UNITED
NATIONS

CAT

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

Distr.
RESTRICTED*

CAT/C/33/D/133/1999
17 December 2004

ENGLISH
Original: SPANISH

COMMITTEE AGAINST TORTURE
Thirty-third session
8-16 November 2004

DECISION

[Original: French/Spanish]

Communication No. 133/1999

Submitted by:	Mr. Enrique Falcon Ríos (represented by counsel, Mr. Istvanffy Stewart)
Alleged victim:	Complainant
State party:	Canada
Date of complaint:	6 May 1999
Date of the decision:	23 November 2004

[ANNEX]

* Made public by decision of the Committee against Torture.

GE.04-45293 (E) 281204 030205

Annex

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Thirty-third session

concerning

Communication No. 133/1999

Submitted by: Mr. Enrique Falcon Ríos (represented by counsel, Mr. Istvanffy Stewart)

Alleged victim: Complainant

State party: Canada

Date of complaint: 6 May 1999

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

Meeting on 23 November 2004,

Having concluded its consideration of complaint No. 133/1999, submitted to the Committee against Torture by Mr. Enrique Falcon Ríos 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

1.1 The complainant is Enrique Falcon Ríos, a Mexican citizen, born in 1978. On arrival in Canada on 2 April 1997 he applied for refugee status. His application was rejected. He claims that his forced return to Mexico would constitute a violation by Canada of article 3 of the Convention, and that the hearing on his claim for refugee status violated article 16 of the Convention. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the attention of the State party on 18 May 1999. At the same time, acting under rule 108 of its rules of procedure, it requested the State party not to expel the complainant to Mexico while his complaint was being considered.

The facts as submitted by the complainant

2.1 The complainant lived and worked on the farm of his uncle, his father's half-brother, a soldier in the State of Chiapas. His uncle, who had bought the farm in February 1995, had deserted from the army in December 1996, without telling his family; he had also been accused of having links with the Ejército Zapatista de Liberación Nacional (EZLN) and of treason against the homeland.

2.2 On 29 December 1996, according to Mr. Falcon Ríos, the complainant and his family were taken by soldiers to a military camp for questioning about, in particular, the whereabouts of the complainant's uncle. They were released at 7 a.m. but were ordered not to leave their home. On 15 February 1997 the army returned, soldiers smashed the door and the windows of the house and again took the family to a military camp for further questioning. This time, however, they were mistreated, and the complainant's mother and sister were raped in the presence of the complainant and his father. The soldiers then tortured the father, striking him on the temple with a pistol butt until he lost consciousness. The complainant's hands were tied behind his back and he was hit in the stomach; a hood was put over his head to induce a feeling of asphyxiation. The soldiers continued to question him about where his uncle was hiding; since the complainant could not reply, they stripped him and cut him near the genitals with a knife; they then tied his testicles and yanked them while continuing to question him. Lastly, they dipped his head in a tub filled with excrement in an attempt to obtain the information they wanted.

2.3 The complainant states that when he and his family returned to the farm they were kept under military surveillance. On 20 March 1997 the soldiers returned; the complainant, his father, his mother and his elder sister were taken to different military camps. The two younger sisters, aged 6 and 9, were left alone in the house. It was the last time that the complainant saw his family. The complainant was again tortured: the soldiers placed a bag over his head and beat him severely, including around the head, thereby causing problems with his sight. They burned his arms to make him sign documents proving he had links with EZLN. The complainant finally signed the documents when the soldiers began to burn his face. They then photographed him, took his fingerprints and falsified an EZLN identity document.

2.4 The complainant states that he lost consciousness after drinking a glass of water containing an unknown substance. When he came to, he had been set free in an unknown location. He claims he was in an armed conflict zone when he regained consciousness.

2.5 Subsequent to these events, the complainant decided to leave his country on 22 March 1997. He arrived in Canada on 2 April 1997 and immediately applied for asylum.

