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

DECISION

Communication No. 1455/2006

Submitted by:	Ms. Surinder Kaur (represented by counsel, Mr. Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	24 February 2006 (initial submission)
Document references:	Special Rapporteur's rule 92 decision, transmitted to the State party on 27 February 2006 (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 India following denial of asylum claim

Procedural issue: Inadmissibility

Substantive issue: Effective remedy, right to life, torture or cruel inhuman or degrading treatment or punishment, "suit at law"

Articles of the Covenant: 2, 6, 7, and 14

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. 1455/2006[*]

Submitted by:	Ms. Surinder Kaur (represented by counsel, Mr. Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	24 February 2006 (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 Ms. Surinder Kaur, an Indian citizen who is of Sikh origin, who voluntarily returned to India from Canada in December 2007. She claims to be a victim of violations by the State party of article 6; article 7; article 2; and article 14, of the International Covenant on Civil and Political Rights. She is represented by counsel; Mr. Stewart Istvanffy.

[*] 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. 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.

[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 17 July 1997; Communication No. 939/2000, *Dupuy v. Canada*, Views adopted on 18 March 2005. The State party also refers to the jurisprudence of the Committee against Torture, 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.

1.2 On 27 February 2006, the Rapporteur for New Communications and Interim Measures requested the State party not to deport the author to India while her case is under consideration by the Committee, in accordance with rule 92 of the Committee's rules of procedures. On 21 March 2006, the State party acceded to the request but requested the Rapporteur to lift the interim measures. On 11 May 2006, having reviewed the State party's request and author's comments thereon, dated 31 March 2006, the Rapporteur denied the request, considering that the author had made out a *prima facie* case.

Facts as presented by the author

2.1 The author states that she was raped and severely abused by the police of the Indian province of the Punjab, while they were conducting an investigation into the activities of militants from the pro-Sikh Khalistani movement. As a result, she suffers from Post Traumatic Stress Disorder. In the early nineties, her husband was detained and tortured by the police because of his suspected association with the same movement. In early 2000, he disappeared after having been tortured by the police. To escape police raids, the author went to the United States, where she applied for refugee status. She was refused and was deported back to India where she was raped again. In 2003, following further abuse by a police inspector in her area and threats made against her son, she came to Canada. Her son remained in India.

2.2 In late 2003, the author applied for refugee status in Canada. On 24 April 2004, the Immigration and Refugee Board ("the Board") determined that she was not a refugee pursuant to the terms of the Refugee Convention due to her lack of credibility. On 3 August 2005, a request for leave to apply for judicial review of this decision was dismissed. On 24 January 2004, applications for a Pre-Removal Risk Assessment ("PRRA") and a Request for Exemption from Immigrant Visa Requirements on humanitarian and compassionate grounds (H&C application) were denied. On 20 February 2006, she filed an application for leave to apply for judicial review of the negative PRRA decision as well as a stay of her removal, with the Federal Court of Canada. On 24 February 2006, the request for a stay of deportation was denied, and on 12 April 2006, judicial review was denied. According to the author, judicial review is not an appeal on the merits, but rather a narrow review for gross errors of law and has no suspensive effect.

2.3 The author alleges that most of the evidence submitted to the Immigration and Refugee Board was not considered by the decision-maker of the PRRA, due to section 113 of the Immigration and Refugee Protection Act, which states that, "only new evidence that arose after [the applicant's] rejection or was not reasonably available or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of rejection……..", will be considered. Thus, the PRRA officer rejected evidence that could have been available earlier including: a further affidavit from her "sarpanch" in India, an affidavit from her son in November 2005, and a letter of support from Khalra Mission Committee of 10 October 2004. The author also refers to a medical certificate of 24 February 2004 which was rejected by the Board despite the fact that it attests to the author's claim that she was raped. The author includes in her submission to the Committee, the latest report by the organization ENSAAF, which is alleged to testify to a current wave of repression in the Punjab, and of a real risk of torture. She further adds that impunity for Sikh torture victims in India is a very serious problem.

The complaint

3.1 The author claims to have exhausted all domestic remedies available to her which would have the effect of preventing her deportation. She claims a violation by Canada of articles 6 and 7 if she is deported, as there is a severe risk of her being "arrested, detained, beaten, tortured or executed" at the hands of the Indian police because of her religious origin and her real or imputed political beliefs. She also claims that she will suffer from emotional trauma if returned to India.

