



**Convention against Torture  
and Other Cruel, Inhuman  
or Degrading Treatment  
or Punishment**

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**Committee against Torture**

**Communication No. 392/2009**

**Decision adopted by the Committee at its fiftieth session**

<i>Submitted by:</i>	R.S.M. (represented by Carlos Hoyos-Tello)
<i>Alleged victim:</i>	R.S.M.
<i>State party:</i>	Canada
<i>Date of complaint:</i>	9 July 2009 (initial submission)
<i>Date of decision:</i>	24 May 2013
<i>Subject matter:</i>	Expulsion from Canada to Togo
<i>Procedural issue:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Risk of torture after expulsion
<i>Articles of the Convention:</i>	3; 22, paragraph 5 (b)

## Annex

### **Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fiftieth session)**

concerning

#### **Communication No. 392/2009**

*Submitted by:* R.S.M. (represented by Carlos Hoyos-Tello)

*Alleged victim:* R.S.M.

*State party:* Canada

*Date of complaint:* 9 July 2009 (initial submission)

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

*Meeting* on 24 May 2013,

*Having concluded* its consideration of communication No. 392/2009, submitted to the Committee against Torture by R.S.M. 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 complainant, his counsel and the State party,

*Adopts* the following:

#### **Decision under article 22, paragraph 7, of the Convention against Torture**

1.1 The complainant is R.S.M., a citizen of Togo born on 7 February 1965. He contends that his extradition to Togo would constitute a violation of article 3 of the Convention against Torture. The complainant is represented by counsel.

1.2 On 13 July 2009, the Rapporteur on new complaints and interim measures decided not to request interim measures from the State party to suspend the complainant's extradition to Togo.

#### **The facts as submitted by the complainant**

2.1 Since 1993, the complainant has been a member of the Union des Forces de Changement (Union of Forces for Change) (UFC), an opposition party in Togo. He was first an ordinary member and was then elected in 2002 to be the leader of the Bé Pa de Souza subsection of the Jeunesse des Forces de Changement (Forces for Change Youth Movement) (JFC). One of his duties was to organize conferences, sporting events and meetings for local youth as a means of boosting recruitment. Many of these young people were arrested while distributing leaflets at his request. Whenever there were arrests, he was sought by the authorities and had to hide out.

2.2 In March 2005, he was chosen to represent his party in the Coalition des Forces Démocratiques (Coalition of Democratic Forces). This coalition was composed of the Alliance pour la Démocratie et le Développement Intégral (Alliance for Democracy and Integral Development) (ADDI), Comité d'Action pour le Renouveau (Action Committee for Renewal) (CAR), Convention Démocratique des Peuples Africains (Democratic Convention of African Peoples) (CDPA), Pacte Socialiste pour le Renouveau (Socialist Pact for Renewal) (PSR), Union des Démocrates Socialistes du Togo (Union of Socialist Democrats of Togo) (UDS-Togo) and the Union des Forces de Changement (UFC). He was involved in the preparation of electoral lists for the 24 April 2005 presidential elections and in the distribution of voting cards at polling station No. 2050 in the Ablogamé No. 2 primary school in Lomé. The complainant told members of the Coalition about irregularities that he had observed while carrying out his duties, including the refusal to register people considered to be opposition supporters and the padding of electoral lists in order to favour the current regime.

2.3 On 2 April 2005, the complainant received a visit from two senior members of the Rassemblement du Peuple Togolais (Togolese People's Assembly) (RPT), the party in power in Togo, who offered him 1 million CFA francs if he would leave the UFC party to become a member of the RPT party and use his influence within the Coalition to encourage young people to vote for the RPT candidate. The complainant states that he turned down this offer.

2.4 On 16 April 2005, the official starting date of the Coalition's election campaign, the complainant was coming back from a meeting chaired by the UFC leader when he was attacked by unidentified persons. He claims that his life was saved by some local youths who heard his cries for help and came to his aid. On 24 April 2005, election day, he worked as a delegated monitor of the Commission Électorale Locale Indépendante (Local Independent Electoral Commission) (CELI) at polling station No. 2018 to ensure that the voting went smoothly. He then received a visit from Ms. S.T., one of the persons who had offered him money on 2 April 2005. Ms. S.T. repeated her offer, but this time she doubled the sum. He again turned it down and informed the other Coalition monitors in attendance at the polling station. Word of what had happened quickly made the rounds at the school where the polling station was located, and the crowd outside booed Ms. S.T. and threw stones at her car. She left the scene with the help of security forces. A few minutes later, Red Beret troops arrived in two army vehicles and began firing tear gas and clubbing people in the crowd. They entered the polling station and tried to remove the ballot boxes, but the crowd stopped them. They then started shooting indiscriminately. The complainant managed to escape by climbing over the school fence.