2.6 On 20 March 1998 the Refugee Protection Division of the Immigration and Refugee Board determined that the complainant was not a refugee within the meaning of the Convention as defined in the Immigration Act, since his account was not credible. It was particularly critical of the implausible circumstances attending his uncle's desertion and the falsification of an EZLN card, there being no evidence that the movement issues identity cards to its members. On 17 April 1998 the complainant submitted an application for judicial review of the Board's decision. In a decision delivered on 30 April 1999, the Federal Court of Canada (First Instance

Division) rejected the application for judicial review of the decision by the Refugee Protection Division, as the complainant had been unable to demonstrate any error that would justify intervention by the Court.

The complaint

3.1 The complainant asserts that his rights were grossly violated in Mexico, and considers that should he return to Mexico he would again be tortured, or even executed, by the Mexican army.

3.2 In support of his allegations of the risk of a violation of article 3 of the Convention, the complainant submits a medical certificate that concludes that "the marks on the patient's body are compatible with the torture that he states he suffered", and a psychological report stating that he "was bruised, weakened by the torture he had undergone and events associated with trauma" and that "without effective support, which implies the acquisition of refugee status", it was to be feared that he "will act on his suicidal impulses".

3.3 Regarding the current situation in Mexico, the complainant stresses that there is total impunity for soldiers and police officers who commit offences against the population. In support of this assertion, he makes reference in particular to a report produced by the International Federation of Human Rights (IFHR) in 1997, which indicates that "illegal arrests, kidnappings, disappearances, extrajudicial killings, cases of torture, judicial proceedings conducted without any guarantee of individual rights, are the result, on the one hand, of the attribution to the army of ever-greater responsibility in areas relating to public security, and of the emergence, which is tolerated and even encouraged, of paramilitary groups, and, on the other hand, of the failure of the judicial machinery to guarantee and protect the rights of victims and of those subject to prosecution", adding that there is a "blatant process of militarization leading to very serious human rights violations".

3.4 In his letter dated 5 May 1999, the complainant submits that the Federal Court did not apply the criteria appropriate to a fair hearing. He claims he was not heard by an impartial, independent tribunal and was not given a fair hearing. He claims that he was the victim of improper handling which could not but result in a denial of refugee status.

State party's observations on admissibility and merits

4.1 On 15 January 2003, more than three years after the Committee informed it of the complaint, the State party submitted its observations on the admissibility and merits of the complaint.

4.2 According to the State party, the complainant has not exhausted domestic remedies. He made no request for leave or judicial review to the Federal Court of Canada regarding the refusal to grant a ministerial stay of removal on humanitarian grounds. Had he believed that the decision embodied an error of law or a significant factual error, he could have requested review by the Federal Court of the decision, which he failed to do. The complainant has not established that judicial review of an application for a ministerial stay of removal can be considered one of the exceptions provided for by the Convention (unreasonable delay and absence of effective relief).

4.3 According to the State party, such a judicial review could genuinely improve the complainant's situation. If a judicial review is accepted, the Federal Court sends the file back to the body which took the original decision or to another body for reconsideration with a view to reaching a fresh decision. The review could be conducted without unreasonable delay. The Federal Court also has authority to order the stay of an expulsion order pending consideration of an application for judicial review. The applicant must then demonstrate that the application concerns a serious issue to be settled by the Court, that he would suffer irreparable harm if no stay was granted, and that the balance of arguments lies in his favour. In this case the complainant did not submit an appeal, and has thus not exhausted all the effective remedies available.

4.4 The State party maintains that the procedure provided for by the Convention should not permit the complainant to escape the consequences of his own negligence and his failure to avail himself of available domestic remedies. It emphasizes that, even where a person risks inhuman or degrading treatment in the event of being sent home, he must respect the forms of and deadlines for domestic procedures before making application to international bodies.

4.5 The State party adds that such a person can also submit an application for a pre-removal risk assessment. If the application is granted, the individual may be authorized to remain in Canada.

