee notes that the complainant has not argued that he was represented by a State-appointed lawyer at the relevant time. It recalls that errors made by a privately retained lawyer cannot normally be attributed to the State party,[16] and concludes that the complainant has failed to advance sufficient elements which would justify his failure to avail himself of the possibility to apply for judicial review of his PRRA decision, or of the humanitarian and compassionate decision of 28 June 1999. Nor has he provided reasons for his failure to complete his application for leave to apply for judicial review of the decision of 30 October 2006 on his request to defer his removal.

9.5 The Committee is therefore of the view that domestic remedies have not been exhausted in accordance with article 22, paragraph 5 (b), of the Convention.

10. Accordingly, the Committee decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the State party and to the complainant.

[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.]

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[16] Communication No. 284/2006, *R.S.A.N. v. Canada*, at para. 6.4.