3.2 The author also claims a violation of articles 2 and 14 of the Covenant, as the PRRA procedure and the humanitarian review procedures do not fulfil the State party's obligation to ensure that she had an effective remedy to appeal the deportation decision. She makes general claims about the procedures, including a claim 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 25 August 2006, the State party provided its submission on the admissibility and merits of the communication. It sets out the facts of the case and provides the detailed reasoning of the Board, the PRRA officer, and the officer who examined the author's H&C application. The Board found, *inter alia*, that the medical certificate of 24 February 2004 had low probative value, as it did not include a telephone number or the registration number of the doctor providing the certificate, as required by the Medical council of India. A document provided by the author to explain that the phone number in question is used within the hospital was found to lack credibility, as it was dated before the hearing and before the issue was raised as a problem at the hearing. The PRRA officer found, *inter alia*, that the psychological evaluation, which concluded that the author was suffering from post-traumatic stress disorder, was similarly given low probative value, as it was provided by a psychotherapist with a Master's degree in education, a professional and academic background not recognised as competent to deliver a psychological diagnosis.

4.2 The State party contests the admissibility of the communication. It submits that the author has failed to exhaust domestic remedies with respect to her claims under articles 6 and 7, as she did not apply for judicial review of the decision on her H&C application. It contests her argument that such a review would be ineffective, given that it is based on the same facts as the PRRA, as both procedures take different considerations into account. While the PRRA considers risk upon return, the H&C procedure considers whether an applicant would suffer unusual and undeserved or disproportionate hardship if he or she had to return to his or her country of origin. The assessment looks at a variety of factors including establishment in Canada, integration into the community and family relationships. Although it would not stay the author's deportation, a positive finding would result in the issuance of a permanent resident visa and allow the author to remain in/or return to Canada. The State party refers to the Committee's own jurisprudence as well as that of the Committee against Torture, to demonstrate that judicial review is widely and consistently accepted as an effective remedy that must be exhausted for the purpose of admissibility[2]. In particular, it refers to the fact that the Committee against Torture has recently

noted the effectiveness of judicial review of the H&C decisions by the Federal Court to ensure the fairness of the refugee determination system in Canada[3].

4.3 The State party submits that the author has failed to substantiate her claims under articles 6 and 7. The lack of credibility of the author's allegations, and the absence of a credible connection between her own personal risk of death and/or torture and the objective evidence of Sikhs and militants and their supporters who are subjected to torture or ill-treatment in the Punjab, leads to the conclusion that the author has failed to establish a risk beyond a mere "theory or suspicion" as required by the Committee against Torture. Documentary evidence indicates that presently torture and ill-treatment are only targeted at high profile militants, and that Sikhs are no longer targeted on the basis of perceived political opinions.

4.4 The State party refers to the assessment by the domestic tribunals, which concluded that the author would not be personally at risk. It argues that it is not credible that she would be suspected of involvement in a terrorist organisation that persecutes Sikhs (Lashkar-E-Toiba). Although, she claims to the Committee that she was alleged to have been suspected of involvement in a different organisation (the pro-Sikh Khalistani movement), the State party submits that this is self-serving and lacks credibility. Moreover, the Board and PRRA officer relied on objective evidence to find that Sikhs are currently not a persecuted group in India and that the current Prime Minister is of Sikh background, a fact inconsistent with any allegations of systematic persecution of Sikhs. Even if the State party were to accept that the author was tortured in the past, it does not follow that she would be at risk of torture now. Moreover, she has not established that she does not have an internal flight alternative in India.

4.5 As to her allegations that she would suffer from severe emotional trauma, it submits that the author has not substantiated this claim even on a *prima facie* basis and notes that she relies upon the same evidence that has already been before the domestic tribunals: documents which have already been carefully assessed and found not to be credible. The psychological evaluation dated 24 November 2004, was found to lack credibility by domestic tribunals due to the credentials of the assessor. In addition, the credibility of the document is called into question, as in her PIF (initial statement to the Board) the author alleges that her father had died in 2001 but in her interview with the psychotherapist she alleged that, "she suffers from the knowledge of arrests and torture her father experienced and the uncertainty about his fate and possible death". The other documents presented, including a letter from a social worker and a doctor at the CLSC, were all assessed by the officers of the Board, the H&C and PRRA officers, and found to be of limited probative value as they were not corroborated by objective evidence. Moreover, although the documents note that the author suffered from psychological and stress related problems, they provide no evidence with respect to the actual psychological impact that return to India would have on the author. Even if the author's mental health is aggravated through deportation, according to the jurisprudence of the Committee against Torture, this is generally insufficient, in the absence of other factors, to amount to cruel, inhuman or degrading treatment[4].

