IHF FOCUS: fair trial and arbitrary detention; torture and ill-treatment; asylum seekers and refugees; hate speech; international humanitarian law.

The UN Committee against Torture (CAT) reached a milestone decision while considering the periodic reports of Canada under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by recommending to Canada to open its civil courts to claims of torture against foreign states or officials in cases where torture has been inflicted abroad. This was the first time the CAT considered that torture victims have the right to pursue their cases also in countries that are not responsible for their torture.

With regard to anti-terrorism measures, the anti-terrorism legislation enacted in Canada after 9/11 was under review throughout 2005, with a view to deciding on its expedience given the fact that it had been used only in one case. Under review were also security certificates, which can be issued by two ministers to declare inadmissible to defendants and their counsels some information on the basis of which the defendants have been arrested. Such certificates have been issued against a number of terrorism suspects who have then been held in *de facto* indefinite detention thereafter because their deportation has been impossible.

On the positive side, the government took steps to better fight incitement to hatred by announcing in May a National Justice Initiative against Racism and Hate. It includes the commitment of the government to consider amendments to the Canadian Human Rights Act to, for example, order internet providers to refuse service to people who have been found to have communicated hate messages.

Another positive development was the Supreme Court of Canada's decision against Leon Mugesera, whose 1992 speech led to mass killings of Tutsis in Rwanda. After fleeing Rwanda, Mugesera arrived in Canada and became a permanent resident. The court ruled that Mugesera had incited hatred and genocide. In addition, the Supreme Court ruled against hate speech in a case involving Roma refugees. On the negative side, Canada continued to fail to bring alleged Nazi war criminals in Canada to justice: at the beginning of the year, revocation of citizenship for five persons who are accused of war crimes were pending.

The safe third country agreement between Canada and the United States (US), which came into force in December 2004, barred refugee claims at the shared land border and mainly affected asylum seekers attempting to seek refuge in Canada. As a result, the number of asylum seekers in Canada dropped dramatically, giving also rise to concerns that not all individuals in need of protection received it in the US. This also because the US, in violation of international standards, routinely held asylum seekers in detention.

Fair Trial and Arbitrary Detention

In 2005, the Canadian parliament reviewed the anti-terrorism legislation enacted after 9/11. The law has been used only once since: to prosecute Canadian born Mohammad Momin Khawaja. He was arrested in March 2004 in Ottawa and charged with participating in a plot to bomb the capital of Great Britain, London. As of early 2006, the case had yet to come to trial. One aspect of the review debate was whether the law should remain in force or be repealed in light of the fact that it was used so little.

Another aspect of the review was the use of security certificates, which are issued jointly by two ministers, the minister of citizenship and immigration and the minister of public safety and emergency

* This chapter is based on a report by David Matas, the chair of the Canadian Helsinki Watch Group, with the exception of the section on asylum seekers and refugees, which was written by the Canadian Council for Refugees.

preparedness. The certificates are issued where the ministers have formed the opinion that an individual is inadmissible on grounds of security, violating human or international rights, involvement in serious criminality or organized criminality, and the ministers hold the view that at least some of the information on which that opinion is based cannot for security or safety reasons be disclosed to the individual concerned or his counsel. The legislation requires the ministers to refer any such certificate to the Federal Court for a ruling on whether the determination by the ministers on admissibility is reasonable.

The power to issue these certificates is old and can now be found in the Immigration and Refugee Protection Act. Previously it was contained in the Immigration Act, and not technically within the scope of a review of the new anti-terrorism legislation. Nonetheless, those certificates have since 9/11 been used against a number of terrorism suspects. In practice, an individual may be held for several years, without criminal charges being brought against him or her, and can be deported without any charges or criminal conviction. Several suspects have remained, effectively, in indefinite detention, because their deportation could put them at risk of torture.

This security procedure has led to a myriad of court challenges which (as of the end of 2005) were before the Supreme Court of Canada in the cases of three different individuals: Hassan Almrei of Syria, in detention since October 2001; Mohamed Harkat of Algeria, detained since December 2002; and Adil Charkaoui of Morocco, in detention from May 2003 to February 2005.