4.6 The State party asserts that the communication does not meet the minimum requirements for compatibility with article 22 of the Convention. There are no substantial grounds for believing that someone is at risk of torture unless it is established that he or she personally will run such a risk in the State to which he or she will be returned. The Convention requires States parties to protect persons who are exposed to a foreseeable, real and personal risk of torture. The State party cites the decision in *Aemi v. Switzerland* [1] in which the Committee established that expulsion of the complainant would have the foreseeable consequence of exposing him to a real and personal risk of torture. The State party also refers to the Committee's general comment on the implementation of article 3 of the Convention.[2]

4.7 As for the human rights situation in Mexico, the State party points out that the situation has considerably improved since the complainant left, and in this connection refers to a number of reports from 2001 (Working Group on Arbitrary Detention, Special Rapporteur on the question of torture, Special Rapporteur on extrajudicial, summary or arbitrary executions). It adds that Mexico is a party to the Convention against Torture and the International Covenant on Civil and Political Rights and its first Optional Protocol, besides the American Convention on Human Rights, the Inter-American Convention to Prevent and Punish Torture, and the Inter-American Convention on Forced Disappearance of Persons.

4.8 The State party refers to the decision by the Refugee Protection Division, which, after having heard the complainant, concluded that his testimony contained significant gaps. It remarks that the complainant was vague about his uncle's rank in the army (which appears to have undermined his credibility), the unlikely circumstances of his uncle's desertion, the submission of a photograph supposedly taken following an assault which shows no injury, and the implausibility of a false EZLN card being made and given to the complainant, as it has never been established that the group issues identity cards to its members. According to the State

party, if the army had forced the complainant to sign the card to prove his membership of EZLN, it would have kept it as evidence. The Federal Court considered all the findings of the Refugee Protection Division and found no reason to intervene.

4.9 The State points out that the complainant was not a political activist when he lived in Mexico. It mentions that the Refugee Protection Division was better placed than the Committee to draw conclusions as to the complainant's credibility.

4.10 According to the State party, the communication does not disclose any compelling circumstance substantiating the possibility of a real and foreseeable personal risk of torture, and is therefore inadmissible as incompatible with article 22 of the Convention.

4.11 As for the alleged violation of article 16, the State party asserts that the complainant has utterly failed to establish that the hearing before the Refugee Protection Division constituted such a violation. It avers that the allegations of bias on the part of members of the Division, based on the questions that they put to the complainant, are without foundation. The State party concludes that the Committee should accordingly find the communication inadmissible.

4.12 The State party recalls the Federal Court's conclusion that the complainant had not demonstrated that the decision by the Refugee Protection Division was based on an error of fact, or on an arbitrary finding, or that it failed to take account of the available evidence. It notes the Federal Court affirmed that the complainant had not demonstrated bias on the part of members of the panel. It adds that the standard set by article 3 of the Convention was applied by the national authorities in assessing the risk to the complainant of deporting him, and that the Committee should not rely instead on its own conclusions.

4.13 The State party points out that facts and evidence are for national authorities to assess, and that the Committee should not re-evaluate findings of fact or review the application of national legislation. It invokes the case law of the Human Rights Committee, which is on record as saying that it is not that Committee's place to question the evaluation of evidence by the domestic courts unless the evaluation amounted to a denial of justice,[3] a precedent that should also be accepted by the Committee against Torture.

4.14 The State party concludes that the communication is without foundation, and that the complainant has not demonstrated a violation of articles 3 and 16 of the Convention.

Complainant's comments on the State party's observations on admissibility and merits

5.1 In observations dated 9 November 2003, the complainant maintains that he did avail himself of the option of requesting a judicial review of the decision denying him refugee status, and that that was the final remedy. The principal remedy available to him was judicial review of the refusal to grant him refugee status in March 1998.

5.2 The complainant observes that his case was cited in a study prepared by a multidisciplinary group on shortcomings in the Canadian system of public hearings for refugees in Canada, in October 2000. The hearing in which he appeared was apparently a travesty, and his case was reportedly perceived as an example of abuse in the conduct of oral proceedings.

5.3 In response to the State party's argument concerning the possibility of judicial review of the decision to deny him relief on humanitarian grounds, the complainant asserts that such a remedy would be based on the same facts as his application for refugee status. He emphasizes the futility, in his case, of seeking such a remedy when the Federal Court has already taken a position on the merits of the case. It is inconceivable that such an appeal would have provided effective relief. And the general rule of exhausting domestic remedies requires only that remedies offering effective relief be exhausted.

5.4 The complainant notes that the new procedure, termed pre-removal risk assessment by the Canadian Government, was not in existence prior to mid-June 2002 and was thus not available to him. He claims that this procedure does not respect obligations under international law or the Canadian Charter of Rights and Freedoms, owing to the absence of an independent decision-making mechanism and a lack of impartiality.

