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COMMITTEE AGAINST TORTURE
Thirty-ninth session
(5 - 23 November 2007)

DECISION

Communication No. 304/2006

Submitted by:	L. Z. B., on her own behalf and on behalf of her daughter J. F. Z. (represented by counsel)
Alleged victim:	The complainants
State party:	Canada
Date of the complaint:	6 October 2006
Date of the present decision:	8 November 2007

Subject matter: Risk of expulsion to Mexico

Issue: Risk of torture in case of expulsion

Procedural issue: Exhaustion of domestic remedies

Articles of the Convention: 3, 22

[ANNEX]

* Made public by decision of the Committee against Torture.

ANNEX

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

Thirty-ninth session

concerning

Communication No. 304/2006

Submitted by:	L. Z. B., on her own behalf and on behalf of her daughter J. F. Z. (represented by counsel)
Alleged victim:	The complainants
State party:	Canada
Date of the complaint:	6 October 2006

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

Meeting on 8 November 2007,

Having concluded its consideration of complaint No. 304/2006, submitted on behalf of L. Z. B. and her daughter J. F. Z. 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 complainants and the State party,

Adopts the following decision of the Committee against Torture under article 22 of the Convention

1.1 The complainants, L. Z. B. (the complainant) and her daughter J. (daughter), are Mexican nationals born in 1961 and 1992 respectively. Their application for political asylum in Canada was rejected in 2006. The complainants claim that their forced return to Mexico would expose them to the risk of torture or death. They are represented by counsel.

1.2 On 10 October 2006, the Committee, acting through its Rapporteur for new complaints and interim measures, and under rule 108 of its rules of procedure, refused to act on the complainants' request for the Committee to ask the State party to suspend their return.

The facts as submitted by the complainant

2.1 On 11 September 2002, the complainant's companion was reportedly tortured and killed in Chilpancingo, Mexico, allegedly by the police, while working as a truck driver. The reasons for the killing are not clear to the complainant, but she claims that her partner had access to compromising information about his employer, B., who belonged to a powerful clan and was running in the local elections.

2.2 The complainant states that her companion's killers believe she has in her possession an envelope containing compromising information. She claims to have received anonymous death threats and was obliged to move to Mexico city with her daughter. She says that, in Mexico city, on 12 August 2003, she was accosted by three individuals claiming to be government officials, who insulted her, demanded the envelope and threatened to kill her daughter. She decided to leave the country and the complainants arrived in Canada on 26 November 2003 and applied for asylum there on 22 December 2003.

2.3 On 26 October 2004, the Refugee Protection Division of the Immigration and Refugee Board rejected their application. According to the complainant, this decision was wrong and unfair because the Refugee Protection Division was partial in its consideration of the evidence. The complainants sought leave to apply to the Federal Court for judicial review of the Refugee Protection Division decision; their request was turned down on 10 May 2005. On 15 June 2006, they applied for a Pre-Removal Risk Assessment (PRRA), but their application was denied on 14 August 2004. Meanwhile, on 2 February 2006, they had asked the Canada Border Services Agency (CBSA) to review their situation on humanitarian grounds, at the same time applying for a stay of removal. A stay having been denied on 5 October 2006, the complainants were told they would be sent back to Mexico. Their application for review on humanitarian grounds was rejected by CBSA on 6 December 2006.

2.4 The complainants believe themselves to be the victims of a number of errors on the part of members of the Board (judges), immigration officials, and even their own lawyers, who, they say, did not examine their application properly. Specifically, the tribunal (i.e., the Refugee Protection Division) found inconsistencies with regard to the place of death of the complainant's partner, but the complainant maintains that these were the result of a mistake in translation.[1] In her view this was a significant error, because the original of the death certificate gave Chilpancingo as the place of death. The translator referred to Chimalhuacan, but as the place where her partner's body was sent. The judge had nevertheless decided that the place name provided by the complainant was wrong, which shows, in the complainant's view, that this piece of evidence was evaluated in a manifestly arbitrary fashion. She maintains that the Refugee Protection Division should have verified not only the authenticity of the document but also the translation.

[1] The complainants state that they submitted another death certificate with their request for PRRA.

2.5 The judge also had doubts about the correct age of the complainant's companion and did not accept her explanation that the Mexican police had misread the details on his voting card. The judge is also said to have noted that, according to the complainant, B. was running for the office of Governor of Mexico State, whereas, she says, she has always stated that he was running for the office of Governor of Netzhuacoyotl.[2] Thus the Refugee Protection Division had again evaluated the evidence in an arbitrary fashion.

2.6 The complainants provide a copy of their request to the Federal Court for judicial review of the Refugee Protection Division denial of their application. They consider the request to be very brief, that it fails to mention the translation error, and that neither their lawyer at the time nor the judge had taken sufficient time to examine their application.