◆ Hassan Almrei (Toronto) has been detained since October 2001. The relevant certificate was found to be "reasonable" in late 2003. In March 2005 he was granted a stay of removal to Syria after it was determined that an initial assessment claiming he was not at risk of torture was full of errors.[1]

◆ Mohamed Harkat (Ottawa) has been held in detention since December 2002. The certificate in his case was found to be "reasonable" in March 2005. He was facing deportation to Algeria where he is at risk of torture.[2]

◆ In February, the Federal Court ordered the release of one of the security certificate detainees, Adil Charkaoui, who had been held under extremely harsh conditions.[3]

At the end of 2005, five people were subject to security certificates in Canada, all Muslim Arab men. A sixth man, Ernst Zundel, was deported to Germany during the year after being subject to a security certificate: he is being charged with Holocaust-denial.[4]

In November 2005, the UN Human Rights Committee criticized Canada's use of security certificates. The committee highlighted the following rights violations related to certificates: long-term detention without charges, lack of adequate information about the reasons for detention, limited judicial review and mandatory detention for those without permanent residence.[5]

The UN Working Group on Arbitrary Detention in June voiced "great concern" over both pre-sentencing detention in the criminal justice system, as well as the detention of asylum seekers and immigrants. It noted that there were more persons deprived of their liberty awaiting trial or sentencing, at any one time, than there were persons actually serving a sentence in detention, following the national sentencing reform. It pointed out that "detention on remand disparately impacts on vulnerable social groups, such as the poor, persons living with mental health problems, aboriginal people and racial minorities."[6]

The parliamentary review, at the end of the year, was still continuing. Although

parliament had heard a number of submissions on this certificate procedure, it was likely that parliament and the government would await the court decisions before making any changes in this procedure.

Torture and Ill-Treatment

A noteworthy development in 2005 were the conclusions by the UN Committee against Torture[7] on Canada's fourth and fifth periodic reports on its compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which were released on 20 May.

In its comments and recommendations, the CAT for the first time in its history expressed a point of view that state parties should open their civil courts to claims of torture against foreign states or officials in cases where torture has been inflicted abroad. When setting out their conclusions on Canada, the CAT stated its concern at "the absence of effective measures to provide civil compensation to victims of torture in all cases" and recommended that "the state party should review its position under article 14 of the convention to ensure the provision of compensation through its civil jurisdiction to all victims of torture." Article 14 of the convention sets out the right to compensation for torture. Canada's, and other countries', interpretation of the article has been that the obligation to provide compensation through civil jurisdiction can only be applied to governments that are responsible for such practices.

◆ In 2002, Houshang Bouzari, an Iranian torture victim living in Canada, argued in his lawsuit against Iran that Canadian courts had a duty to give him a right to compensation against Iran, where he had been subjected to torture. The Canadian courts disagreed, holding that the duty to deal with such complaints set out in the UN Convention against Torture applied only to torture inflicted in Canada. Justice Katherine Swinton of the Ontario Superior Court, after hearing a testimony of an expert about the periodic reports by state parties to the CAT, observed that "none of these reports have indicated that a state has granted a civil remedy for torture committed outside its territory, and there has been no negative comment from the Committee."

Hate Speech

Making the Canadian law against incitement to hatred workable has been a continuing problem. The criminal code's prohibition against incitement to hatred does not allow for private prosecutions: state consent is required. This consent has been difficult to realize even when the substantive offence appears to have been committed.

A further difficulty with the law is that a good deal of the incitement to hatred being propagated within Canadian borders is sourced in embassies and consulates operating in Canada, which have hidden behind diplomatic and consular immunity to shield their activities from Canadian law.

Nonetheless consular immunity is not absolute: consular officials can be prosecuted for any crime - the only limitation is that they are not liable to arrest and detention pending trial, except for grave crimes. Canadian legislation defines grave crimes as any offence for which an offender may be sentenced to imprisonment for five years or more.

For inducement to commit a crime against humanity, the maximum punishment is life, and the criminal code offence of promotion or advocacy of genocide has a maximum sentence of five years. Thus, a consular official has no immunity from arrest and detention pending prosecution for these offences. The offence of promotion of hatred has, however, a maximum sentence of only two years, and therefore

would not fit within the definition of a grave crime.