[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. 183/2001, B.S.S v. Canada, Views adopted on 12 May 2004

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 that under article 2, the right to a remedy arises only after a violation of a right has been established and argues that consequently this claim is inadmissible.[5] Alternatively, the author has failed to substantiate her allegations under this provision, given the broad range of effective remedies available in Canada. 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 alternative, the State party contends that the immigration proceedings satisfy the guarantees of article 14. The author had her case heard by an independent tribunal, was represented by counsel, had access to judicial review of the negative refugee determination and had access to both the PRRA and H&C processes, including access to apply for leave to judicially review those decisions.

4.7 The State party argues that it is not within the scope of review of the Committee to consider the Canadian refugee determination system in general, but only to examine whether in the present 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. As confirmed by the Federal Court in its denial of the author's application for a stay, the decision states that "the PRRA officer properly considered and dealt with the evidence before him in accordance with his statutory obligation. Thus, rejection of evidence that was not "new" was entirely proper and reasonable." As to the author's argument that the PRRA officer and the Federal Court "ignored" evidence, the author herself admits having failed to file the required materials within the requisite timeframe and, according to the Committee's jurisprudence, an author must exercise due diligence in the pursuit of available remedies. The State party sets out in detail the reasons why each piece of evidence was considered but subsequently rejected as invalid by the PRRA. 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 have already received it from the Board.

4.8 Finally, 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 India, since the national proceedings disclose no manifest error or unreasonableness and are 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 competent to re-evaluate findings of fact or review the application of domestic legislation.

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[5] See Communication No.275/1988, S.E. v. Argentina, inadmissibility decision of 26 March 1990, para. 5.3.

[6] The State party refers to the decision of the European Court which considered that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of article 6, paragraph 1, of the European Convention. Maaouia v. France, Application No. 39652/98 (5 October 2000).

Author's comments on the State party's submission

5.1 On 31 March 2006, 2 May 2006, and 24 March 2007, the author reiterates the arguments made in her initial submission. She clarifies that she will be persecuted on account of the alleged links her husband had with military groups, the fact that he was tortured, that she too suffered past abuse, and because she is a Sikh. On judicial review, she argues that all of the issues raised by that submission were raised and argued before the Court in the request for a stay and the request for judicial review of the refusal of refugee status before the Board. The Ministry of Justice constantly pleads before the Federal Court that this H&C type of decision is discretionary and that the Court should not intervene. The author submits that the government should not so argue in the domestic courts and then argue before the international forum that they are effective recourses.

5.2 The author submits that the State party's submission largely repeats the decisions of the Board and PRRA officer and provides no serious analysis of whether these are well founded. She provides responses in point form to the findings of the Board and PRRA officer. As an example, with respect to the argument on the low probative value of the confidential psychological report, the author submits that a simple telephone call to the number in question would have established that it is a number at the hospital. As to the qualifications of the psychotherapist who did the psychological report, the author submits that the same individual has produced many reports before the Board and her credentials are clearly established. The author denies, as argued by the PRRA officer and the State party, that she had said that her husband and father were members or supporters of Lash-E-Toiba, an extremist Muslim group.

5.3 The author denies there is a reasonable internal flight alternative and argues that she has provided sufficient evidence to demonstrate otherwise. She provides more information and documentation on the general human rights situation in India, to demonstrate that there is evidence that torture with impunity, as well as extrajudicial executions are still continuing. She also provides reports about the alleged problems in the decision-making process of the Board.

Author's supplementary submission and the State party's response thereon

6.1 On 2 April 2008, author's counsel informed the Committee that the author had returned voluntarily to India during the month of December. She had informed her counsel that she could not continue living without her husband or son and that she felt isolated in Canada. She also informed him that her brother-in-law was going to get married at the end of December in the Punjab and that all of her family and closest relatives would be present. Her counsel helped her obtain the necessary documents. During the month of January counsel learnt that she had been detained upon arrival and was taken to Tihar Fort in Delhi and was very badly treated but does not have any details. She was freed on bail after a period of 20/30 days and there is allegedly a criminal trial pending against her for using false documents to leave India. Counsel alleges that people close to the author believe that something terrible happened to her in detention but he has no details. He spoke to the author's husband who has expressed the wish to continue with this communication and ask the Committee not to close the case or take any decision without having the results of an investigation, counsel intends to undertake with the Punjab Human Rights Organisation.

