



**International Covenant on
Civil and Political Rights**

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Decision

Communications No. 1872/2009

<u>Submitted by:</u>	D.J.D.G. et al (The authors are represented by counsel, Lina Anani)
<u>Alleged victim:</u>	The authors
<u>State party:</u>	Canada
<u>Date of communication:</u>	8 April 2009 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 92 and 97 decision, transmitted to the State party on 9 April 2009 (not issued in document form)
<u>Date of adoption of decision:</u>	26 July 2010

* Made public by decision of the Human Rights Committee.

<i>Subject matter:</i>	Deportation from Canada to Colombia; access to Pre-removal Risk Assessment (PRRA)
<i>Procedural issues:</i>	Failure to exhaust domestic remedies; mootness of the complaint
<i>Substantive issues:</i>	Risk of arbitrary deprivation of the right to life; non-refoulement; arbitrary detention; detention conditions; fair proceedings; family life and best interest of the child
<i>Articles of the Covenant:</i>	2, paragraphs 2 and 3; 6, paragraph 1; 7; 9, paragraph 1; 10, paragraph 1; 14, paragraph 1; 23, paragraph 1; and 24, paragraph 1
<i>Articles of the Optional Protocol:</i>	1; 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-ninth session)

concerning

Communication No. 1872/2009**

Submitted by: D.J.D.G. et al (The authors are represented by counsel, Lina Anani)

Alleged victim: The authors

State party: Canada

Date of communication: 8 April 2009 (initial submission)

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

Meeting on 26 July 2010,

Adopts the following:

Decision on Admissibility

1.1 The authors of the communication, dated 8 April 2009, are D.J.D.G. (first author), her partner, E.G.A. (second author) and two minor children, D.A.A.D. and L.S.A.D., all Colombian citizens. They claim that their deportation from Canada to Colombia would constitute a violation of article 2, paragraph 3; article 6, paragraph 1; article 7; article 23, paragraph 1; and article 24, paragraph 1, of the Covenant. The authors are represented by counsel, Ms. Lina Anani.

1.2 On 9 April 2009, the Special Rapporteur on new communications and interim measures decided to issue a request for interim measures pursuant to rule 92 of the Committee's rules of procedure.

1.3 On 22 October 2009, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered separately from the merits.

The facts as presented by the authors

2.1 The first author's grandmother and mother owned a rural farm in Chiquinquirá, Boyacá, Colombia. They were allegedly targeted by the Revolutionary Armed Forces of

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Lazhari Bouzid, Ms. Christine Chanut, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Mr. Fabián Omar Salvioli and Mr. Krister Thelin.

Colombia (FARC), had to pay an extortion tax (*vacuna*) and the FARC used the first author's family to store chemicals for the use in the production of illegal drugs. When the family could not pay the extortion tax anymore, they fled to Bogotá.

2.2 In 1997, when the first author was 13 years old, the FARC kidnapped her mother and four-year-old brother in Bogotá. They demanded ransom and sent the first author's mother's fingertips to the family as a warning that they would kill her if ransom was not paid. The first author's brother was subjected to beatings; his face was slashed with the lid of a can and scarred with brass knuckles. After the payment of part of the ransom, the first author's mother and brother were released. A complaint was filed with the Colombian authorities. The first author's mother then fled alone to the United States of America.

2.3 In 2002, when the first author's mother visited Colombia from the United States, she was again kidnapped by the FARC and held for 10 days. She was mistreated and stabbed several times in her hands and legs. When she tried to escape, she was shot in the leg and then left on the road. She again filed a complaint about the kidnapping and fled the country a second time.

2.4 A few months later, the first author was kidnapped by the FARC in reprisal for the complaint filed by her mother. During her detention, she was subject to repeated rape and other forms of sexual assault. Her legs were cut with a broken bottle and her hands burned with cigarette butts. As a result of the repeated rape, the first author became pregnant, depressed, suicidal, and developed HPV,¹ which caused cervical cancer. During her pregnancy she met her common-law partner, and a daughter was born from this union in 2007.

2.5 In October 2008, the authors fled Colombia to the United States after an incident in which a man, who was leaning against the second author's car, was shot and killed. The family believes that the man was mistaken for the second author. At the same time, the first author's uncle received a death threat telephone call, after which he and his family fled to Argentina, where they remain in hiding under an assumed identity. The authors believe that attempts by some of the first author's family members living outside Colombia to reclaim the family farm led to further targeting by the FARC.