2.5 On 26 April 2005, when the election results were announced and the RPT candidate was proclaimed to be the victor, the complainant invited young people from his local area and elsewhere to demonstrate peacefully in protest against these results, which he considered to be fraudulent. The military responded violently on behalf of the Government. Homes were ransacked and killings, rapes and other acts of violence were committed.

2.6 The complainant was picked up on 27 April 2005 when he was on his way back to the Catholic mission where he had taken refuge the previous day. At first, he was taken into an area of the bush behind the Headquarters of the Armed Forces where other opposition supporters were being held. On arrival, he was beaten with clubs and rifle butts. The following day, he was doused with water and covered in sand before again being beaten by soldiers. Four days later, he was taken, blindfolded, to a secret detention centre in the north of the country, where he was beaten daily and forced to perform hard labour. Some of his fellow inmates died there. The complainant managed to escape on 3 May 2006 with the help of a soldier who was a former classmate and who recognized him and helped him to get to Benin. However, he was not safe in that country either, because Togolese forces were

taking reprisals outside their territory against people who had fled Togo. That was why he decided to leave. On 23 July 2006, armed with a false French passport, he left for France, where he made a stopover before going on to Canada. On 25 July 2006, he arrived in Canada and went to the offices of Citizenship and Immigration Canada in Montreal, where he applied for asylum.

2.7 On 20 June 2007, the Immigration and Refugee Board (IRB) concluded that the complainant was neither a refugee under the 1951 Convention nor a person in need of protection, as he had been found to be lacking in credibility and the Board did not believe that he was involved in the UFC party. On 17 December 2007, leave to apply for judicial review of this decision was denied by the Federal Court of Canada, with no reason being given. On 10 April 2008, as he was subject to a removal order, he was summoned by the Canada Border Services Agency in order to make arrangements for his departure. On that occasion, he was offered the opportunity to file a pre-removal risk assessment (PRRA) application, which he submitted on 23 April 2008.

2.8 On 7 April 2009, the PRRA application was rejected and the complainant was ordered to leave Canada. On 15 June 2009, he applied for leave and judicial review of this decision before the Federal Court of Canada. That application was rejected on 22 September 2009, with no reason being given. Meanwhile, an application for a stay of the removal order had been rejected by the Canada Border Services Agency and his departure date had been set for 10 July 2009.

### **The complaint**

3.1 The complainant claims that his return to Togo would constitute a violation of article 3 of the Convention. He states that he would not be safe in his country because of his UFC membership and he fears not only that he would be arrested again, but that he would be murdered. Owing to his dissident activities and his fight for democracy, he was detained and subjected to conditions of detention comparable with those found in concentration camps. He claims that the decision to deny his PRRA application fails to take into account the situation in Togo. He is still an active political dissident within the UFC party, which in itself is a dangerous activity in a country under military rule. His escape from the military camp and the fact that he witnessed serious human rights violations in that camp (forced labour, the burial of persons who had died from exhaustion, physical and psychological torture, summary executions, etc.) only add to the risk that he faces.

### **State party's observations on admissibility and the merits**

4.1 On 10 February 2010, the State party submitted its observations on the admissibility and on the merits of the case. It maintains that the complainant's allegations before the Committee have been thoroughly examined by the Canadian authorities, who have concluded that they are completely unfounded. The complaint provides no new evidence that might alter this conclusion.

4.2 On 11 September 2006, in support of his application for asylum, the complainant submitted a completed Personal Information Form to the Refugee Protection Division of the Immigration and Refugee Board of Canada. Subsequently, at a hearing during which he was accompanied by his lawyer, he was questioned at length by the Board about his political activities and his claims that he had been targeted by the Togolese Armed Forces. The Board found his responses to be unsatisfactory and full of inconsistencies and contradictions, and it gave no weight to the evidence that he had entered regarding his political affiliations. The Board rejected the complainant's explanations as to why the Togolese authorities had not arrested him at any time between 2002 and the April 2005 elections even though he had allegedly been targeted by them because of his political activities. It concluded that the complainant was wholly lacking in credibility with respect

to his political affiliations as a member of the UFC party since 1993, as a representative of the Coalition of Democratic Forces in 2005 and as a delegated monitor of the Electoral Commission on election day. The Board therefore did not believe that the complainant had been arrested and held from 27 April 2005 to 3 May 2006.<sup>1</sup>