5.5 The complainant continues to assert that he was tortured by members of the Mexican army in 1996 and 1997, shortly before he submitted his communication to the Committee. In support of his application he provided medical and psychological reports as well as photographs showing that he had been tortured. He asserts that there are no inconsistencies in his account, and that there is ample proof that a great many Mexicans in the south-east of Mexico have been involved in incidents such as this.

5.6 The complainant contests the State party's argument that the human rights situation in Mexico has improved since he left the country. He maintains that there are only general statements of intent by the Mexican authorities, and that minimal progress has been made towards eradicating torture or ending impunity for those committing it.

5.7 The complainant defends the credibility of his claims about his uncle's desertion and disappearance. He maintains that persecution of members of Zapatista groups and of groups supporting them takes place throughout the whole country, contrary to the assertions by the State party. He claims to have been tortured because of his supposed sympathy towards the Zapatistas. He bears scars as a result of torture, and, if deported to Mexico, would be in imminent danger of detention or torture. He points out that the conflict in Chiapas is not over. He adds that the author of the psychological report on his mental state is a member of the support network in Montreal for victims of violence and a recognized expert in such cases.

5.8 The complainant maintains that the Canadian asylum procedure has been sharply criticized by the Canadian bar and by the Canadian Council for Refugees. He asserts that the procedure militates against the right to a hearing with proper safeguards and results in abuses comparable to those committed in his own case.

5.9 The complainant contests the State party's argument that questioning by his counsel in the examination was not restricted. He reminds the Committee of the restrictions on the questions that his counsel was authorized to raise: counsel was not allowed to ask questions about torture or the context in which it occurred.

Issues and proceedings before the Committee as to admissibility

6. Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a) and (b), of the Convention, that the same matter has not been and is not being considered under another procedure of international investigation or settlement, and that the complainant has exhausted all domestic remedies; this rule does not, however, apply if it is established that application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief to the victim.

7.1 The Committee takes note of the complainant's allegations to the effect that the Federal Court, in ruling on his case, did not apply the criteria appropriate to a fair hearing and that the internal procedure as conducted violated article 16 of the Convention. In the Committee's view, however, the complainant has not successfully demonstrated that the incidents on which his complaint is based amount to the cruel, inhuman or degrading treatment referred to in article 16 of the Convention. The complaint being insufficiently substantiated, the Committee finds this part of the communication inadmissible.

7.2 As regards the arguments relating to article 3 of the Convention, the Committee takes note of the State party's comments to the effect that internal remedies had not been exhausted since the complainant did not apply to the Federal Court for approval or judicial review of the refusal to allow him humanitarian status.

7.3 The Committee observes 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. It expressed particular concern at the apparent lack of independence of the civil servants deciding on such appeals, and at the possibility that a person could be expelled while an application for review was under way. It concluded that those considerations could detract from effective protection of the rights covered by article 3, paragraph 1, of the Convention. It 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 criteria, and not on a legal basis, and is thus ex gratia in nature. The Committee has also observed that when judicial review is granted, the Federal Court returns the file to the body which took the original decision or to another decision-making body and does not itself conduct a review of the case or hand down any decision. The decision depends, rather, on the discretionary authority of a minister and thus of the executive. The Committee adds that since an appeal on humanitarian grounds is not a remedy that must be exhausted to satisfy the requirement for exhaustion of domestic remedies, the question of an appeal against such a decision does not arise. The Committee thus concludes that all the necessary conditions have been met, and that article 22, paragraph 5 (b), does not prevent it from considering the communication.

7.4 The Committee also recalls its case law[4] to the effect that 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 remain where he is.

7.5 The Committee also notes the State party's claim that the complainant could also have requested a review of the risks of return to his country before being expelled, and if the application had been granted he might have been authorized to remain in Canada. On this point the Committee observes, in the light of the material on file, that if, in the related proceedings, an individual resubmitted an application for asylum that had already been evaluated by the Refugee Protection Division, as in the present case, it would only be any fresh evidence that would be taken into consideration, and otherwise the application would be rejected. In its view, therefore, this procedure would not afford the complainant an effective remedy; the Committee has consistently held that only effective remedies need to be exhausted.