2.7 The complainants argue that these errors - lack of thorough consideration, mistakes in translation, etc. - were disastrous for them, yet they cannot be blamed for the errors, which were made by others. Furthermore, the B. family is a powerful one and has connections with powerful and corrupt politicians in Mexico. The complainants' lives would thus be in danger there.

The complaint

3. The complainants assert that their forcible return to Mexico would constitute a violation by Canada of their rights under article 3 of the Convention.

State party's observations

4.1 The State party submitted its observations on 17 April 2007. It recalls that the Committee has consistently held that it is not for the Committee to examine the evaluation of the facts and evidence at the national level unless that evaluation was clearly arbitrary or amounted to a denial of justice, or the decision makers had acted in a partial manner, which was not the case here. The State party notes that the communication addresses exactly the same facts as those considered by the Canadian authorities that had concluded that the complainants were not credible.

4.2 The State party provides a detailed description of Canada's asylum procedures. The complainants arrived in Canada on 26 November 2003 as visitors. On 22 December 2003 the complainant informed Citizenship and Immigration Canada (CIC) that she wished to request asylum on behalf of the two of them. On 9 January 2004 her application was sent to the

[2] In this regard, the complainant's counsel states that the complainant's level of education (five years of primary school) prevented her from understanding that a place like Netzhuacoyotl could not have a governor. Counsel provides a newspaper cutting dated 24 December 2002 which states that B. had been nominated as candidate in local elections due to take place in March 2003.

Refugee Protection Division.[3] The Refugee Protection Division hearing was held on 26 October 2004, in the presence of the complainants' lawyer. Their application was rejected on 6 January 2005. The tribunal determined that the complainants were not refugees or persons in need of protection, in light of their application's overall lack of credibility and of their failure to clearly establish that there was a substantial risk to their life or a risk of torture or cruel treatment, or a reasonable possibility of persecution in Mexico.

4.3 The tribunal found the complainant's answers "confused" and there were substantial differences between the claims made in some of the documents before the tribunal and the complainant's testimony. The explanations provided failed to clear up all these conflicting points.

4.4 The tribunal noted that, according to the complainant and the newspapers, her partner had died in Chilpancingo (Guerrero State), but the translation of the death certificate provided gave Chimalhuacan (Mexico State and allegedly the companion's place of residence). In answer, the complainant had said she had identified the body in Chilpancingo. After the hearing she sent the tribunal a document regarding the transfer of the body, but that document did not explain why the death certificate gave Chimalhuacan as the place of death.

4.5 In addition, the complainant had stated on her Personal Information Form (PIF) that she had lived in Mexico since January 2002 whereas, according to the newspapers, her companion lived in Chimalhuacan. When confronted with this point at the hearing, she answered that she had made a mistake. The tribunal points out that corrections and errors of this kind detract from the complainant's credibility.

4.6 According to articles in the press, the complainant's partner had fallen victim to a gang of criminals posing as criminal investigation officers, who had robbed him of everything but his identity papers.[4] The complainant explained that it was a plot designed to cover up the role played by the police. The tribunal accepted the newspapers' version and not the complainant's, given the latter's overall lack of credibility. The tribunal wondered why her alleged pursuers should have waited three months to demand such an important envelope and why, after the complainants had moved house in February 2003, the daughter should have continued to go to the same school.[5] "Such carelessness on a mother's part", the tribunal found, "is not consistent with [the behaviour] of an individual who genuinely fears for the safety of her family."

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[3] The Refugee Protection Division of the Immigration and Refugee Board (an independent administrative tribunal) holds hearings in order to determine whether a person is a protected person. A protected person is either a refugee within the meaning of the Convention relating to the Status of Refugees or a person in need of protection.

[4] According to these accounts, the complainant's partner had been robbed of his truck complete with load.

[5] The tribunal notes that the complainant admitted this at the hearing.

4.7 The complainant apparently decided as early as August 2003 to flee the country but did so only three months later. The tribunal found this lapse of time excessive, particularly where death threats were hanging over an individual and her family: an individual in such a situation would be expected to leave at the earliest opportunity.

4.8 The complainants asked the Federal Court for leave to apply for judicial review of the Refugee Protection Division decision[6] but that request was turned down on 10 May 2005.

4.9 They then applied for a Pre-Removal Risk Assessment (PRRA) on 15 June 2006, citing the same risks as those cited to the Refugee Protection Division. They argued that even if they settled elsewhere in Mexico they would be tracked down. Furthermore, the fact that they had applied for asylum in Canada would put them in an even more dangerous situation in Mexico.