2.6 The authors travelled overland to Canada with the first author's two younger siblings, whom they left with their mother in the United States. The authors however continued their journey to Canada where the second author's godfather lives. They filed a refugee claim at the border in January 2009. On 26 January 2009, they were found to be ineligible under s.101(e) of the Immigration and Refugee Protection Act (IRPA)² due to the Safe Third Country Agreement with the United States and were returned to the United States, where the second author was detained. They were also issued with an exclusion order, barring them from re-entry to Canada for one year.

2.7 On 16 February 2009, they again sought to file a refugee claim in Canada after crossing the border on foot. Based on the decision of 26 January 2009, they were found to be ineligible under s.101(c) of IRPA³ and were detained. On 1 April 2009, the authors

¹ Human papillomavirus (HPV) is a sexually transmitted infection, which may be at the origin of cervical cancer.

² Immigration and Refugee Protection Act: s.101(1) A claim is ineligible to be referred to the Refugee Protection Division if ... (e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence.

³ Immigration and Refugee Protection Act: s.101(1) A claim is ineligible to be referred to the Refugee Protection Division if ... (c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned.

submitted their application for a Pre-Removal Risk Assessment (PRRA). On 3 April 2009, they were advised that their PRRA had been suspended pursuant to s.112(2)(d) of IRPA,⁴ which provides that persons who have been outside of Canada for less than six months, and have since re-entered, are not eligible for a Pre-Removal Risk Assessment (PRRA). The authors maintain that, even if they had been outside of Canada for longer than six months they would have still been ineligible for a PRRA due to s.112(2)(b),⁵ which states that they are ineligible to apply for a PRRA if they have been found ineligible under s.101(1)(e) of IRPA, as the authors entered from the United States, where they could receive an assessment of their claim for protection.

2.8 On 6 April 2009, the authors were served with a Notice of Removal indicating that they would be removed to Colombia on 9 April 2009. On 7 April 2009, the authors requested the Minister of Citizenship and Immigration to exempt them under s.25 of IRPA (humanitarian and compassionate considerations)⁶ from the operation of ss. 101(1)(c)⁷ and 112(2)(d)⁸ and allow them to make a refugee claim or have their PRRA re-instated. In addition to that, they also filed an emergency motion to stay their removal. On 8 April 2009, the Government of Canada advised the authors that their deportation was temporarily cancelled and that a new deportation date could be set any time. The authors explain that the State party created an administrative stay of the deportation in contrast to a judicial stay granted by a court. In creating an administrative stay, the State party maintains control of when it will next take steps to remove the authors and it limits the authors' ability to argue for their release from detention.

The complaint

3.1 The authors submit that there are serious grounds to believe that their rights under article 2, paragraph 3; article 6, paragraph 1; article 7; article 23, paragraph 1; and article 24, paragraph 1, of the Covenant would be violated and they would face irreparable harm if returned to Colombia.

3.2 The authors submit that under the provisions of the State party's legislation, they are not entitled to any assessment of their claim of persecution having made a claim at the United States-Canada border, which had been rejected on the basis of the Safe Third Country Agreement and then having made a second attempt from within Canada. They argue that the intent of the conflicting provisions is to ensure that the Safe Third Country Agreement is strictly enforced and that persons entering from the United States land port of entry are compelled to make their claims in that country. However, the authors being destitute without access to legal advice on this very technical area of law made decisions

⁴ Immigration and Refugee Protection Act: s.112(2) Despite subsection (1), a person may not apply for protection if (b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible; (d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

⁵ See previous.

⁶ Immigration and Refugee Protection Act: 25.(1): The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

⁷ See note 3 above.

⁸ See note 4 above.

without understanding their very serious consequences. As the authors entered Canada on foot and not through a formal land port of entry, the legislation does not allow their return to the United States. As a result and in violation of the non-refoulement principle, they are being returned directly to Colombia without any risk assessment and without the possibility to seek for protection elsewhere. They submit that, in violation of article 2, paragraph 3, of the Covenant, they are deprived of an effective remedy for a substantive examination of their claims under articles 6, paragraph 1, 7, 23, paragraph 1 and 24, paragraph 1, of the Covenant.⁹ In addition to that, the authors cannot challenge the State party's legislation before the Federal Court, as there has not been any "error of law" by the authorities.

