



**International covenant
on civil and
political rights**

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

DECISION

Communication No. 1580/2007

Submitted by: F.M. (represented by counsel, Johanne Doyon)

Alleged victims: The author, his wife M.C. and their children S. (20),
P.C. (17), P. (14), L. (11) and P. (10)

State party: Canada

Date of communication: 26 July 2007 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the
State party on 9 August 2007 (not issued in document form)

Date of adoption of decision: 30 October 2008

Subject matter: Removal of the claimants to Mexico.

* Made public by decision of the Human Rights Committee.

Substantive issues: Right to life; right to protection from cruel, inhuman or degrading treatment or punishment; right to security of the person; right to be heard by a competent, independent and impartial tribunal; right of children to protection.

Procedural issues: Non-exhaustion of domestic remedies; unsubstantiated allegations incompatible with the Covenant.

Articles of the Covenant: 6; 7; 9, paragraph 1; 13; 14; and 24, paragraph 1.

Article of the Optional Protocol: 5, paragraph 2 (b).

[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. 1580/2007*

Submitted by: F.M. (represented by counsel, Johanne Doyon)

Alleged victims: The author, his wife M.C. and their children S. (20),
P.C. (17), P. (14), L. (11) and P. (10)

State party: Canada

Date of communication: 26 July 2007 (initial submission)

The Human Rights Committee, established pursuant to 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 dated 26 July 2007 is Mr. F.M., who is submitting the communication also on behalf of his wife and their five children (20, 17, 14, 11 and 10 years of age, respectively), all Mexican citizens who were deported to Mexico after submission of the communication. They claim to be victims of violations by Canada of articles 6; 7; 9, paragraph 1; 13; 14; and 24, paragraph 1, of the Covenant. They are represented by counsel.

1.2 On 9 August 2007, the Special Rapporteur on New Communications and Interim Measures decided to deny the request for interim measures of protection made by the authors in their initial submission.

* 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.

Facts as presented by the author

2.1 Mr. F.M. states that his half-sister was married to M.C., alleged to be a member of a gang of drug traffickers in Mexico. F.M. reported his sister and her husband missing to the Office of the Public Prosecutor in Atizapan on 18 September 2005, as he had not heard from them for some time. The following day, their bodies were discovered in a car. They had allegedly been shot in the head on the orders of the leader of a rival gang of drug traffickers, known as "El Compadre". Since then, their three children have been in the custody of F.M. and his wife. The double killing was allegedly carried out by one S.M.

2.2 The Atizapan judicial police conducted an investigation into the double killing, led by Police Commander Contreras. F.M. was questioned on 19 September 2005. The victims' home was searched in his presence on 19 and 22 September 2005. Police officers allegedly stole personal effects, including drugs, from the victims' home and threatened F.M. to keep him silent.

2.3 Towards the end of September 2005, F.M. and his family began to receive anonymous telephone threats and were watched from a vehicle parked outside their house. On 13 October 2005, the family received two suspicious telephone calls at the home of F.M.'s mother. On 18 October 2005, the vehicle that had been parked outside their house was seen in front of the house of the murdered couple while the family was there to fetch the children's personal effects. On 21 October 2005, the author went to the Office of the Public Prosecutor in Atizapan to make a complaint. An official there told him that he should go to the judicial police, which he was not willing to do because he was afraid of Police Commander C.

2.4 On 23 October 2005, the alleged victims and eight other family members left Mexico. They arrived in Canada the same day and immediately applied for asylum. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected the asylum application on 17 May 2006. It considered that the alleged victims had failed to demonstrate well founded fear of persecution in Mexico and concluded that they were neither refugees nor protected persons. Moreover, it concluded that the alleged victims' asylum applications would have failed even had their allegations been credible, since internal flight in Mexico was possible. The alleged victims were sent back to Mexico on 19 October 2007.

The complaint

3.1 Mr. F.M. claims to be a victim of violations by the State party of articles 6; 7; 9, paragraph 1; 13; 14; and 24, paragraph 1, of the Covenant. He claims that his and his wife's and children's life and safety are in danger because they belong to the family of an alleged drug trafficker who was murdered. They have received threats from drug traffickers and/or the police/judicial authorities. He claims that they cannot obtain protection from the Mexican State and that there is no internal flight alternative in Mexico. He asserts that the alleged killer of his half-sister and her husband is known to have attacked and threatened to kill the family members of his victims, and that drug traffickers are protected by corrupt police.

3.2 Mr. F.M. also contends that IRB has not assessed the credibility of the alleged threats against them. Even if the allegations were credible, IRB considered that there was an internal flight alternative in Mexico and noted that other family members of the deceased remained in Mexico. Mr. F.M. considers that they are at greater risk than other family members, in particular as the children of the persons killed are now in their care.

3.3 The author asserts that police corruption is widespread in Mexico and that they cannot hope for any protection from the police, in particular against drug traffickers, who act with impunity.

3.4 The author argues that they have exhausted domestic remedies, as humanitarian applications and pre-removal risk assessment (PRRA) are not effective remedies. Decisions on humanitarian applications are not made on a legal basis but are rather granted as favours by a minister. PRRA is not an effective remedy either, as only new evidence is considered and petitions are systematically rejected, as confirmed by the case law of the Committee against Torture (communication No. 133/1999, *Falcon Rios v. Canada*).