4.3 The PRRA application was based chiefly on the same claims that the complainant had made before the Immigration and Refugee Board. The complainant had added that he had written and produced a play entitled *Togo: A Reign of Terror*, in which he denounced the current regime, and said that the play had been put on in various towns in 2004 and 2005. All the people who had been in the play had had to flee Togo because they had been targeted as opponents of the regime currently in power. The PRRA officer had noted that the complainant had not produced any credible documentation to corroborate his claim that he had put on such a play; nor had he explained why he had not submitted this information when he was applying for asylum. As for the general situation in Togo, the officer had taken note of the documentation submitted by the complainant and other reports regarding the commission of serious human rights violations during the 2005 elections. The current Government has, however, taken steps to improve its justice system and to combat corruption and impunity, particularly with respect to the abuses committed in 2005. The Government also reached a broad political agreement with opposition parties in April 2006. In addition, in June 2005 it established the High Commission for Repatriates and Humanitarian Action to ensure that protective measures and assistance were provided to persons who were returning to the country after having fled from the conflict that had broken out after the 2005 elections. The general population had played a very active part in the elections of 14 October 2007, which had taken place peacefully. In view of the complainant's failure to prove that he would personally be at risk, and given the current situation in Togo, the officer had found that there was no evidence that the complainant would run a risk of being subjected to torture or to cruel or unusual treatment or punishment or that his life would be in danger in Togo.

4.4 In conjunction with his application for leave and judicial review of the PRRA officer's decision, on 8 July 2009 the complainant submitted a request for a stay of the removal order that was to be carried out on 10 July 2009. On that same date, the Federal

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<sup>1</sup> In its decision, a copy of which is in the file, the Board draws attention to inconsistencies in the complainant's account. For example, he claimed to have been sought by the authorities since 2002. Asked to explain why he had not been arrested until 2005 while continuing to carry out his political activities, he replied that he was not sleeping at home, but was instead moving from place to place, and that it would have taken the deployment of thousands of soldiers to enter every house in his neighbourhood to find him. The Board rejected these explanations as unreasonable and did not believe that the complainant had been targeted by the authorities in Togo before 2005. The document entitled "Mandate for Coalition Representatives" which he furnished bore the signature of the Coalition's Chairperson, but that signature was a photocopy. The voting card shown by the complainant to the Board contained errors in the entries showing his age and profession. Since he claimed that, as a Coalition representative, he had to oversee the registration and issuance of voting cards, he was asked to explain why he had not corrected the errors on his own voting card. He replied that he had not been at liberty to do so, but that he had reported the errors to the Coalition. He became totally confused when asked to state when and how he had reported those errors. The Board had found that the complainant had not proven that he had been appointed as a representative of the Coalition for the 2005 elections. The complainant could not give a credible explanation for why, in his presentation of the facts of the case, he had failed to mention that he had reported the first visit of Ms. S.T. to the Coalition authorities at a meeting on 7 April 2005, after which he had apparently been assigned bodyguards when travelling, even though he had reported having informed the Coalition of the second visit of Ms. S.T. Nor did the Board give any weight to his UFC membership card, which was dated 28 July 2005, a date on which he was allegedly in prison. In addition, the explanations he gave for how he had obtained it were contradictory.

Court denied the request for a suspension of the order because the complainant had failed to demonstrate: (1) that his request was based on a serious issue; (2) that he was at risk of suffering irreparable harm; or (3) that the balance of (in)convenience was in his favour.

4.5 On 13 July 2009, a warrant for the arrest of the complainant was issued after he had failed to present himself at the Montreal airport on 10 July 2009, at which time he was to be removed from Canada. Agents of the Border Services Agency attempted to act on the arrest warrant but were unable to locate the complainant at his home.

4.6 The State party contends that the complaint is inadmissible on the ground of failure to exhaust domestic remedies under article 22, paragraph 5 (b), of the Convention. The complainant could have applied for a visa exemption and permanent resident status on humanitarian grounds (known as an “H&C application”) and, if that application had been denied, could have applied for leave and judicial review before the Federal Court of Canada. The complainant has given no explanation for his failure to exhaust these remedies; nor has he furnished any evidence to show that the application of these remedies would be unreasonably prolonged or that they would be unlikely to provide him with the effective relief that he is seeking to obtain with the assistance of the Committee.