4.10 The PRRA officer took the view that the situation in Mexico was the same as it had been when the application to the Refugee Protection Division had been rejected.[7] After having studied the asylum application, the other evidence and information on the current situation in Mexico, the officer had concluded on 14 August 2006 that there were no substantial grounds for believing that the complainants would be in danger of being subjected to torture in Mexico or that their lives would be at risk.

4.11 The PRRA officer noted that the rest of the complainants' family were still living in Mexico, even though it would be reasonable to suppose that it would be in their pursuers' interests to turn on their relatives given the alleged contents of the compromising letter.

4.12 On 3 October 2006, faced with the possibility of forcible return to Mexico, the complainants submitted a request for a stay of removal until the Canadian Border Services Agency (CBSA) had made a decision on their application for reconsideration on humanitarian grounds. On 5 October 2006 CBSA refused to grant a stay and on 6 December 2006 rejected the application for reconsideration on humanitarian grounds. The State party explains that, since the complainants had cited risks to their life and safety in Mexico, their application had been assessed by a PRRA officer, that is to say an immigration official with special training in assessing the risks of return.

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[6] The State party notes that any legal measure may be subject to judicial review by the Federal Court if leave is granted. The standard applied in granting leave for judicial review on immigration matters is whether there is an arguable case concerning a serious issue.

[7] According to the State party, the only new element was a letter from the complainant's sister stating that she had been told by someone else that people had come to the complainant's former home looking for her. The officer noted that the letter was unsigned, and it was impossible to determine who these people were or what links, if any, they had with the police. There was no mention of the date the alleged incident occurred and the letter had not been produced until June 2006, whereas the complainant was sought since 2002.

4.13 The State party points out that the complainants cited the same risks to CBSA as they had in their asylum and PRRA applications. The complainant had also argued that, as a single mother, she would find herself in a very difficult financial situation in Mexico, which would prevent her from applying for permanent resident status (in Canada). CBSA noted that the complainants have relatives in Mexico, while, in terms of the child's best interests, the complainant's daughter, who had been in Canada for three years, had not formed bonds with local people such that being taken away from them would create unwarranted or unreasonable difficulties. Unless otherwise indicated, a child's well-being lies in living with their parents.

4.14 CBSA thoroughly considered all the risks cited by the complainant, and the situation in Mexico. It examined the translation of the death certificate, which gives Chilpancingo as the place of death, unlike the translation provided to the Refugee Protection Division, but decided that it could not credit it with great evidentiary value. In any case, CBSA noted that, even if it accepted the certificate, it did not prove that the killing had been carried out by the police. CBSA was unable to grant an exemption from this requirement on humanitarian grounds.

4.15 The State party further asserts, citing the Committee's case law recognizing the effectiveness of submitting a request for leave and judicial review in conjunction with an application for stay of removal, that the complainants have not exhausted effective domestic remedies. They could have asked the Federal Court for leave to apply for judicial review of the PRRA decision and, at the same time, could have requested a stay of the removal order pending the outcome. They could have submitted the same request for leave to apply for judicial review - again along with an application for a stay - in respect of the CBSA decision not to grant an administrative stay of removal pending consideration of the application on humanitarian grounds. Lastly, they could have requested leave to apply for judicial review of the CBSA denial of their application on humanitarian grounds. Since these remedies have not been exhausted, the communication is inadmissible.

4.16 The State party further argues that the communication is inadmissible because it is manifestly unfounded. The complainants have failed to produce any evidence in support of their claims that they would be in danger of being subjected to torture in Mexico. All the Canadian decision makers found that the complainants generally lacked credibility. As to the CBSA decision, the State party recalls that the Federal Court did not deem it necessary to intervene and denied leave for judicial review of that decision.

4.17 With regard to the present communication, the State party notes that the complainants claimed to be the victims of errors made by the lawyers they themselves retained. The State party recalls that the Committee has held that "alleged errors made by [the complainant's] privately retained lawyer cannot normally be attributed to the State party".[8] In the State party's view, the communication contains no information that might explain the inconsistencies and contradictions noted by the Canadian decision makers.

[8] *R.S.A.N. v. Canada*, communication No. 284/2006 (21 November 2006), para. 6.4.

4.18 The State party notes that, in considering the complainants' case, the Canadian authorities consulted numerous documents on the general situation in Mexico, including the Committee's final comments following its consideration of Mexico's latest periodic report. It appears that torture is still a problem in the Mexican penal system.

4.19 In the State party's view, the fact that the complainants have not shown that there are substantial prima facie grounds to believe that they personally would face a real and foreseeable risk of torture in Mexico renders their complaint inadmissible. They have been unable to demonstrate that the individuals who are looking for them are in fact public officials or persons acting in an official capacity or at the instigation or with the consent or acquiescence of the Mexican authorities, which is a necessary condition for a finding of risk of torture.

