UNITED
NATIONS

CCPR

International covenant on civil and political rights

Distr.
RESTRICTED*

CCPR/C/89/D/1234/2003
22 May 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Eighty-ninth session
12-30 March 2007

DECISION

Communication No. 1234/2003

Submitted by:	Ms. P.K. (represented by counsel, Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	5 December 2003 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 December 2003 (not issued in document form)
Date of adoption of decision:	20 March 2007

* Made public by decision of the Human Rights Committee.

Subject matter: Deportation of complainant to Pakistan

Procedural issues: inadmissibility ratione materiae, non re-evaluation of facts and evidence, accessory character of article 2

Substantive issues: notion of "suit at law"

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

Articles of the Optional Protocol: 2 and 3

[ANNEX]

ANNEX

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

Eighty-ninth session

concerning

Communication No. 1234/2003**

Submitted by:	Ms. P.K. (represented by counsel, Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	5 December 2003 (initial submission)

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

Meeting on 20 March 2007

Adopts the following:

DECISION ON ADMISSIBILITY

1.1 The author of the communication is Ms. P.K., a Pakistani citizen born in 1953 in Karachi, currently in hiding in Pakistan, after her deportation from Canada. She claims to be a victim of violations by Canada[1] of article 2; article 6; article 7 and article 14 of the International Covenant on Civil and Political Rights. She is represented by counsel, Stewart Istvanffy.

1.2 On 5 December 2003, in the light of the allegation by counsel that the alleged victim was subject to an imminent risk of deportation, the State party was requested, at its earliest convenience, to inform the Committee whether there was a risk that the alleged victim would be forcibly removed from Canada prior to the submission of the State party's observations on the admissibility and merits

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada and Sir Nigel Rodley.

[1] The Covenant and the Optional Protocol entered into force for Canada on 19 August 1976.

of the communication.

1.3 On 9 January 2004, in view of the State party's reply dated 8 January 2004, and taking into account the fact that the author had gone into hiding, the Special Rapporteur on New Communications and Interim Measures denied the author's request for interim measures to prevent her deportation from Canada to Pakistan. This was without prejudice to any future request for interim measures if the author was likely to be apprehended by the authorities.

Factual background

2.1 Until November 1998, the author lived in Karachi with her husband and six children. She is a former member of the Mohajir Quami Movement (MQM) in Karachi, Pakistan, where she took part in its women related activities. In 1998, after the rape of one of her relatives by Mr. S., a top leader of MQM, she quit the party, became a member of the Pakistan Peoples Party (PPP) and publicly criticized the abusive behaviour of Mr. S., who was backed by MQM armed gangs. She was allegedly a victim of an attempted sexual assault and murder by Mr. S. in August 1998, who thereafter constantly threatened her and her relatives, and persecuted her with the help of MQM members and police officers. The police did not act on her complaints against Mr. S. Because of threats to her life, she fled to Canada where she arrived on 3 November 1998.

2.2 On 6 January 1999, she applied for asylum, which was denied on 25 November 1999 by the Refugee Division of the Immigration and Refugee Board (the Board), on the grounds that she was not credible, as her testimony about the events in her country was "often evasive, hesitant, confused and full of contradictions, inconsistencies and improbabilities". Her application for leave to apply for judicial review of the Board's decision was denied by the Federal Court on 15 May 2000. In 2001, the author tried to commit suicide on three occasions.

2.3 On 24 April 2003, the author applied for a Pre-Removal Risk Assessment (PRRA), which was found to be negative on 9 October 2003. The PRRA Officer considered that the author would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Pakistan. The officer noted that the author's reasons for leaving Pakistan were not political but rather the result of a common crime perpetuated by an individual. Furthermore, the author had not made a link between her situation and the reported general situation of women in Pakistan, on which she had relied. Finally there were inconsistencies in some of the author's supporting documentation, none of which supported a finding that she would be at risk in Pakistan.

2.4 The author applied for permanent residence in Canada on humanitarian and compassionate grounds (H&C), based on allegations of personal risk in Pakistan. Her application was denied on 9 October 2003, on the grounds that it could not be concluded that the State protection for the author was inadequate in Pakistan, and that even if she was victimized by the individual who had allegedly threatened her, that would be a common crime motivated by a personal grudge against her as an individual.

2.5 On 15 November 2003, the author requested judicial review of this decision and requested a stay of deportation in the Federal Court, a remedy without suspensive effect. On 2 December 2003,

the request for stay of deportation was denied. On 6 December, the author failed to appear for her scheduled removal, and an arrest warrant was issued.