◆ The Falun Gong movement has taken advantage of the law against incitement of hatred to press a complaint against Chinese consular officials in Calgary who distributed anti-Falun Gong literature in Edmonton. The Edmonton police in June 2005 accepted this complaint and forwarded it to the attorney general of Alberta for his consent, but consent was denied. The complainants have challenged that denial of consent in court, but there was no decision on that challenge by the end of 2005.

A positive development on the hate speech front in 2005 was the judgment of the Supreme Court of Canada in a case involving Roma.

◆ White supremacist demonstrators in August 1997 paraded in front of a motel housing Roma refugee claimants with signs like "Gypsies out" or "Honk if you hate Gypsies." Six demonstrators were charged with promoting hatred against Roma. The Ontario Court of Justice dismissed the charge, refusing to take judicial notice of the fact that the term "Gypsies" can refer to "Roma." The acquittal was upheld on appeal first by the Ontario Superior Court and then by the Ontario Court of Appeal on the basis that not all people referred to as "Gypsies" are Roma. The Supreme Court of Canada on 24 February 2005 overturned the acquittal and held that the trial judge should have taken judicial notice of dictionary definitions showing that "Gypsy" can refer to "Roma." It ordered a new trial. The prosecution dropped charges against four accused and proceeded only against two: one of them received a conditional discharge, the other a suspended sentence.

A second positive development was the commitment by the government of Canada to a comprehensive hate crimes strategy. Irwin Cotler, a former co-chair of the Canadian Helsinki Watch Group and, during 2005, minister of justice for the government of Canada, announced on 9 May 2005 a National Justice Initiative against Racism and Hate. One of the many items set out in this strategy was the commitment of the government to consider "amending the Canadian Human Rights Act to allow an Internet service provider to be ordered to refuse service to a person who has been found to have communicated hate messages, to the extent necessary to prevent further communication; and to hold Internet service providers liable to the extent that they knew or should have known that their facilities were being used to communicate hate messages."

Asylum Seekers and Refugees[8]

On 29 December 2004, the US and Canada implemented a safe third country agreement signed between the two countries two years previously. According to the agreement, each country named the other as a safe country for refugees, and, with some exceptions, barred refugee claims at the shared land border. Although the agreement is reciprocal, it overwhelmingly affects asylum seekers attempting to make a refugee claim in Canada, via the US, since the number of asylum seekers going in the opposite direction is very small.

The partial closing of the land border to asylum seekers had a dramatic effect on the numbers of refugee claims made in Canada in 2005: only 19,624 individuals filed refugee claim, which is the lowest number in any year since the mid-1980s. Whereas just under 9,000 claims were made at the land border in 2004, only 4,019 claims were made there in 2005.

Refugee and human rights advocates consistently argued that the US was not necessarily safe for all refugees. For example, refugees fleeing spousal abuse and Colombia claimants were more likely to be

recognized in Canada as refugees than in the US, and the US detained refugee claimants more systematically than Canada did, as a deterrent to their making or maintaining claims. These concerns were heightened in the course of the year by the passing into law in the US of the REAL ID Act, which weakens still further the legal protections offered to asylum seekers. Despite this change in US law, the Canadian government did not even undertake a review of the implications of the act for the finding that the US is a safe third country.

On the first anniversary of the implementation of the safe third country agreement, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches, together with an individual asylum seeker in the US, launched a legal challenge of the Safe Third Country Agreement, on the basis that it violates Canada's international obligations and the Canadian Charter of Rights and Freedoms, which is an integral part of the Canadian Constitution.

In the course of 2005, the Immigration and Refugee Board worked on the development of guidelines on vulnerable persons appearing before the board. This responds to calls made since 1993 by torture survivors' centers and the Canadian Council for Refugees for the adoption of guidelines for survivors of torture. Finalization of the guidelines was delayed to 2006.

Controversy continued over the use of security certificates under which non-citizens are detained and subject to deportation, without access to all the evidence brought against them (see Fair Trial and Arbitrary Detention, above).

The UN Working Group on Arbitrary Detention visited Canada in June 2005.[9] It investigated the treatment of security certificate detainees and made pointed criticisms. The working group also raised a number of concerns relating to the detention of refugee claimants, including the unrealistic demands for identity documents sometimes made of refugees.

