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HUMAN RIGHTS COMMITTEE
Eighty-seventh session
10 – 28 July 2006

DECISION

Communication No. 1302/2004

Submitted by:	Dawood Khan (represented by counsel, Stewart Istvanffy)
Alleged victim:	The author
State Party:	Canada
Date of communication:	30 July 2004 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 9 August 2004 (not issued in document form)
Date of adoption of decision:	25 July 2006

* Made public by decision of the Human Rights Committee.

Subject matter: Deportation to country of origin with risk of torture

Procedural issues: None

Substantive issues: Risk of torture and death, review of expulsion order, unfair "suit at law", and ineffective remedy

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

Articles of the Optional Protocol: 2

[ANNEX]

ANNEX

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

Eighty-seventh session

concerning

Communication No. 1302/2004[*]

Submitted by:	Dawood Khan (represented by counsel, Stewart Istvanffy)
Alleged victim:	The author
State Party:	Canada
Date of communication:	30 July 2004 (initial submission)

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

Meeting on 25 July 2006,

Having concluded its consideration of communication No. 1302/2004, submitted to the Human Rights Committee by Dawood Khan under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication is Mr. Dawood Khan, born on 31 July 1950, a Pakistani national, currently residing in Canada and awaiting deportation to Pakistan. He claims to be a victim of violations of articles 2, 6, 7, 14 and 18 of the International Covenant on Civil and Political Rights. He is represented by counsel, Stewart Istvanffy. The Optional Protocol entered into force for Canada on 19 August 1976.

[*] The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Mr. Hipólito Solari-Yrigoyen.

Facts as submitted by the author

2.1 The author is a Christian. He was born in Quetta in the province of Baluchistan, a stronghold for the Sunni terrorist group, Sipah-E-Sahaba. There have been massacres of religious minorities in Quetta. The author was involved in most of the important religious events of his church. He is a well-known musician playing a traditional instrument called the tabla. In December 1998, he acted as a judge at the Baluchistan province music competition. Members of the Sipah-E-Sahaba group threatened him after the competition because he nominated, and voted for, a Christian girl who eventually won the first prize.

2.2 In July 1999, the author moved from Quetta to Lahore in Punjab to escape persecution. On 31 December 1999, he was kidnapped by five militants of the Sipah-E-Sahaba group. During his detention, he was threatened with death or torture if he did not convert to Islam and allegedly suffered sexual abuse. In support of this allegation, he provides a medical report dated 10 August 2004 attesting that he suffers from post-traumatic stress disorder resulting from the physical, psychological and sexual assault he suffered in Pakistan.

2.3 On 7 January 2000, a man came to his home to inform him that he would be forced to convert to Islam on 14 January 2000 at the June-e-Masjed mosque. On 5 February 2000, the author and his family fled to Waziribad. After consulting with the "leadership of his community" and his family, he was advised to seek refuge outside Pakistan. He secured an invitation to play in Canada, obtained a visa, and left Pakistan on 22 April 2000. Since his departure, his family has continued to receive threats. One of his cousins was allegedly attacked by the group seeking the author.

2.4 On 24 May 2000, the author applied for refugee status in Canada. On 15 November 2000, his application was refused by the Immigration and Refugee Board (IRB) because of the implausibility and inconsistencies in his testimony. He alleges that he was poorly represented and that due to post-traumatic stress disorder, he did not present all the available evidence. Neither did he inform the authorities that he had been tortured and still suffers from the effects of such torture. Neither medical reports, nor any information had been provided on the alleged torture. On 21 December 2000, the author applied for leave to apply for judicial review of the IRB decision. On 30 April 2001, leave to apply for judicial review was denied by the Federal Court.

2.5 On 9 July 2001, the author applied for permanent residence in Canada on humanitarian and compassionate grounds. In order to be successful, the application must demonstrate that the person would suffer excessive hardship if he had to return to his country of origin to apply for permanent residence in Canada. On 7 July 2003, this application was dismissed.