2.6 On 1 March 2004, the author turned herself in to the Canadian immigration authorities. She was released on condition that she present herself for deportation on 5 March 2004, and was deported without escort on this date.

The complaint

3.1 The author initially claimed that her deportation to Pakistan would constitute, and later did constitute, a violation of article 6 and article 7 of the Covenant, since she has been placed at severe risk of mistreatment and torture in her country, where the military and the police are routinely persecuting political activists. Moreover she would be subjected to arrest, detention, beatings, torture or even execution at the hands of the Pakistani police, because of her religious origin and her real or assumed political beliefs.

3.2 The author requests the Committee to examine the quantity and quality of the evidence in support of her case. She claims that domestic proceedings leading to the removal order against her violated article 2 and article 14 of the Covenant, as there was no fair and independent examination of the case before ordering deportation and the order of deportation is based on a presumption that all refugee claimants are lying or abusing the system. She claims that the current PRRA procedure and humanitarian review procedures do not respect the right to a remedy[2].

The State party's observations

4.1 On 27 May 2004, the State party commented on the admissibility and merits of the communication. On admissibility, it recalls that while a complainant need not prove his or her case, he or she must submit sufficient evidence in substantiation of his or her allegations to constitute a prima facie case. It submits that the author has failed to make at a prima facie with respect to her allegations under articles 6 and 7. With reference to the author's claim under these articles the State party contends that in fact the actual basis of her communication is her fear of Mr. S. Because of his actions, she allegedly quit the MQM party and joined the PPP.

[2] Counsel refers to the case of *Chahal v. United Kingdom*, European Court of Human Rights, Judgement of 15 November 1996, paragraphs 151 and 152, and invites the Committee to adopt the ECHR's interpretation.:
"151. In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant the expulsion or to any perceived threat to the national security of the expelling State.
152. Such scrutiny need not be provided by a judicial authority but, if it is not, the powers and guarantees which it affords are relevant to determining whether the remedy before it is effective."

4.2 The State party submits that the author's allegations are not credible and refers to the Immigration and Refugee Board's determination to that effect. The Board had doubts with regard to the facts relating to Mr. S. and to the fact that she was a PPP activist. It is not within the scope of review by the Committee to re-evaluate findings of credibility made by competent domestic tribunals. The state party invokes the Committee's settled jurisprudence that it cannot re-evaluate facts and evidence unless it is manifest that the evaluation was arbitrary or amounted to a denial of justice. The author has made no such allegations and the material submitted does not support a finding that the Board's decision suffered from such defects. Furthermore, both the Immigration and Refugee Board and a specially trained PRRA Officer determined that there was no serious possibility that the author would be at risk of persecution if sent back to Pakistan.

4.3 With respect to the documents submitted by the author which describe the human rights situation in Pakistan, the State party submits that the author has not demonstrated that she would be at "personal risk" in Pakistan. She has alleged not that she fears rape by Mr. S. but that she has been "targeted for detention or death by this man and his political party". So far as the State party is concerned she has not established that Pakistan does not protect its citizens against such acts by non-state agents. With regards to her fear of reprisals from MQM members because of her alleged membership in a rival party, it is submitted that she has not established that the State would not or could not protect her against MQM.

4.4 With respect to the claim under article 6 of a violation of her right to life, the State party submits that the author has not substantiated her allegation, even on a prima facie basis, that "the necessary and foreseeable consequence of the deportation" [3] would be that she would be killed if returned to Pakistan or that the State could not protect her. It concludes that the claim under article 6 should be declared inadmissible.

4.5 With respect to the allegations under article 7, the State party asserts that the author's allegations do not establish a risk to a level beyond mere theory or suspicion, and do not substantiate a real personal risk of torture. It is not sufficient to show that women in Pakistan suffer from discrimination and abuses without providing a prima facie basis for believing that the author herself is at substantial risk of acts which meet the definition of torture or which amount to cruel, inhuman or degrading treatment or punishment.

4.6 The State party refers to the definition of "torture" in Article 1 of the Convention against Torture, which requires severe pain or suffering and also state involvement or acquiescence. It submits that in applying article 7 of the Covenant 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, and refers to the jurisprudence of the European Court of Human Rights to this effect[4].