4.7 The State party also asserts that the complaint is inadmissible under rule 113 (b) of the Committee’s rules of procedure because it has not been sufficiently substantiated. The complainant chiefly bases his case on his claim that he was tortured during the time that he was held in detention (27 April 2005 to 3 May 2006) because of his political activities and that this could happen again if he were to be sent back to Togo. Even if he had established that he was tortured during his alleged detention, that would not be enough to establish that he would be at risk of being subjected to torture in the future if he were to be sent back. The Immigration and Refugee Board considers that the complainant is lacking in credibility and that the evidence he has produced to substantiate his political activities is worthless, particularly in terms of his involvement in the UFC party and his role as a representative of the Coalition of Democratic Forces. His account of the events in question, which was marked by contradictions and inconsistencies, and the evidence that he produced did not convince the Immigration and Refugee Board that he had actually been held in detention during the period that he said he had been. In addition, the PRRA officer was of the opinion that the complainant had not substantiated his membership in the UFC party, nor had he proven that he was sought by the Togolese authorities or that he would be personally in danger in Togo. After examining the documents submitted to it, the Federal Court had found no reason to set those findings aside.

4.8 The complaint submitted to the Committee does not contain any new evidence that would call the Canadian authorities’ conclusions into question. The complainant claims that he would run the risk of being summarily executed because of his escape and because he has witnessed and been subjected to human rights violations, including physical and psychological torture. Yet he has not provided evidence that he, personally, is wanted by the Togolese authorities. He has not provided any evidence that he belongs to the UFC party or substantiated his alleged political activities. To back up his claim that being a political opponent who belongs to the UFC party is dangerous in itself, he cites the public documents that he submitted with his PRRA application. However, as the PRRA officer concluded, these documents are general in nature and do not demonstrate that there are substantial grounds for believing that he would personally be at risk of being arrested and thus in danger of being tortured. Furthermore, these documents do not indicate that torture is systematically used in Togolese prisons or that it is so widespread or so widely tolerated that the whole of the prison population is in danger. According to the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment regarding his mission to Togo in April 2007, the Government has put numerous measures in place that have improved prison conditions, including the situation with regard to ill-

treatment, since 2005. The report makes no mention of the secret concentration camps that the complainant claims exist.<sup>2</sup> In the Special Rapporteur's 2009 follow-up report on the action taken pursuant to the recommendations he had made in the report on his 2008 mission to Togo, he takes note with satisfaction of the measures introduced for that purpose.<sup>3</sup>

4.9 The State party does not dispute the veracity of NGO reports of human rights violations during the April 2005 elections. Publicly available documents do not, however, indicate that there has been any repetition of those events since then. In the Special Rapporteur's 2009 report, he says that the October 2007 elections went smoothly. Moreover, a thorough review of the documentary evidence indicates that the position of political dissidents has been improving. In August 2006, the Government and all opposition parties signed a broad political agreement under which the opposition's right to take part in public affairs is recognized. The evidence submitted by the complainant therefore does not provide grounds for concluding that he would run the risk of being arrested in Togo simply because he is a member of the UFC party and is an active political dissident. And even if he were to be at risk of arrest, that would not mean that there was reason to believe that the complainant would personally be in danger of being subjected to torture.

4.10 According to the State party, independent, impartial Canadian experts have analysed the complainant's claims in accordance with the applicable laws and the principle of equity. In the absence of proof of an obvious error, abuse of process, bad faith, obvious bias or serious procedural irregularities, the Committee should not substitute its own findings for those of the Canadian authorities. It is the duty of the courts of States parties to the Convention to assess the facts, weigh the evidence and, in particular, to evaluate the credibility of the parties in each case. In the State party's view, the complainant has not demonstrated that the Canadian authorities' decisions are flawed in any way that would provide grounds for the Committee to overrule them.

4.11 The State party submits, as an additional argument to its observations on admissibility and on the same grounds, that the complaint should be dismissed on the merits as it fails to demonstrate any violation of article 3 of the Convention.

#### **Complainant's comments on the State party's submission**

5.1 The complainant submitted his comments on the State party's submission on 21 April 2010. With respect to the State party's argument that the complainant should have applied for a visa exemption and permanent resident status on humanitarian grounds, he refers to the Committee's jurisprudence in communication No. 133/199 (*Falcon Ríos v. Canada*), in which the Committee decided that this kind of appeal is not a remedy that must be exhausted in order to satisfy the requirement of exhaustion of domestic remedies.

5.2 With regard to the evidence relating to personal risk, the complainant reaffirms his earlier claims. He contends that there is still a risk of torture and appends newspaper articles concerning protests and arrests of members of the opposition in Togo following the presidential elections of 4 March 2010. He states that he has demonstrated that the Canadian authorities who considered his case were not impartial and that his case has been flawed by obvious error, abuse of process, bad faith, bias and serious procedural irregularities.

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<sup>2</sup> A/HRC/7/3/Add.5.