2.6 On 4 December 2000, the author applied for consideration as a member of the class of Post-Determination Refugee Claimants in Canada (PDRCC). On 25 January 2003, he was informed that the PDRCC procedure no longer existed under the new Immigration and Protection Act adopted in 2001, and that it was replaced by the Pre-Removal Risk Assessment (PRRA) procedure. On 24 February 2003, the author made PPRA submissions on the risk of torture upon return to Pakistan. On 8 July 2003, his PRRA application was refused. He claims that he did not obtain this decision until March 2004. On 16 March 2004, he applied for leave to apply for judicial review of the PRRA decision and submitted a

motion for a stay of deportation which was granted on 23 March 2004. On 7 July 2004, leave to apply for judicial review was denied by the Federal Court.

The complaint

3.1 The author claims a violation of articles 6 and 7 of the Covenant because, as a well-known Christian, he is at risk of kidnapping, detention, beatings, torture and execution, by the Sunni extremist groups if returned to Pakistan. He claims that he would not benefit from any protection from the police, which sympathize with the Sipah-E-Sahaba. He submits that the State party is unwilling to prevent religiously motivated violence and is unable to ensure legal redress after violent sectarian incidents.

3.2 The author claims a violation of article 18 because, if returned to Pakistan, he will be persecuted for his Christian beliefs and refusal to convert to Islam. He provides information from various sources pertaining to the persecution of Christians generally, and information from Christian churches in Pakistan confirming that he is in danger.

3.3 The author claims a violation of articles 2 and 14, because to him, the current PRRA procedure does not constitute an effective remedy. He submits that the risk assessment is made by immigration agents who have no competence in international human rights or legal matters generally. The decisions are not made by a competent, independent and impartial tribunal, and the decisions are frequently inconsistent with the jurisprudence of the Federal Court or the IRB. They seldom take into account the real country situation. In the overwhelming majority of cases, the procedure leads to negative decisions. The author also submits that the decisions are taken "on the enforcement side of immigration, with heavy pressure to produce deportation numbers from the top". There is no proper judicial control by the Federal Court.

State party's submission on admissibility and the merits

4.1 On 6 May 2005, the State party contested the admissibility and merits of the communication. Firstly, it argues that the author has not exhausted domestic remedies. He did not raise issues in the domestic proceedings that are now alleged in his communication. The State party submits that if he did not fully explain the torture at the initial hearing, he should have done so in the subsequent domestic proceedings. It recalls that in his application for leave for judicial review submitted to the Federal Court on 21 December 2000, he did not raise the issue of procedural fairness and natural justice. Nor did he raise this issue in the subsequent procedures. Regarding the author's explanation that he was badly represented, the State party submits that neglect owing to the author's counsel cannot be attributed to the State party.[1] Moreover, it argues that the author did not pursue an available domestic remedy when he submitted new evidence on the day of his scheduled removal from Canada. He could have requested an examination of the medical report he submitted to the Committee on 10 August 2004 and, consequently, a stay of his removal on the basis of this report. He could further have requested a second PRRA or application for permanent residence in Canada on humanitarian and compassionate grounds, based on the new evidence. As a result, the State party considers that the author has not exhausted domestic remedies.

[1] Communication No.433/1990, *A.P.A. v. Spain,* Decision of inadmissibility adopted on 25 March 1994, para.6.3.

4.2 The State party submits that the author has not sufficiently substantiated, for the purposes of admissibility, his allegations with respect to articles 2, 6 and 7 of the Covenant. With respect to the claim that the PRRA procedure is not an effective remedy under article 2, it argues that article 2, paragraph 2, describes the nature and scope of the obligations of the States parties, and that article 2, paragraph 3, does not recognise an individual right to a remedy. A right to a remedy arises only after a violation of the Covenant has been established. The claim is thus not substantiated and should be dismissed under article 3 of the Optional Protocol.

4.3 With regard to the claim under articles 6 and 7, the State party relies on the findings of the IRB with respect to the author's lack of credibility, and submits that it is not within the scope of the Committee to re-evaluate findings of credibility made by domestic courts or tribunals. The medical report of 10 August 2004 does not demonstrate that the author suffered from post-traumatic stress disorder at the time of his refugee hearing four years earlier, and thus does not explain why he did not testify about what happened to him in a forthright manner. It adds that he does not substantiate his new claims about the nature of the torture he suffered and the ongoing medical problems associated with that torture. As to the allegation that his family still is in danger in Pakistan, the State party notes that the author submits various new letters from family and friends in Pakistan and Canada. It argues that these letters are self-serving.