3.3 The authors argue that they have submitted credible evidence that their removal to Colombia would expose them to a serious risk of arbitrary deprivation of their lives, in violation of article 6, paragraph 1, of the Covenant and being subjected to torture or other cruel, inhuman or degrading treatment or punishment, in violation of article 7, paragraph 1, of the Covenant.

3.4 The authors further argue that the legislation barring them from a risk assessment ignores the interest of the two minor children, as the threats, to which they would be exposed on their return to Colombia, are not assessed. In addition to that, the Minister has not taken any decision under s.25 of the IRPA, and therefore ignored the best interest of the two children.¹⁰ They submit that this would violate the children's rights under article 24, paragraph 1, of the Covenant. To the extent that the removal of the children's parents to Colombia would endanger their well-being, such a removal would also violate the children's rights under article 23, paragraph 1, of the Covenant.

State party's submission on admissibility

4.1 On 20 August and 22 December 2009, the State party submitted its comments on admissibility and requested that the interim measures be lifted or that the Committee take a decision on admissibility at its next session. It explains that a new application for a Pre-Removal Risk Assessment (PRRA) was submitted on 11 August 2009 and that the authors' removal was stayed. On 3 November 2009, the authors' PRRA application was rejected and their application for judicial review remains pending before the Federal Court.

4.2 The State party recalls the facts and explains that the authors entered the United States from Mexico without border inspection in November 2008. On 21 January 2009, they arrived at the Canada-United States land border post and applied for refugee status. They were found illegible under s.101 (1)(e) of the IRPA and the Canada-United States Safe Third Country Agreement (STCA) and were returned to the United States. The authors made an asylum claim in the United States and their hearing was scheduled for 30 April 2009. At an unknown date, the authors re-entered the State party's territory and submitted a second application for asylum on 16 February 2009. Pursuant to s.101(1)(c), the authors were found to be ineligible, having been found ineligible previously. On 1 April 2009, the authors submitted an application for Pre-Removal Risk Assessment, which was suspended pursuant to s.112(2)(d) of the IRPA, given that less than six months passed after the authors' claim for refugee protection was determined to be ineligible. On 7 April 2009, the authors applied to the Minister of Citizenship and Immigration for an exemption of the ineligibility provisions and to be allowed to present a PRRA. On 8 April 2009, the authors were advised that their deportation was cancelled.

⁹ Amnesty International, Canadian Section has issued an opinion according to which removal of the authors without risk assessment would constitute a violation of the non-refoulement principle.

¹⁰ See communication No. 1069/2002, *Bakhtiyara v. Australia*, Views adopted on 29 October 2003, para. 9.7.

4.3 During the examination of the authors' second PRRA application, the authorities examined, in addition to the facts as submitted by the authors, "unbiased and trustworthy sources", such as the Immigration and Refugee Board's Country of Origin Research and the United States Department of State Country Report on Human Rights Practices in 2008. The authorities concluded that the human rights and security situation in Colombia has considerably improved and that there has been a significant decrease in massacres and kidnappings, and the total number of FARC members has been reduced since the authors' departure in October 2008. They further noted that there was no substantial evidence that the police would be unwilling or unable to provide protection to the authors. They also observed that the authors first went to the place of residence of the first author's mother in New York but did not make any attempt to seek asylum in the United States, while it would be reasonable to expect such an application in the first safe country of opportunity.

4.4 The State party submits that due to the pending judicial review by the Federal Court, the communication has become inadmissible for failure to exhaust domestic remedies, pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

4.5 In the alternative, the State party argues that the communication should be declared inadmissible on the grounds that it is moot. Considering that the authors' complaint is that they are subject to deportation without access to any form of consideration of their claim for protection and given that they have been able to apply for a PRRA, the facts supporting the complaint have ceased to exist. Recalling the Committee's jurisprudence, the State party submits that the authors can no longer complain of being victims of a violation of the Covenant, the alleged inconsistency having been remedied by the State party.¹¹ The communication should therefore be declared inadmissible under article 1, of the Optional Protocol.