4.7 The State party emphasises that the author has not established that state protection would be

[3] See Communication No. 692/1996, *A.R.J. v. Australia,* Views adopted on 28 July 1997, paras. 6.11 to 6.13, and Communication No. 706/1996, *G.T. v. Australia,* Views adopted on 4 November 1997, paras. 8.1 and 8.2.
[4] *Bensaid v. The United Kingdom,* Application No.44599/98 (6 February 2001), para. 40.

unavailable or ineffective. Her evidence that she complained to the police about Mr. S. was considered "very vague" by the Board. The Board considered it implausible that the police would not protect her against a member of an opposition party. The State party concludes that the author has not substantiated, even on a prima facie basis, that there is a real risk that her rights as guaranteed by Article 7 would be violated by her removal to Pakistan. Even if the allegation that she fears mistreatment by an individual were true, she has failed to establish that Pakistan is unwilling or unable to protect her.

4.8 With respect to the claims under article 2, the State party submits that her claims are incompatible with the provisions of the Covenant, because article 2 does not recognise an independently available right to a remedy. It refers to the Committee's jurisprudence[5] that under article 2, the right to a remedy arises only after a violation of a Covenant right has been established and argues that consequently this claim is inadmissible.

4.9 With reference to article 14, the State party argues that refugee and protection determination proceedings do not fall into the category of either criminal charge or suit at law covered by article 14. Rather, they are in the nature of public law, and the fairness of these proceedings is guaranteed by article 13. The State party submits that, given the equivalence of article 6 of the European Convention on Human Rights and article 14 of the Covenant, the European Court's case law is persuasive. The European Court considered that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of article 6, paragraph 1, of the European Convention[6]. The State party accordingly concludes that this claim is inadmissible ratione materiae under the Covenant.

4.10 In the alternative, the State party contends that the immigration proceedings satisfy the guarantees of article 14. The author had her case heard by an independent tribunal, was represented by counsel, had access to judicial review of the negative refugee determination and had access to both the PRRA and H&C processes, including judicial review of those decisions.

4.11 On the author's general criticism of the refugee determination process and the scope of judicial review, the State party argues that it is not within the scope of review of the Committee to consider the Canadian refugee determination system in general, but only to examine whether in the present case it complied with its obligations under the Covenant.

4.12 Finally the State party submits that the Committee should not substitute its own finding on whether the author would reasonably be at risk of treatment in violation of the Covenant upon return to Pakistan, since the national proceedings disclose no manifest error or unreasonableness and are tainted by abuse of process, bias or serious irregularities. It is for the national courts of the States parties to evaluate the facts and evidence in a particular case. The Committee should refrain from becoming a "fourth instance" tribunal competent to re-evaluate findings of fact or review the

[5] See Communication No.275/1988, *S.E. v. Argentina*, inadmissibility decision of 26 March 1990, para. 5.3.
[6] *Maaouia v. France,* Application No. 39652/98 (5 October 2000).

application of domestic legislation.

Authors' comments

5.1 On 12 November 2004, counsel indicated that further to her state of post-traumatic stress and deep depression and as a result of her illegal situation, the author asked to be deported and returned to Pakistan in early March 2004, to see her family. Through her husband, counsel learned that upon her return to Pakistan, she received death threats and went into hiding. Her family expressed the wish to continue proceedings before the Committee.

5.2 On 23 March 2006, counsel commented on the State party's submission. He indicates that he has received e-mails from the immediate family of the author, and argues that her life is still seriously threatened. He claims that the agent of persecution is a high-ranking member of the governing party in Karachi, and not simply a private individual. This has consistently been interpreted as being state persecution in refugee rights jurisprudence.

5.3 Counsel affirms that the author is threatened by powerful politicians in Karachi, in a country where women receive no protection from the authorities in this type of situation. He refers to reports of international human rights organizations which underline the failure of Pakistan to prevent, investigate and punish abuses of women's rights by state agents and private actors.

5.4 On the personal risk faced by the author, counsel refers to evidence submitted during the PRRA proceedings, which included a letter from a lawyer in Karachi confirming the main facts, and an affidavit of her cousin who was raped by Mr. S., a letter from the women's wing of the PPP and two letters from her husband. Counsel also submitted evidence concerning the danger for women in situations such as the author's, as well as extracts from the author's medical and psychological files following her suicide attempts. Counsel claims that sending the author back to Pakistan, where the abuse of women's rights is met with impunity, is like a death sentence.

5.5 Counsel argues that the PRRA process does not respect the guarantees of the Canadian Charter of Rights and Freedoms and international obligations. He reiterates his claim that there is no effective remedy before the Federal Court or within the PRRA procedure, to ensure the enforcement of the international prohibition against return to torture.

