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HUMAN RIGHTS COMMITTEE
Ninety-fourth session
13 to 31 October 2008

DECISION

Communication No. 1578/2007

Submitted by:	Mr. Javed Dastgir (represented by counsel, Mr. Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	26 July 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 27 July 2007 (not issued in document form)
Date of adoption of decision:	30 October 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Deportation to Pakistan following denial of asylum claim

Procedural issue: Inadmissibility on account of non-exhaustion

Substantive issues: Effective remedy, right to life, torture or cruel inhuman or degrading treatment or punishment, "suit at law", freedom of religion

Article of the Covenant: 6, 7, 14, 18 and 2

Articles of the Optional Protocol: 2 and 3

[Annex]

ANNEX

DECISION OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninety-fourth session

concerning

Communication No. 1578/2007*

Submitted by:	Mr. Javed Dastgir (represented by counsel, Mr. Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	26 July 2007 (initial submission)

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

Meeting on 30 October 2008,

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Mr. Javed Dastgir, a Pakistani citizen and Shia Muslim, whose whereabouts are currently unknown. He claims that if he is removed to Pakistan he will be a victim of violations by the State party of article 6; article 7; article 14; article 18; and article 2, of the International Covenant on Civil and Political Rights. He is represented by counsel; Mr. Stewart Istvanffy.

1.2 On 30 July 2007, the Rapporteur for New Communications and Interim Measures, on behalf of the Committee, denied the author's request for interim measures of protection.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Ms. Helen Keller, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Facts as presented by the author

2.1 The author lived in Lahore in the province of Punjab, which is the stronghold for the Sunni sectarian group, the Sipah-E-Sahaba Pakistan (SSP). He alleges that he was persecuted by the SSP because of his prominent membership in the Shia group, and his involvement with a benevolent organisation (Anjuman Hussainia) associated with his temple (Imambargah) in Lahore. He alleges that he was subjected to beatings by members of the SSP on three occasions. On 14 January 1998, he was beaten subsequent to a speech he made at a protest against the SSP. On 31 May 2000, he was beaten and stabbed, receiving 21 stitches to his leg, when supervising the erection of a community welfare centre on behalf of the Anjuman Hussainia. He alleges that he made a statement to the police and wrote to the Deputy Commissioner of the police of Lahore regarding this event, but that no action was taken. On 3 August 2001, he was attacked and beaten by SSP members. He complained to the police about this incident but no action was taken. He provides medical reports as alleged evidence of these beatings.

2.2 According to the author, on 25 June 2000, SSP members harassed his family by forcibly entering their home, in search of the author. On 2 October 2001, the SSP fired shots outside their home and threatening them. The author alleges that the strain of these incidents led to the illness and death of his mother in October 2001. He also alleges that in 2005, his brother was murdered by the police, due to the latter's political associations and ties with militants.

2.3 After consulting with the leadership in his community and his family, and considering that there was nowhere in Pakistan where he could go to avoid persecution, the author decided to seek refuge outside the country. He travelled to Canada and requested refugee status in September 2001. On 19 June 2003, the Immigration and Refugee Board (IRB) determined that the author was not a Convention Refugee, largely on the basis that he had failed to establish his identity. According to the author, the Board did not take sufficient account of the documentation provided in support of his case and was made by a member of the Board, who is alleged to refuse most asylum seekers.

2.4 On 17 September 2003, a request for judicial review of this decision was denied. On 17 March 2007, the author made an application for a Pre-Removal Risk Assessment (PRRA), which was denied on 2 May 2007. Similar allegations as those made against the Board member were made against the PRRA Officer involved in the case. On 19 June 2007, the author filed for judicial review of this decision and an application for a stay of deportation. He claims that judicial review by the Federal Court is not an appeal on the merits but a very narrow review on gross errors of law and has no suspensive effect. On 23 July 2007, the application for a stay was refused, as the author had not proved irreparable harm[1]. The author states that he did not apply for a visa on humanitarian and compassionate grounds, as the case would be the same as before the PRRA and his real reasons for staying in Canada are related to the risk of his being murdered in Pakistan.