4.6 The State party further submits that the evidence was insufficient to establish the authors' allegations on a prima facie basis. It argues that even if the facts as submitted by the authors were true, the alleged agent of persecution is a non-State actor, the FARC. The authors have not reported their mistreatment to the Colombian authorities and have not established that these would be unable to protect them. It underlines that the allegations concerning police inaction with respect to the first author's mother's complaints in 1997 and 2002 are not evidence that the authors could not receive police protection in present-day Colombia. The State party recalls the Committee's jurisprudence with regard to *Khan v. Canada*, in which the Committee concluded that the author had not demonstrated that the State authorities were unable or unwilling to protect him and found the communication inadmissible for lack of substantiation.¹² The State party argues that this was consistent with the approach taken by the Office of the United Nations High Commissioner for Refugees, which considers that acts by non-State actors amount to persecution within the meaning of the Refugee Convention if the acts are knowingly tolerated or if the authorities refuse, or prove unable to offer effective protection.¹³ In addition to sources consulted by the PRRA officer, the State party cites reports by Amnesty International and Human Rights Watch, which account for significant weakening of the FARC in Colombia, supporting the

¹¹ See communications No. 478/1991, *A.P.L.-v.d.M. v. The Netherlands*, decision on inadmissibility adopted on 26 July 1993, paras. 6.3 and 7(a); No. 501/1992, *J.H.W. v. The Netherlands*, decision on inadmissibility adopted on 16 July 1993, paras. 5.2 and 6 (a); No. 1291/2004, *Dranichnikov v. Australia*, Views adopted on 20 October 2006, para. 6.3.

¹² See communication No. 1302/2004, *Khan v. Canada*, decision on inadmissibility adopted on 25 July 2006, para. 5.6.

¹³ See Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, document HCR/IP/4/Eng/REV.1, para. 65.

conclusion that the authors would not face a real risk of a violation of articles 6 and 7 of the Covenant.

4.7 With regard to the authors' allegation of a violation of articles 23, paragraph 1, and 24, paragraph 1, of the Covenant, the State party submits that the authors would be deported in unity and therefore it would not have any effect on the family's or children's interest.

4.8 Finally, the State party recalls the Committee's constant jurisprudence that it is not for the Committee to re-evaluate findings of facts or evidence by domestic authorities, unless the evaluation is arbitrary or amounts to a denial of justice.¹⁴ It submits that the evaluation made by the PRRA officer was reasonable and fully supported by evidence and that it is therefore not in the competence of the Committee to re-evaluate the findings.

Authors' comments

5.1 On 30 January 2010 and 24 May 2010, the authors submitted their comments on the admissibility of their communication. In addition to the claims raised in their initial submission, the authors further claim violations of articles 2, paragraph 2, 9, paragraph 1, 10, paragraph 1, and 14, paragraph 1, of the Covenant.

5.2 The authors refute the State party's argument that they had made an asylum claim in the United States and explain that they were placed in deportation proceedings and were given a hearing on 30 April 2009 with respect to their deportation from the United States to Colombia.

5.3 The authors add to the facts as submitted and state that in June 2009, the State party's authorities released them from detention and in July 2009 served them with a PRRA with a stay. On 7 October 2009, their PRRA application was rejected and their application for leave and judicial review before the Federal Court remains pending. On 24 February 2010, the Federal Court heard the authors on the mootness of their application to re-instate the first PRRA. The decision on the issue of mootness and on whether the Federal Court has jurisdiction to hear the case remains pending. The authors explain that there has not been any hearing on the merits.

5.4 With regard to the State party's argument that the communication should be declared inadmissible for failure to exhaust domestic remedies, the authors maintain that the legal provisions of the State party are prima facie in violation of the Covenant, and therefore the case should be examined on the merits. They further argue that due to the exceptional circumstances of the case, the Committee should remain seized of the communication pending the outcome of the domestic proceedings, in particular due to the fact that their removal to Colombia would constitute a violation of the Covenant.

5.5 The authors submit that the laws, as applied to the authors, are in contravention with the Covenant and as such in violation of article 2, paragraph 2. They further submit that their prolonged detention for over four months due to alleged flight risk was in contravention to article 9, paragraph 1. They submit that in particular the administrative cancellation of their removal, it being not binding, prevented them from litigating the allegation of arbitrary detention. After their release, the authors' application for review of the detention became moot and therefore prevented any review by domestic courts. They further argue that the conditions of detention resulted in harm for the authors' older child. The child was separated from his father and his psychological condition deteriorated

¹⁴ See for example communications No. 1551/2007, *Tarlue v. Canada*, decision on inadmissibility adopted on 27 March 2009, para. 7.4; No. 1455/2006, *Kaur v. Canada*, decision on inadmissibility adopted on 30 October 2008, para. 7.3.

considerably. He became aggressive, incontinent and expressed suicidal ideas when he wanted to join his great-grandmother in heaven even though understanding that she was deceased. Furthermore, the child was not enrolled in school and only sporadic educational activities were provided by volunteers. The rest of the family also suffered from being separated from each other, which resulted in a violation of article 10, paragraph 1, in particular with regard to the elder child. Finally, the authors submit that the decision in their PRRA application was not rendered on an independent and impartial basis and based itself on litigation concerns by the Government. As such, it violated the authors' right to a fair hearing by a competent, independent and impartial court, in violation of article 14, paragraph 1.