In May 2005, CAT criticized Canada for its failure to respect the absolute prohibition on return to torture contained in article 3 of the Convention against Torture. The committee called on Canada to "unconditionally undertake to respect the absolute nature of article 3 in all circumstances" and to incorporate it fully into law.[10]

During the year, the Canadian government continued to fail to implement the right of appeal for refugees, despite it being an integral part of the law.[11] CAT called on Canada in May 2005 to "provide for judicial review of the merits, rather than merely of the reasonableness, of decisions to expel an individual where there are substantial grounds for believing that the person faces a risk of torture."

Processing of privately sponsored refugees[12] continued to be extremely slow, with 50% of cases taking more than 21 months from October 2004 to September 2005 (more than 29 months in applications related to Africa/Middle East, the slowest region). At the same time, the government did not even meet the low end of their target for 2004, allowing only 3,115 privately sponsored refugees into Canada, even though over 13,000 applications were waiting in the backlog at the end of the year.

International Humanitarian Law

Accountability for War Crimes

A continuing problem for Canada in 2005 was the failure to bring alleged Nazi war criminals residing in Canada to justice. At the beginning of the year, revocation of citizenship for five war crimes cases was pending.

The War Crimes Unit in the Department of Justice did not launch a World War II revocation case unless it had compelling evidence that the individual was complicit

in war crimes or crimes against humanity. Though, in form every revocation case was supposed to determine only whether the person entered Canada by false representation or fraud or by knowingly concealing material circumstances, in every one of these cases the government had won, there were serious grounds for considering that the individuals were complicit in war crimes and crimes against humanity.

Before 2005, seven people had died after revocation of citizenship or deportation proceedings were launched against them by the Department of Justice war crimes unit and before they were completed. They were: Wasily Bogutin, Serge Kisluk, Ludwig Nebel, Erichs Tobiass, Antanas Kenstavicius, Josef Nemsila, and Walter Obodzinsky.

At the beginning of the year, there were five cases the War Crimes Unit had won in Federal Court: Jacob Fast, Wasyl Odynsky, Michael Baumgartner, Vladimir Katriuk and Helmut Oberlander. The Federal Court had determined that these five individuals had lied on entry to Canada, therefore the next step was revocation of citizenship by cabinet decision. However, that revocation never came for any of the five. One of them, Michael Baumgartner, died during the year.

◆ Jacob Fast was part of the political section of the Nazi auxiliary police in Zaporozhye, Ukraine. According to Justice Pelletier, all of the auxiliary police participated in the rounding up and killing of the Jews living in Zaporozhye. The political section was responsible for the arrest, imprisonment, torture and deportation of prisoners to concentration camps in Poland and Germany. The Canadian government began proceedings against Jacob Fast on 30 September 1999 and the Federal Court decided against him on 3 October 2003. More than two years later, there was still no cabinet action to strip him of Canadian citizenship and proceed with deportation.

◆ Vladimir Katriuk was a member of an auxiliary *Waffen SS* battalion, which committed atrocities against civilians in what is now Belarus. Katriuk was in charge of a platoon unit. Justice Nadon found that Katriuk was lying when he testified that he did not participate in military operations with his battalion and when he testified he was forced to join the battalion. The judge, however, failed to make a finding that Katriuk was complicit in war crimes, writing "Not enough is known to reach any conclusion." Yet, by law, he did not have to reach any such conclusion because he had already found that Katriuk lied his way into Canada, which should have been sufficient for revocation of citizenship and deportation. The case of Vladimir Katriuk began on 15 August 1996. The Federal Court found against him on 29 January 1999. Seven years later, the cabinet had yet to make a decision on the revocation of his citizenship.

The other cases mentioned above have followed the same model, with the case of Helmut Oberlander being a good example for delays: his case began in January 1995, and the Federal Court found against him in February 2000, five years later. In his case, the Supreme Court of Canada remarked that the delays were "inordinate and arguably inexcusable" and that the dilatoriness of the case "defies explanation." Oberlander's citizenship was revoked in July 2001 but the Supreme Court in May 2004 overturned the Oberlander revocation and sent it back to cabinet for reconsideration. As of the end of 2005, over a year and a half later, the cabinet had yet to take up this reconsideration.