<sup>3</sup> A/HRC/10/44/Add.5.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

6.1 Before considering any complaint contained in a communication, the Committee against Torture must decide whether the communication is admissible under article 22 of the Convention. As required under article 22, paragraph 5 (a), of the Convention, the Committee has ascertained 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 does not consider any complaint unless it has ascertained that the complainant has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of remedies has been unreasonably prolonged or that these remedies are unlikely, after a fair trial, to bring effective relief to the alleged victim.

6.3 The Committee takes note of the State party's argument that the complaint should be declared inadmissible under article 22, paragraph 5 (b), of the Convention because the complainant did not apply for a visa exemption and permanent resident status on humanitarian grounds (known as an "H&C application"). In that regard, the Committee recalls 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. At that time, the Committee 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 grounds, rather than on any legal basis, and is thus *ex gratia* in nature. The decision depends on the discretionary authority of a minister and thus of the executive.<sup>4</sup> The Committee also refers to its case law,<sup>5</sup> according to which the principle of exhaustion of domestic remedies requires the petitioner to use remedies that are directly related to the risk of torture in the country to which he would be sent, not those that might allow him to stay where he is for reasons unrelated to the risk of torture. Consequently, in the light of its case law on the subject, the Committee finds that, in this instance, the failure to apply for a visa exemption and permanent resident status on humanitarian grounds does not constitute a failure to exhaust domestic remedies and is therefore not an obstacle to the complaint's admissibility.

6.4 As to the allegations made regarding a violation of article 3 of the Convention, the Committee is of the opinion that the arguments put forward by the complainant regarding the risk of torture that he would face if he were to be sent back to his country raise substantive issues which should be dealt with on the merits, rather than on admissibility alone. The Committee therefore declares the complaint to be admissible.

### *Consideration of the merits*

7.1 The issue before the Committee is whether the removal of the complainant to Togo would constitute a failure by the State party to fulfil its obligation under article 3, paragraph 1, of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

7.2 The Committee recalls its jurisprudence and its general comment concerning the implementation of article 3, in which it has established that the burden is upon the complainant to present an arguable case and that the risk of torture must be assessed on

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<sup>4</sup> See communication No. 133/1999, *Falcon Ríos v. Canada*, decision of 23 November 2004, para. 7.3, and communication No. 333/2007, *T.I. v. Canada*, decision of 15 November 2010, paras. 6.3 and 6.4.

<sup>5</sup> Communication No. 170/2000, *A.R. v. Sweden*, decision of 23 November 2001, para. 7.1.

grounds that go beyond mere theory or suspicion while taking note of its general comment, the Committee also recalls that, under article 22, paragraph 4, of the Convention, it shall consider communications received in the light of all information made available to it by or on behalf of the individual and by the State party concerned, and that, under that article it thus has the power of free assessment of the facts of a case based upon the full set of relevant circumstances.

7.3 The Committee must determine whether there are substantial grounds for believing that the complainant would personally be in danger of being subjected to torture in Togo. In order to do so, it must, in accordance with article 3, paragraph 2, of the Convention, take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass human rights violations. However, the Committee recalls that the aim of its determination is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. Additional grounds must be adduced to show that the individual concerned would personally be at risk. Conversely, the absence of a consistent pattern of gross violations of human rights does not necessarily mean that a person cannot be considered to be in danger of being subjected to torture under the specific circumstances applying to that person's case.

7.4 The Committee is aware that the human rights situation in Togo is worrying and, in fact, it referred to serious human rights violations, especially in places of detention, in its concluding observations on the State party's second periodic report, which it considered in November 2012.<sup>6</sup> Nonetheless, the Committee notes that the facts as presented to it do not provide it with grounds for concluding that the complainant would personally face a present, foreseeable and real risk of torture if he were sent back to Togo. The complainant has not provided sufficient evidence to establish his ties with the Union for Forces for Change or the nature of his activities as a member of that political party. He has not furnished evidence that he is sought by the authorities and is in danger of being arrested. He has not provided evidence or detailed information to support his claims that he was detained and tortured. He has provided no medical record or other document concerning any after-effects that would corroborate his alleged arrest or the ill-treatment that he says he was subjected to while being held in detention between April 2005 and May 2006. The arguments put forward regarding the human rights situation existing in Togo after his arrival in Canada do not suffice to establish the existence of a personal risk.

7.5 Taking into account all the information made available to it, the Committee has concluded that the complainant has failed to establish that he would face a foreseeable, real and personal risk of being subjected to torture if he is sent back to Togo at this time.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the State party's decision to return the complainant to Togo would not constitute a breach of article 3 of the Convention.

[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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<sup>6</sup> CAT/C/TGO/CO/2.