4.4 The State party submits that the author has not established that he would be at "personal risk" in Pakistan. It observes that the various reports of major human rights organisations submitted by the author refer primarily to the resurgence of sectarian violence directed against Shia Muslims in Pakistan, the targeting of the Ahmadi community, and the systemic targeted killings of people unrelated to the sectarian strife, particularly in Karachi. These reports do not explain or mention that Christians are particularly targeted by extremists. There have been many changes in Pakistan since the author's departure, which demonstrate the State's involvement in the protection of its citizens against actions taken by extremist factions such as the Sipah-E-Sahaba. The government of Pakistan banned this organization in June 2002, as well as its successor, the Millat-e-Islamia, in November 2003. As to the allegation that the police collude with the Sipah-E-Sahaba (and its successor group), the State party observes that credible, first-hand information on such collusion is very scarce. It submits that the author has not substantiated the claim that he will be killed, tortured or subjected to cruel, inhuman or degrading treatment upon return to Pakistan.

4.5 With regard to the claim under article 7, the State party argues that the author's allegations do not establish a real, personal and foreseeable risk of torture or cruel, inhuman or degrading treatment. It submits that for applying article 7 in situations such as the author's, where the alleged agent of persecution is a non-state actor, a higher threshold of evidence is required. It argues that when the fear emanates from a non-state actor, "clear and convincing" proof of a State's inability to protect must be advanced.[2] In the present case, the author has not established, nor rebutted the presumption, that Pakistan is unwilling or unable to protect him from the Sipah-E-Sahaba.

4.6 The State party contends that the claims under articles 14 and 18 are incompatible with the provisions of the Covenant. Alternatively, these claims are inadmissible on the grounds of

[2] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at 726.

non-substantiation. With regard to the claim under article 14, it submits that refugee and protection determination proceedings do not fall within the scope of that provision. They are in the nature of public law and their fairness is guaranteed by article 13.[3] In the alternative, if the immigration proceedings fall within the scope of application of article 14, the State party submits that they satisfy the guarantees contained therein. The author's case was heard by an independent tribunal, at which he knew the case he had to meet, was represented by counsel, and had a full opportunity to participate, including testifying orally and making submissions. He had access to judicial review, as well as the right to make a humanitarian and compassionate application. Consequently, the State party submits that the claim under article 14 is incompatible *ratione materiae* with the provisions of the Covenant and should be dismissed under article 3 of the Optional Protocol.

4.7 With regard to the claim under article 18, the State party observes that the author does not allege that it has violated this provision. He is in fact alleging that his Christian faith could result in his being persecuted or ill-treated in Pakistan. However, Canadian authorities did not believe that he was in danger because of his religion. The State party recalls that article 18 does not prohibit a State from removing a person to another State that may not apply this provision. It invokes General Comment 31[80] of 29 March 2004, where the Committee specified that States parties have an obligation not to expel a person from their territory "where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant". The State party emphasises that the Committee has only exceptionally considered the extraterritorial application of rights guaranteed by the Covenant, thereby protecting the essentially territorial nature of the rights guaranteed therein. Consequently, it submits that the claim under article 18 should be declared inadmissible, as a violation of this provision is outside the competence *ratione materiae* of the Committee.

4.8 With regard to the author's general claims relating to the scope of judicial review by the Federal Court and the PRRA procedure, the State party notes that it is not within the scope of the Committee to consider the Canadian system in general, but only to examine whether in the present case Canada complied with its obligations under the Covenant. In any event, there are previous decisions of international tribunals, including the Committee itself, which considered the impugned processes to be effective remedies.[4]

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[3] Communication No.1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para.10.8.