5.6 With regards to judicial review by the Federal Court, counsel argues that this court has generally restricted itself to a role of control of the procedures rather than a control of the substance of Canada's international human rights obligations.

State party's supplementary submissions

6.1 On 31 August 2006, the State party commented on counsel's submissions. It argues that the author's voluntary return to Pakistan is indicative of a lack of subjective fear of persecution or death in Pakistan. It invokes the definition of "refugee" within the meaning of the 1951 Convention Relating to the Status of Refugees, which requires, inter alia, that a refugee be unwilling to avail herself, due to a well-founded fear of persecution, of the protection of her country of nationality. According to article 1C of the Convention, refugee protection ceases when a refugee voluntarily re-

avails herself of the protection of her country or has voluntarily re-established herself in her country.

6.2 The State party argues that this principle of voluntary return applies equally to the author's allegations under articles 6 and 7 of the Covenant that her removal to Pakistan put her at risk of death or torture, cruel, inhuman or degrading treatment or punishment. If her fear of return had been genuine, even if she did not wish to remain in hiding, she could have turned herself in while at the same time renewing her request for interim measures to the Committee.

6.3 The State party endorses the authorities' findings that the author is not at risk in Pakistan. In the alternative, it submits that the fact that she has been able to avoid harm is conclusive evidence of the existence of an "internal flight alternative" within Pakistan. The fact that she may not be able to return to the family home does not amount to a violation of article 7 of the Covenant.

6.4 With respect to the e-mails from the author's family, the State party argues that e-mail evidence does not establish that the author is at real risk in Pakistan. In particular, the e-mails suggest that the author may be living apart from her family as a result of marital problems, and not due to an alleged fear of a third party. The author's daughters wrote to counsel that their father is angry with their mother.

6.5 The State party points out that there is no indication from counsel what happened after the daughters urged him to give them his phone number so that the author could call him from her mobile, in March 2005. It questions the fact that despite the author's access to a mobile phone and widespread internet access in Karachi, counsel has been unable to have any contact with her. Counsel's selective presentation of evidence, and in particular the absence of any information about the author since March 2005, indicates that there is in fact no evidence which would support a finding that the author's removal to Pakistan was in violation of any of her rights under the Covenant.

6.6 On counsel's criticisms of various aspects of the Canadian refugee determination system, the State party reiterates that it is not within the scope of review of the Committee to consider the Canadian system in general.

Issues and proceedings before the Committee

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol.

7.2 The Committee notes that the State party challenges the admissibility of the entire communication. In respect of the author's claims under articles 6 and 7, the Committee recalls that States parties are under an obligation not to expose individuals to a real risk of being killed or subjected to torture or cruel, inhuman or degrading treatment or punishment upon entering in another country by way of their extradition, expulsion or refoulement[7]. It also notes that the Refugee

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

Division of the Immigration and Refugee Board, after a through examination, rejected the asylum application of the author on the basis of lack of credibility of the author. The author's application for leave for appeal was rejected by the Federal Court. The Pre-Removal Risk Assessment Officer (A) found that there was no serious reason to believe that her life would be at risk or that she would be the victim of cruel and unusual punishment or treatment. Finally, the author's application for permanent residence in the State party on humanitarian and compassionate grounds (H&C) was rejected as it could not be said that State protection for the author was inadequate in Pakistan.

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

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

7.5 The Committee recalls that the concept of a "suit at law" under article 14, paragraph 1, of the Covenant is based on the nature of the right in question rather than on the status of one of the parties[9]. In the present case, the proceedings relate to the author's right to receive protection in the State party's territory. The Committee considers that proceedings relating to an alien's expulsion, the guarantees in regard to which are governed by article 13 of the Covenant, do not also fall within the ambit of a determination of "rights and obligations in a suit at law", within the meaning of article 14, paragraph 1. It concludes that the deportation proceedings of the author do not fall within the scope of article 14, paragraph 1, and are inadmissible ratione materiae pursuant to article 3 of the Optional Protocol.

7.6 With regard to the author's claims under article 2 of the Covenant, the Committee recalls that the provisions of article 2 of the Covenant, which lay down general obligations for State parties, cannot, by themselves and standing alone give rise to a claim in a communication under the Optional

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

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

Protocol. The Committee considers that the author's claim to this effect cannot be sustained, and that accordingly it is inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

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

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

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