2.5 The author claims that the general human rights situation in Pakistan is critical, and there have been numerous car bombings and massacres of civilians, particularly Shias. There is a

[1] In it's submission of 11 December 2007, the State party informed the Committee that his application for judicial review of the PRRA decision was denied on 6 September 2007.

situation of impunity in Pakistan for those persecuting him and this is well-documented in human rights reports and newspaper articles.

The complaint

3.1 The author claims to have exhausted all domestic remedies available to him that would have the effect of preventing his deportation. He claims a violation of articles 6 and 7 if he is deported, as there is a risk that he may be subjected to torture and/or murdered, particularly in light of the two previous murder attempts against him and the murder of his brother.

3.2 He also claims a violation of article 2, as the PRRA and the humanitarian and compassionate review procedures do not fulfil the State party's obligation to ensure that he has an effective remedy. He claims a violation of article 14, for the "lack of due process for fundamental rights" and a violation of article 18 "because of the persecution for his religious beliefs."

3.3 The author advances general claims about the asylum review procedures in Canada, including an allegation that the risk assessment is undertaken by immigration agents who have no competence in matters of international human rights or in legal matters generally, and who are not impartial, independent or competent.

The State party's submission on admissibility and merits

4.1 On 11 December 2007, the State party provided its submission on admissibility and merits. It provides detailed explanations of the IRB, the PRRA officer, and the judicial review of the PRRA decision. The IRB found, *inter alia*, that the author's claims were not credible and that the story he presented was "a complete fabrication". It came to this conclusion on the grounds that the author: had not established his identity; lacked credibility, in that he provided contradictory information and; failed to establish a fear of persecution and the unavailability of protection in Pakistan. Among the factors that led to substantial doubt about his identity were: his use of a false passport; his explanation about the alleged use of a nickname; the lack of conformity of his identity card; the ease with which the author could obtain false documents; and his use of three or even four different names. The State party submits that although the author did file for leave to apply for judicial review of the IRB decision, his application was dismissed due to his failure to file an Application Record (the supporting documentation required for the application). Thus, his application for leave to apply for judicial review was never properly submitted to the Federal Court and was dismissed due to lack of diligence in completing the application process.

4.2 The PRRA officer concluded that the evidence tendered did not demonstrate any personal risk to the author should he be returned to Pakistan. The newspaper articles had a low probative value by reason of the fact that; they were photocopies thereby rendering difficult verification of their authenticity; the author's name was not mentioned in the articles and; the facts listed in the article do not establish a link between the author and his allegations of risk. The PRRA officer concluded that despite the continuing sectarian violence and political conflict in the country, the author failed to establish any risk to him personally. He had failed to establish a link between his alleged brother's death and his claim of a risk of persecution. The reasoning behind the denial of his application for a stay of the removal order was based not only on the author's failure to prove irreparable harm but on the fact that his "allegations of risk if returned to Pakistan were

addressed and decided by the PRRA officer" and that "there [was] no need for this court to intervene at this stage because the officer's analysis on the allegations of risk is not flawed and unreasonable." Following the negative PRRA decision, the author was ordered to leave Canada on 31 July 2007 pursuant to the removal order. However, the author failed to appear at the airport and a warrant was issued for his arrest. His whereabouts remain unknown.

4.3 The State party challenges the admissibility of the communication, arguing that the claims under articles 6 and 7 are inadmissible for failure to exhaust domestic remedies and for lack of substantiation, and that the claims under articles 2, 14 and 18 are inadmissible, on the ground of incompatibility with the Covenant and non-substantiation. It submits that the author has not exhausted domestic remedies, as he failed to complete his application for leave to apply for judicial review of the negative IRB decision and failed to make an application for permanent residence on humanitarian and compassionate grounds. It refers to the jurisprudence of the Committee, as well as the Committee against Torture, to demonstrate that judicial review is recognised to be an effective remedy that must be exhausted for the purposes of admissibility of a communication and the author could have made the same arguments upon judicial review of the IRB's decision as he did to the Committee, namely that evidence was dismissed arbitrarily and that the IRB does not consider cases seriously[2]. In particular, it refers to the fact that the Committee against Torture has recently noted the effectiveness of judicial review of the humanitarian and compassionate decisions by the Federal Court to ensure the fairness of the refugee determination system in Canada[3].