[4] Inter-American Commission on Human Rights, Organisation of American States, Report on the Situation of Human Rights of Asylum Seekers within the Canadian refugee determination system (2000). Human Rights Committee Views: Communication No.654/1995, *Adu v. Canada*, Decision of inadmissibility adopted on 18 July 1997, para.6.2; Communication No.603/1994, *Badu v. Canada*, Decision of inadmissibility adopted on 18 July 1997, para.6.2; and Communication No.604/1994, *Nartey v. Canada*, Decision of inadmissibility adopted on 18 July 1997, para.6.2. Committee against Torture Decisions: Communication No.66/1997, *P.S.S. v. Canada*, Decision of inadmissibility adopted on 13 November 1998, para.6.2; Communication No. 86/1997, *P.S. v. Canada*, Decision of inadmissibility adopted on 18 November 1999, para.6.3; Communication No. 42/1996, *R.K. v. Canada*, Decision of inadmissibility adopted on 20 November 1997, para.7.2; Communication No.95/1997, *L.O. v. Canada*, Decision of inadmissibility adopted on 19 May 2000, para.6.5; and Communication

Issues and proceedings before the Committee

5.1 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 the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement for the purposes of article 5, paragraph 2(a), of the Optional Protocol.

5.3 As to the author's allegation that he was not afforded an effective remedy to contest his deportation, the Committee observes that the author has not substantiated how the Canadian authorities' decisions failed in this case thoroughly and fairly to consider his claim that he would be at risk of violations of articles 6 and 7 if returned to Pakistan. In these circumstances, the Committee need not determine whether the proceedings relating to the author's deportation fell within the scope of application of article 14 (determination of rights and duties in a suit at law).[5] This part accordingly is inadmissible under article 2 of the Optional Protocol.[6]

5.4 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 return to another country by way of their extradition, expulsion or refoulement.[7] The Committee must therefore decide whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his removal to Pakistan, there is a real risk that the author would be subjected to treatment prohibited by Articles 6 and 7.[8] The Committee notes that the Refugee Division of the Immigration and Refugee Board, after a thorough examination, rejected the asylum application of the author on the basis of lack of credibility and implausibility of the latter's testimony (see para.2.3 above), and that the rejection of the Pre-Removal Risk Assessment application was based on similar grounds after another full examination. It further notes that in both cases, applications for leave to appeal were rejected by the Federal Court (see paras.2.3 and 2.5 above). The author has not shown sufficiently why these decisions were contrary to the standard set out above, nor has he adduced sufficient evidence in support of a claim to the effect that he would be exposed to a real and imminent risk of violations of articles 6 and 7 of the Covenant if deported to Pakistan.

No. 22/1995, *M.A. v. Canada*, Decision of inadmissibility adopted on 3 May 1995, para.4. European Court of Human Rights: *Vilvarajah and Others v. United Kingdom*, 14 E.H.R.R 218 (1991), para.126.

[5] Communication No.1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, para.10.5.

[6] Communication No.1315/2004, *Daljit Singh v. Canada*, Decision on inadmissibility of 30 March 2006, para.6.2.

[7] General Comment No.31[80], 29 March 2004, para.12.

[8] See Communication No.706/1996, *T. v. Australia*, Views adopted on 4 November 1997, paras.8.1 and 8.2; and Communication No.692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para.6.9.

5.5 The Committee takes note of the psychological report submitted on 10 August 2004, in support of the claim that the author suffers from post-traumatic stress disorder. It observes that such a report should have been presented earlier to the national authorities and that it is not too late to request a new PRRA or application for permanent residence on humanitarian and compassionate grounds based on the new report. It accordingly concludes that the claim is also inadmissible as the author has not exhausted domestic remedies under article 2 of the Optional Protocol.[9]

5.6 With regard to the claim under article 18, the Committee takes notes of the author's submission that he was threatened by a man with a forced conversion to Islam in January 2000. However, it also takes note of the State party's contention that its obligation in relation to future violations of human rights by another State only arises in cases of a real risk of irreparable harm, such as that contemplated by articles 6 and 7.[10] In any case, it observes that even if non-State agents were motivated to subject the author to coercion in Pakistan that would impair his enjoyment of the freedom to have or adopt a religion or belief of his choice, he has not demonstrated that State authorities were unable or unwilling to protect him. The Committee accordingly concludes that his claim is also inadmissible as insufficiently substantiated under article 2 of the Optional Protocol.

6. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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

[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.1315/2004, *Daljit Singh v. Canada*, Decision on inadmissibility of 30 March 2006, para.6.3.
[10] General Comment No.31[80], 29 March 2004, para.12.