5.6 The authors maintain that the State party's legislation applied to the authors, preventing them from making a refugee claim due to their arrival on the State party's territory from the United States, as well as barring them from making a PRRA application due to the previous removal under the Safe Third Country Agreement and their re-entry in less than six months, is in contravention to the State party's obligation to prevent violations of the Covenant, specifically the principle of non-refoulement.¹⁵ The authors recall the Committee's jurisprudence, according to which automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life,¹⁶ and maintain that the application of the State party's legislation results in automatic violation of the principle of non-refoulement and thereby constitutes a violation of articles 6, paragraph 1, and 7.

5.7 The authors submit that their complaint has not become moot, as there continues to be a live issue between the parties with regard to their PRRA. Referring to an e-mail exchange between the Department of Justice, the Citizenship and Immigration (CIC) manager and the PRRA Unit, in which the Justice Liaison officer of the CIC highlights their litigation concerns to the PRRA coordinator, the authors maintain that their PRRA decision was marked by government interference and not based on the merits of the risk application. They further submit that their PRRA was rushed and a decision was rendered in an unusual short period without allowing them to submit further evidence, including an assessment by Amnesty International on their situation. They further explain that their request for exemption under s.25 still has not been decided and therefore a live issue remains for consideration.

Further submission by the State party

6.1 On 22 June 2010, the State party provided an update of the domestic proceedings and reiterated that it requests the Committee to lift the interim measures. It further highlighted that it has not yet had the opportunity to reply to the authors' new allegations invoking articles 2, paragraph 2, 9, paragraph 1, 10, paragraph 1, and 14, paragraph 1.

6.2 The State party submits that the authors' application for judicial review before the Federal Court of their first PRRA application was rejected on 1 June 2010. The Court held that the application was moot, since the authors had already received a PRRA assessment. It further noted that it was reasonable to expect from the authors that they would make a refugee claim in the first safe country and not stay in the United States visiting the first author's mother for three months before travelling to Canada to make their refugee claim. The State party underlines that the Federal Court decision demonstrates that its system for

¹⁵ See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, paras. 12, 13 and 17.

¹⁶ See communication No. 1421/2005, *Larrañaga v. Philippines*, adoption of views on 24 July 2006, para. 7.2.

refugee protection is effective to prevent removal to a country where a person may face a violation of article 6, paragraph 1, or article 7 of the Covenant. The State party submits that the authors' communication should be declared moot under article 1, of the Optional Protocol, as the remedy sought - a risk assessment prior to removal - had already been carried out.

6.3 With regard to the authors' second request for judicial review of their negative PRRA decision before the Federal Court, the State party advises that leave has been granted and a hearing has been scheduled on 13 July 2010. The State party submits that the ongoing litigation underscores the authors' failure to exhaust domestic remedies and the communication should therefore be declared inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the 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.

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

7.3 The Committee notes that the authors' application for Pre-Removal Risk Assessment had been rejected on 7 October 2009 and that their application for leave and judicial review before the Federal Court remained pending, with a hearing having been scheduled for 13 July 2010. It further notes that on 1 June 2010, the Federal Court has rejected the authors' application, as moot, as they had already received what they had been seeking on the judicial review - a PRRA assessment. It has also noted the State party's argument that the communication should be declared inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee notes the authors' argument that despite pending domestic procedures, the Committee should remain seized of the matter due their pending removal to Colombia and due to a prima facie violation of the Covenant of the legal provisions in the State party. The Committee observes that, at the time of consideration of the communication, domestic remedies remain pending before the Federal Court of the State party. It further observes that a favourable decision by the Federal Court could effectively stop the authors' deportation to Colombia and therefore their communication before the Committee would become moot. In light of this, the Committee considers that the authors have failed to exhaust domestic remedies and declares the communication inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8. The Human Rights 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 State party and to the authors.

[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.]