State party's observations on admissibility and merits

4.1 In February and September 2008, the State party contested the admissibility and merits of the communication. It regards the communication as inadmissible because domestic remedies have not been exhausted. The alleged victims could have submitted a request for leave and judicial review of the negative decision by RPD to the Federal Court. The author contends that they did not do so as they did not have the right to appeal the decision. According to the State party, although there is no right to judicial review of an RPD decision, the Federal Court examines every request for leave to apply for judicial review in detail. A number of Federal Court rulings presented by the author in support of his claim demonstrate that the request for leave to apply for judicial review is an effective remedy. On a number of occasions, the Human Rights Committee and the Committee against Torture have declared communications inadmissible because their authors had not exhausted available domestic remedies, including request for leave and judicial review to the Federal Court (communication Nos. 1302/2004 and 273/2005, respectively). The alleged victims could also have asked the Federal Court for leave to apply for judicial review of the PRRA decision and the decision on their application on humanitarian grounds. At the same time, they could have requested the Federal Court to order suspension of the expulsion order until a decision was issued on their request for leave, or, if leave was granted, until completion of the judicial review.

4.2 The State party also submits that the communication is manifestly unfounded and that some of the allegations made by the author are incompatible with the Covenant. It recalls that, according to the Committee's general comments on articles 6 and 7, an individual must demonstrate that there is a real and personal risk that their rights will actually be violated. However, the author did not establish prima facie violations of articles 6 and 7 of the Covenant. No violation of article 9, paragraph 1 can be established in the present case in the absence of a real personal risk to life or risk of torture or cruel, inhuman or degrading treatment.

4.3 Both RPD and the PRRA officer found that the alleged victims' allegations lacked credibility and that they had not produced evidence in support of their claims. When RPD observed that other family members were living in Mexico without a problem, the alleged

victims indicated that that was because these persons did not live in Atizapan. The alleged victims were not able to explain why their safety would continue to be threatened if they moved to another town in Mexico.

4.4 The State party contests the assertion that Mexican drug traffickers are protected by corrupt police. The newspaper articles presented by the author as evidence show that the alleged killer of the two persons mentioned above has, in fact, been arrested.

4.5 With regard to article 24, paragraph 1, of the Covenant, the State party maintains that this allegation adds nothing to the allegations submitted under articles 6 and 7 of the Covenant. In the alternative, it recalls that the alleged victims have not demonstrated that their expulsion would deprive the four children of the protection they are entitled to as minors.

4.6 The State party maintains that the allegations under articles 13 and 14 of the Covenant are incompatible *ratione materiae* with the provisions of the Covenant. Article 13 is not applicable in this case, since the alleged victims were not legally in Canada when the expulsion order was issued. Alternatively, the State party maintains that there was no violation of article 13, since the expulsion order was issued only once their asylum application had been rejected after careful consideration and with the possibility of judicial review.

4.7 The State party contests the applicability of article 14 to the determination of refugee status or to the protection that a State may grant an asylum-seeker. Alternatively, the State party submits that the alleged victims have not shown that the RPD and PRRA procedures were not conducted in accordance with article 14 of the Covenant.

4.8 The State party therefore requests the Committee to declare the communication inadmissible. If the communication is declared admissible, the State party maintains that it is unfounded for the same reasons.

Author's comments

5.1 On 8 May 2008 the author submitted his comments on the State party's observations. He states that they did not submit a request for leave and judicial review of the RPD decision to the Federal Court because their representative at the time had advised them against doing so. The representative had made it clear that an application to the Federal Court was unnecessary, would be too costly and would almost certainly not succeed.

5.2 The author reiterates that neither PRRA nor the humanitarian application are effective remedies in Canada. Therefore, requests for leave and judicial review of PRRA and humanitarian decisions cannot be considered effective remedies for the author in this instance.

5.3 The author states that the RPD finding that their arguments lack credibility was based on unlikely circumstances or inconsistencies that were of no relevance, and RPD had not addressed the main ground for their request for protection. He also points out that internal flight was not an alternative for him and his family owing to human rights violations and crime rates in Mexico.

Deliberations of the Committee

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

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

6.3 The Committee notes that the State party argues that the communication is inadmissible because domestic remedies have not been exhausted. In particular, it points out that the alleged victims could have submitted a request for leave and judicial review of the negative IRB decision to the Federal Court. They could also have applied to the Federal Court for leave to apply for judicial review of the PRRA and humanitarian decisions. At the same time, they could also have requested the Federal Court to order the suspension of the expulsion order until a decision was issued on the request for leave and, if leave was granted, until completion of the judicial review. The Committee notes that the author has argued in turn that these requests did not constitute effective remedies. The Committee refers to its case law to the effect that mere doubts about the effectiveness of domestic remedies do not relieve the author of a communication from the duty to exhaust them.¹ In these circumstances, the author of this communication has thus failed to exhaust domestic remedies. The communication is therefore inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 In the light of this finding, the Committee does not need to consider the other claims submitted concerning the admissibility of the communication.

7. The Committee therefore decides:

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

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

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

¹ See communication No. 654/1995, *Kwame Williams Adu v. Canada*, decision of 18 July 1997, para. 6.2.