4.4 The State party submits that the humanitarian and compassionate application is an available and effective remedy and both the Committee against Torture and this Committee have in recent Views[4] considered this procedure to be a remedy that is required to be exhausted before a communication is considered admissible. The test is whether the applicant would suffer unusual, undeserved or disproportionate hardship if he had to apply for a permanent resident visa from outside Canada. Such an application can be based on risk, in which case the officer assesses the risk the applicant may face in the country to which he is to be returned, included in this assessment are considerations of the risk of being subjected to unduly harsh or inhuman treatment, as well as poor conditions in the receiving country.

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[2] Communication No. 654/1995, *Adu v. Canada*, Views adopted on 18 July 1997; Communication No. 603/1994, *Badu v. Canada*, Views adopted on 18 July 1997; Communication No. 604/1994, *Nartey v. Canada*, Views adopted on 18 July 1997 ; Communication No. 939/2000, *Dupuy v. Canada*, Views adopted on 18 March 2005.CAT jurisprudence includes as follows: Communication No. 66/1997, *P.S.S v. Canada*, Views adopted on 13 November 1998; Communication No. 86/1997, *P.S. v. Canada*, Views adopted on 18 November 1999; Communication no. 42/1996, *R.K.v. Canada*, Views adopted on 20 November 1997; Communication no. 95/1997, *L.O. v. Canada*, Views adopted on 15 May 2000; and Vilvarajah and Others v. United Kingdom, 14 E.H.RR. 218 (1991).

[3] Communication No. 273/2005, *Aung v. Canada*, Views adopted on 15 May 2006, para. 6.3 and Communication No. 183/2001, *B.S.S v. Canada*, Views adopted on 12 May 2004, para. 11.6.

[4] Communication No. 273/2005, *Aung v. Canada*, Views adopted on 15 May 2006, para. 6.3 and Communication No. 183/2001, *B.S.S v. Canada*, Views adopted on 12 May 2004, para. 11.6.

4.5 The State party submits that the author has not substantiated his claims under articles 6 and 7. His claims are based on the same facts and evidence presented before the domestic authorities, and there is nothing new to suggest that the author is at a personal risk of torture or any ill-treatment in Pakistan. The State party relies on the decisions of its domestic authorities and submits that it is not within the scope of the Committee to re-evaluate findings of credibility made by competent domestic tribunals unless, as stated by the Committee that, "it is manifest that the evaluation was arbitrary or amounted to a denial of justice". If that the Committee wishes to re-evaluate the findings of the domestic authorities, the State party provides the reasoning of these authorities in detail.

4.6 The State party submits that article 2 does not guarantee a separate right to individuals but describes the nature and scope of the obligations of State parties. It refers to the Committee's jurisprudence[5] that under article 2, the right to a remedy arises only after a violation of a Covenant right has been established and argues that consequently this claim is inadmissible. Alternatively, the author has failed to substantiate her allegations under this provision, given the broad range of effective remedies available in the State party. The author has had opportunities under different domestic bodies to challenge his deportation before impartial decision-makers. He failed to diligently follow through his application for judicial review of the IRB decision and to make a humanitarian and compassionate application to which he could have sought judicial review in the event of a negative decision. He did pursue judicial review of the PRRA decision, but was denied leave to apply. Thus, he has not shown how this system, either through its individual mechanisms or as a whole, failed to provide him with an effective remedy.

4.7 The State party argues that refugee and protection determination proceedings do not fall within the terms of article 14. These proceedings are in the nature of public law, the fairness of which is guaranteed by article 13.[6] The State party accordingly concludes that this claim is inadmissible *ratione materiae* under the Covenant. In the event that the author's reference to article 14 is an error and the Committee wishes to consider his allegations under article 13, the State party submits that the allegations are inadmissible on grounds of incompatibility. Since the author is not at risk in Pakistan and he is the subject of a lawful removal order, he is not "lawfully in the territory" of Canada. In the alternative, the State party submits that the author has not established that the proceedings leading to the removal order against him were not in accordance with lawful procedures or that the Canadian Government acted in bad faith or abused its power[7]. His case heard by an independent tribunal, was represented by counsel, and had a full opportunity to participate, including testifying orally and making written submissions. He had access to judicial review of the IRB decision and to both the PRRA and humanitarian compassionate processes, including access to apply for leave to judicially review those decisions.