6.2 0n 21 May 2008, the State party responded that the author's voluntarily return to India is indicative of an absence of subjective fear of persecution or death. If her fear of return had been genuine, she would not have voluntarily returned to India to attend her brother-in-law's wedding. The fact that she chose to go back despite having the benefit of assistance from experienced legal counsel, indeed with assistance of her counsel, is strongly indicative of her lack of fear of mistreatment in India. As acknowledged by counsel, there is no evidence that the author had been detained or treated poorly. Counsel is only able to recount third party anecdotes. He does not appear to have spoken to the author herself, despite the fact that her friends from Canada have been allegedly able to do so, as he provides no first hand accounts of any such conversation.

6.3 According to the State party, there can be no credible risk of mistreatment to the author in India while her husband, whose involvement in a terrorist group was the reason the author herself feared persecution, is apparently alive, contactable by phone and able to speak freely with author's counsel. Indeed, in 2006 the author alleged that her husband had been disappeared and was possibly murdered by the police during the police torture since 2000. The fact that this is the first time since 2006 that the author mentions her husband's status is further evidence of her lack of credibility. The State party notes that the author's statement about a criminal charge relating to the use of false documents is also not credible as the author herself previously acknowledged that she left India on a valid passport. The State party submits that the author's request without evidence or clear understanding of what if any investigation will be undertaken is an attempt to delay consideration of the author's communication indefinitely.

Issues and proceedings before the Committee

7.1 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.

7.2 The Committee notes that the State party challenges the admissibility of the entire communication. With respect to the author's claims under articles 6 and 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering in another country by way of their extradition, expulsion or refoulement[7]. It also notes that the Refugee Division of the Immigration and Refugee Board, after a through examination, rejected the author's asylum application on the basis of her lack of credibility. The author's application for leave to apply for judicial review of this decision to the Federal Court was dismissed. The Pre-Removal Risk Assessment Officer found that there was no serious reason to believe that her life would be at risk or that she would be the victim of cruel and unusual punishment or treatment and a judicial review of this officer's decision was rejected by the Federal Court. Finally, the author's application for permanent residence in the State party on humanitarian and compassionate grounds (H&C) was rejected as it could not be said that State protection for the author was inadequate in India.

[7] See Communication No.1302/2004, *Khan v. Canada*, inadmissibility decision of 25 July 2006, para. 5.4.

7.3 The Committee recalls its jurisprudence that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice[8]. It also recalls that the same jurisprudence has been applied to removal proceedings[9]. The material before the Committee does not show that the proceedings before the authorities in the State party suffered from any such defects. Accordingly, the Committee considers that the author has failed to substantiate her claims under articles 6 and 7, for purposes of admissibility, and it concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

7.4 As to the author's allegation under article 14 that she was not afforded an effective remedy, the Committee has noted the State party's argument that deportation proceedings do not involve either "the determination of any criminal charge" or "rights and obligations in a suit at law". The Committee observes that the author has not been charged or convicted for any crime in the State party and that her deportation is not by way of sanction imposed as a result of a criminal proceeding. The Committee accordingly concludes that the author's refugee determination proceedings do not constitute determination of a "criminal charge" within the meaning of article 14.

7.5 The Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties.[10] In the present case, the proceedings relate to the author's right to receive protection in the State party's territory. The Committee recalls its jurisprudence[11] that proceedings relating to an alien's expulsion, the guarantees in regard to which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author do not fall within the scope of article 14, paragraph 1, and are inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

7.6 With regard to the author's claims under article 2 of the Covenant, the Committee recalls that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, by themselves and standing alone give rise to a claim in a communication under the Optional Protocol. The Committee considers that the author's claim to this effect cannot be sustained, and that accordingly it is inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

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[8] See for example Communication No. 541/1993, Errol Simms v. Jamaica, inadmissibility decision adopted on 3 April 1995, para. 6.2.

[9] Communication No. 1234/2003, P.K. v. Canada , Inadmissibility decision adopted on 20 March 2007

[10] Communication No. 112/1981, Y.L. v. Canada, inadmissibility decision adopted on 8 April 1986, para.9.1 and 9.2; Communication No.441/1990, Casanovas v. France, Views adopted on 19 July 1994, para.5.2; Communication No. 1030/2001, Dimitrov v. Bulgaria, decision on admissibility adopted on 28 October 2005,para.8.3.

[11] Communication No. 1234/2003, P.K. v. Canada, supra.

a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

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