4.20 Consequently, the State party considers that the complainants have failed to establish a prima facie violation of article 3 of the Convention and the communication should therefore be declared inadmissible. In the alternative, the State party argues that the communication is unfounded.

Complainants' comments

5.1 The complainants submitted comments on the State party's observations on 17 June 2007. They repeat their previous claims and further argue, in respect of the Committee's competence to evaluate the facts and evidence, that in their case the Canadian authorities' evaluation of the evidence was manifestly arbitrary and resulted in a denial of justice.

5.2 With regard to the State party's observations on their claims to have been the victims of errors made by the lawyers (and interpreters) they had retained, the complainants note that they also complained of errors made by the Canadian decision makers. In particular, the Refugee Protection Division judge had decided that the place of death of the complainant's partner given in the newspapers and in her testimony was different from that given on the death certificate.

5.3 The complainant states that she has indeed exhausted all available effective remedies. She applied for asylum with her daughter and her application was rejected. She requested judicial review of that rejection in the Federal Court; she applied for PRRA and filed on humanitarian grounds. She applied for administrative stays to halt their removal. Now that all those applications have been turned down, she maintains, there are no other remedies available.

5.4 As to the lack of grounds for the communication and the personal risk of persecution, the complainant states that the central piece of evidence in her case, her partner's death certificate, was evaluated in an arbitrary and unfair fashion. That evidence clearly shows that she and her daughter would personally be at direct risk in Mexico.

5.5 The complainants repeat that these errors, which arise from a failure to properly examine the case, adversely affected them, paving the way for their return to a place where they could suffer torture, disappearance or even death.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee must ascertain that the complainant has exhausted all available domestic remedies; this rule does not apply where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the alleged victim.

6.3 The Committee notes that the State party contests the admissibility of the complaint on the grounds that domestic remedies have not been exhausted. The complainants have replied that they did exhaust all effective domestic remedies: they applied for asylum and following the rejection of their application requested judicial review in the Federal Court, which denied their request. They then applied for PRRA and filed for residence on humanitarian grounds, both of which applications were also rejected. Lastly, they applied for administrative stay to halt their removal.

6.4 Firstly, as to the denial of the complainants' request for a review of their case on humanitarian grounds, the Committee recalls[9] that, at its twenty-fifth session, in its final observations on the report of the State party, it considered the question of requests for ministerial stays on humanitarian grounds. It expressed particular concern at the apparent lack of independence of the civil servants deciding on such "appeals", and at the possibility that a person could be expelled while an application for review was under way. It concluded that those considerations could detract from effective protection of the rights covered by article 3, paragraph 1, of the Convention. It observed that, although the right to assistance on humanitarian grounds is a remedy under the law, such assistance is granted by a minister on the basis of purely humanitarian criteria, and not on a legal basis, and is thus ex gratia in nature. The Committee has also observed that when judicial review is granted, the Federal Court returns the file to the body which took the original decision or to another decision-making body and does not itself conduct a review of the case or hand down any decision. The decision depends, rather, on the discretionary authority of a minister and thus of the executive. The Committee adds that, since an appeal on humanitarian grounds is not a remedy that must be exhausted to satisfy the requirement for exhaustion of domestic remedies, the question of an appeal against such a decision does not arise.

[9] See *Falcon Rios v. Canada*, communication No. 133/1999, decision of 23 November 2004, paras. 7.3-7.4.

6.5 The Committee also recalls its case law[10] to the effect that the principle of exhaustion of domestic remedies requires petitioners to use remedies that are directly related to the risk of torture in the country to which they would be sent, not those that might allow them to remain where they are.

6.6 Secondly, the Committee notes that the complainants have not explained why they did not consider it necessary to ask the Federal Court for leave to apply for judicial review of the negative PRRA decision. The Committee recalls that it has previously found that these remedies are not mere formalities, and the Federal Court may, in appropriate cases, look at the substance of a case.[11] In the present case the complainants have not in fact challenged the effectiveness of this remedy and have not argued that exhaustion of the final remedy would take an unreasonable length of time. The Committee also notes that, even though the complainants believe that the correct version of the complainant's partner's death certificate is a "crucial" piece of evidence in their case, they nevertheless did not bring it to the attention of the judicial authorities. Under the circumstances, the Committee is of the view that the conditions of article 22, paragraph 5 (b), have not been met in this case and that the communication is therefore inadmissible.

6.7 The Committee consequently decides:

(a) That the communication is inadmissible;

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

[Adopted in English, French, Russian and Spanish, the French 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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[10] Communication No. 170/2000, *Anup Roy v. Sweden*, decision of 23 November 2001, para. 7.1.

[11] *T.A. v. Canada*, communication No. 273/2005, decision of 15 May 2006, para. 6.3.