7.6 In the light of the foregoing, the Committee finds the communication admissible insofar as it relates to a violation of article 3, and thus proceeds to discuss the case on its merits.

Issues and proceedings before the Committee as to the merits

8.1 As provided in article 3, paragraph 1, the Committee must decide whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if he were returned to Mexico. In order to take this decision, the Committee must take into account all relevant considerations, in accordance with article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the purpose of this analysis is to determine whether the person concerned would personally be in danger of being subjected to torture in the country to which he would be returned. It follows that the existence in a country of a consistent pattern of gross, flagrant or mass violations of human rights is not in itself a sufficient reason for establishing that a particular person would be in danger of being subjected to torture if he were returned to that country. There must be other reasons to suggest that the person concerned would personally be in danger. Similarly, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person cannot be subjected to torture in his own particular situation.

8.2 The Committee draws attention to its general comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

8.3 The Committee recalls the report on its visit to Mexico from 23 August to 12 September 2001,[5] and stresses that recent reports on the human rights situation in Mexico have concluded that although efforts have been made to eliminate torture, many cases of torture are still reported. However, in line with the reasoning previously advanced, although it might be possible to assert that there still exists in Mexico a pattern of human rights violations, that in itself would not constitute sufficient cause for finding that the complainant was likely to be subjected to torture on his return to Mexico; additional reasons must exist indicating that the complainant would be personally at risk.

8.4 The Committee notes that the State party has at no time challenged the authenticity of the medical and psychological reports on the author's case. In the Committee's view, those reports lend considerable weight to his allegation that he was tortured during the interrogations he underwent in a military camp. According to the medical report, Mr. Falcon Ríos bore numerous scars from cigarette burns on various parts of his body, and scars from knife wounds to both legs. The conclusion of the reporting physician was that "the marks on the patient's body are compatible with the torture that he states he suffered".

8.5 The Committee notes the State party's point that the Refugee Protection Division concluded that the complainant's testimony contained significant gaps. However, it also notes that, according to the psychologist's report, the complainant displayed "great psychological vulnerability" as a result of the torture to which he had allegedly been subjected. The same report states that Mr. Falcon Ríos was "very destabilized by the current situation, which presents concurrent difficulties", and that he was "bruised, weakened by the torture he had undergone and events associated with trauma". In the Committee's view, the vagueness referred to by the State party can be seen as a result of the psychological vulnerability of the complainant mentioned in the report; moreover, the vagueness is not so significant as to lead to the conclusion that the complainant lacks credibility. In considering the foregoing and formulating its opinion, the Committee has had due regard for its established practice, according to which it is not the Committee's place to question the evaluation of evidence by the domestic courts unless the evaluation amounts to a denial of justice.

8.6 The Committee also takes note of, and attaches due weight to, the evidence and arguments put forward by the complainant concerning his personal risk of being subjected to torture: the fact that he has been arrested and tortured in the past because he was suspected of having links with EZLN; the scars he continues to bear as a result of acts of torture which he suffered; the fact that the conflict between the Mexican Government and the Zapatista movement is not yet over and that some members of his family are still missing. In the light of the foregoing and after due deliberation, the Committee considers that there is a risk of the complainant being arrested and tortured again on returning to Mexico.

9. In the light of the foregoing, the Committee concludes that removal of the complainant to Mexico would constitute a violation by the State party of article 3 of the Convention.

10. In accordance with rule 111, paragraph 5, of its rules of procedure, the Committee requests the State party to inform it, within 90 days, of the steps it has taken in response to the present views.

[Adopted in English, French, Russian and Spanish, the Spanish 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.]

Notes

[1] Communication No. 34/1995, CAT/C/18/D/34/1995, 9 May 1997.

[2] General comment of the Committee against Torture on the implementation of article 3 of the Convention in the context of article 22 (CAT/C/XX/Misc.1, 21 November 1997).

[3] Communication No. 584/1994, para. 5.3, decision taken on 22 July 1996.

[4] Decision 170/2000, *Anup Roy v. Sweden*, 23 November 2001, para. 7.1.

[5] CAT/C/75.