Accountability for Crimes against Humanity

The positive news on the international criminal front in 2005 was the Supreme Court of Canada decision in the case of Leon Mugesera. Mugesera gave a speech

in November 1992 referring to Tutsis as cockroaches and calling for their extermination. This speech was immediately followed by mass killings of Tutsis in Rwanda, and its words and themes became central to the propaganda inciting the genocide of April 1994. Mugesera fled Rwanda immediately after his speech and surfaced in Canada in August 1993 as a permanent resident. The government of Canada began removal proceedings against him, claiming misrepresentation, participation in crimes against humanity and incitement to genocide.

The government succeeded at the first three levels but lost at the Federal Court of Appeal in spectacular fashion. The court set such onerous requirements for proving incitement to hatred, genocide and crimes against humanity, no case would ever likely be able to meet those requirements.

The Supreme Court accepted that the Federal Court of Appeal had misjudged its role, retrying the case on its facts, which it should not have done. The Supreme Court further ruled that the crime of incitement to genocide does not require a direct causal link to acts of genocide and that the crime of incitement to hatred does not require proving a causal link to actual hatred. The Supreme Court went on to hold that a tribunal must take into account the nature of the target audience and not just a reasonable observer in determining whether the offence of incitement to hatred is made out. The court also accepted that the crime against humanity of persecution had been made out even if the crime against humanity of counselling murder had not.

The Supreme Court of Canada not only overturned the decision of the Federal Court of Appeal, but also contradicted its own previous problematic ruling in the case of Imre Finta. Finta was head of unit in Szeged, Hungary during World War II, which detained almost 9,000 Jews and shipped them off in cattle cars to Auschwitz and other concentration camps. He was acquitted by a jury after a highly contentious charge to the jury about the legal definition of the crimes for which he was charged. The Supreme Court of Canada in 1994 upheld the charge.

Since the decision in the Mugesera case on 28 June 2005, the Royal Canadian Mounted Police laid charges on 19 October 2005 under the Crimes against Humanity and War Crimes Act, which was legislated in 2000 to replace the legislation under which Imre Finta had been prosecuted. The new charge has been laid against Désiré Munyaneza, a Rwandan in Canada. Munyaneza has been charged with complicity in genocide, war crimes and crimes against humanity. The charge was the first under the 2000 legislation. By the end of the year, the case had yet to come to trial.

Endnotes

1 Amnesty International, "Security Certificates: Time for Reform," at www.amnesty.ca/take_action/actCertificates_300305.php.
2 Ibid.
3 Information from the Canadian Council for Refugees to the IHF, February 2006.
4 Ibid.
5 UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada. 02/11/2005: CCPR/C/CAN/CO/5*, November 2005, at www.unhchr.ch/tbs/doc.nsf/(Symbol)/7616e3478238be01c12570ae00397f5d?Opendocument.

[6] UN News Centre, "UN experts voice concern over increase in unsentenced detainees in Canada," 1 June 2005, at www.un.org/apps/news/story.asp?NewsID=14642&Cr=canada&Cr1=.

[7] UN Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Canada, 07/07/2005, CAT/C/CR/34/CAN. (Concluding Observations/Comments)*, at www.unhchr.ch/tbs/doc.nsf/(Symbol)/3cb671dd5759dc86c125704300482db6?Opendocument.

[8] This section was provided by the Canadian Council for Refugees.

[9] UN News Centre, "UN experts voice concern over increase in unsentenced detainees in Canada," 1 June 2005, at www.un.org/apps/news/story.asp?NewsID=14642&Cr=canada&Cr1=.

[10] UN Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Canada, 07/07/2005, CAT/C/CR/34/CAN. (Concluding Observations/Comments)*, at www.unhchr.ch/tbs/doc.nsf/(Symbol)/3cb671dd5759dc86c125704300482db6?Opendocument.

[11] Under the Immigration and Refugee Protection Act, which came into force on 28 June 2002, the panel for refugee claims was reduced from two to one in most cases on the basis that there would be an opportunity to appeal. Nevertheless, once the legislation was passed, the government announced that implementation of the Refugee Appeal Division (RAD) was being delayed. On November 3, 2005, the government again announced not to implement the Refugee Appeal Division "at this time."

[12] Private groups can sponsor refugees to be resettled to Canada. In such cases the groups are responsible for the social and economic support of the refugees for the first year following their arrival. The Canadian government must, however, determine that the persons sponsored are "in need of protection."