4.8 The State party argues that it is not within the scope of the Committee to consider the Canadian refugee determination system in general, but only to examine whether in the present

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[5] See Communication No.275/1988, *S.E. v. Argentina*, Decision of 26 March 1990, para. 5.3.
[6] The State party refers to its jurisprudence in Communication no. 1341/2005, *Zundel v. Canada,* Views adopted on 20 March 2007, and Communication no. 1234/2003, *PK v. Canada*, Views adopted on 20 March 2007.
[7] It refers to Communication no. 58/1979, *Maroufidou v. Sweden*, Views adopted on 9 April 1981.

case it complied with its obligations under the Covenant. It submits that the PRRA procedure is an effective domestic mechanism for the protection of those who may be at risk upon removal. The State party refers the Committee to several decisions of the Federal Court, among them Say v. Canada (Solicitor General)[8], where the independence of the PRRA decision-makers was considered in detail. On the argument that the PRRA officer did not consider evidence previously presented to the IRB, the State party submits that this course of action is in conformity with the PRRA officer's jurisdiction under s. 113 (a) of the IRPA. The officer correctly stated that, "le processus d'examen des risques avant renvoi ne constitue par [sic] un pallier d'appel ou de révision de la décision négative de la section de la protection des réfugiés." The State party submits that the author's broad allegations against the PRRA are entirely unsubstantiated and the fact that there is a low acceptance rate at the PRRA stage reflects the fact that most persons in need of protection already received it from the Board.

4.9 The State party submits that the Committee should not substitute its own findings on whether the author would reasonably be at risk of treatment in violation of the Covenant upon return to Pakistan, since the national proceedings disclose no manifest error or unreasonableness and were not tainted by abuse of process, bias or serious irregularities. It is for the national courts of the States parties to evaluate the facts and evidence in a particular case. The Committee should refrain from becoming a "fourth instance" tribunal.

4.10 As to the author's claim of a violation of article 18, the State party assumes that the author is arguing that if he were to be deported he would be subjected to religious persecution, on the ground that he claims to be a Shia Muslim. The State party argues that the domestic authorities, at all levels, did not believe that he was in danger or at risk because of his religion. In addition, the article in question does not prohibit a state from removing a person to another state that may not adhere to the protection of this article. The Committee has only exceptionally given an extraterritorial application to rights guaranteed by the Covenant, thereby protecting the essentially territorial nature of the rights guaranteed therein. According to the State party, limiting the power given to a state to control who immigrates across its borders by giving extraterritorial power relating to articles of the Covenant would deny a states' sovereignty over removal of foreigners from its territory.

5. Despite a request to counsel for comments on the State party's submission, dated 12 December 2007, as well as two subsequent reminders, dated 8 May 2008 and 4 August 2008, the author did not comment on the State party's arguments.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol.

6.2 On the issue of exhaustion of domestic remedies, the Committee notes the State party's argument that the author failed to pursue several avenues of domestic redress. He failed to

[8] 2005 FC 739.

complete his application for leave to apply for judicial review of the negative IRB decision, on the basis of which his application was dismissed and he failed to make a humanitarian and compassionate leave application, as he believed that it would merely affirm the decision of the PRRA. The Committee recalls that mere doubts about the effectiveness of domestic remedies do not absolve an author of the requirement to exhaust them, and that the fulfilment of reasonable procedural rules is the responsibility of the applicant himself[9]. It also notes that, despite several reminders to the author, he has failed to respond to the State party's arguments on non-exhaustion of domestic remedies, in particular with respect to his application for judicial review of the IRB decision. Thus, the Committee considers that the author has failed to exhaust domestic remedies, under articles 2 and 5, paragraph 2(b), of the Optional Protocol.

7. The Committee therefore decides:

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

b) That this decision shall be communicated to the State party and to the author, through counsel.

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

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[9] Communication no. 1543/2007, *Aduhene, and Agyemam v. Germany*, Decision adopted on 21 July 2008. Communication no. 982/2001, *Bhullar v. Canada*, Decision adopted in 31 October 2006.