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COMMITTEE AGAINST TORTURE
Thirty-sixth session
(1 – 19 May 2006)

DECISION

Communication No. 273/2005

Submitted by:	Mr. Thu AUNG (represented by counsel)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	13 July 2005 (initial submission)
Date of present decision:	15 May 2006

Subject matter: deportation with alleged risk of torture and cruel, inhuman or degrading treatment or punishment

Procedural issues: non exhaustion of domestic remedies

Substantive issues: risk of torture on deportation; risk of cruel, inhuman or degrading treatment or punishment on deportation

Articles of the Convention: 3, 16

[ANNEX]

*Made public by decision of the Committee against Torture.

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-sixth session

Concerning

Communication No. 273/2005

Submitted by:	Mr. Thu AUNG (represented by counsel)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	13 July 2005 (initial submission)

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

Meeting on 15 May 2006,

Having concluded its consideration of complaint No. 273/2005, submitted to the Committee against Torture on behalf of Thu AUNG 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 of the Committee against Torture under article 22 of the Convention

1.1 The complainant is Mr. Thu AUNG, a Burmese national born on 8 January 1978 in Yangon, Myanmar, and currently residing in Canada, from where he faces deportation. He claims that his forcible return to Myanmar would constitute a violation by Canada of articles 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 15 July 2005, and requested it, under Rule 108, paragraph 1 of the Committee's rules of procedure, not to expel the complainant to Myanmar while his complaint is under consideration by the Committee. The request was made on the basis of the information contained in the complainant's submission and could be

reviewed at the request of the State party in light of information and comments from the State party and the complainant.

1.3 By submission of 21 December 2005, the State Party requested that the admissibility of the complaint be examined separately from the merits. On 26 January 2006, the Special Rapporteur on New Communications and Interim Measures granted the State party's request, pursuant to Rule 109, paragraph 3 of the Committee's Rules of Procedure.

The facts as presented by the complainant:

2.1 The complainant was involved in student demonstrations while attending the University of Hlaing, Myanmar, in 1998. In November 1998 he was involved in a demonstration where he was detained and questioned. In detention, the complainant alleges that the police made him sign a document stating that if he was caught in anti-government activities again, he would be detained indefinitely. After his release, he was interrogated on several occasions and he knew that the government was monitoring his activities. In 2001 the complainant distributed documents relating to human rights abuses, although he did not belong to a democracy organization. He was not caught distributing these documents. In 2001 a friend of the complainant founded a soccer (football) association ('union') and asked him to join. The complainant agreed and recruited more members to play soccer. At the time in Myanmar such associations or unions were not allowed.

2.2 In January 2002 the complainant was granted a visa to study English at the Global Village School in Vancouver, Canada. He arrived in Canada on 14 December 2002, on a student visa.

2.3 In February 2003 he applied for refugee status after his mother had informed him that the Government of Myanmar was looking for him for distributing anti-government literature. She told him that the authorities had detained his father and interrogated him about the complainant's activities. His mother also told him that one of his friends had been arrested.

2.4 The complainant's application for refugee status was dismissed on 25 September 2003. Counsel explains that the complainant did not highlight that he was a member of a soccer 'union' at the time of his application for refugee status, as he thought that 'relevant organizations' for the purposes of the application meant political organizations, not sporting organizations. He did not consider at the time that he was at risk for his involvement in the soccer 'union', and only learned of a warrant for his arrest based on his involvement in the soccer 'union' at a later stage. On 20 July 2004 the complainant made submissions under the pre-removal risk assessment (PRRA) procedure, including new evidence in the form of a letter from his father and a copy of the warrant for his arrest dated 29 December 2003. The PRRA was denied on 17 September 2004. At the hearing on 29 September 2004 the complainant was advised to return by 7 October 2004 with an itinerary to return to Myanmar. He was scheduled to leave Canada on 26 October 2004.

2.5 The complainant applied for leave and judicial review of the PRRA decision before the Federal Court of Canada on 14 October 2004, which was due to be heard on 25 October 2004. In the meantime, on 22 October 2004 a consent agreement was reached between the complainant and the Minister of Citizenship and Immigration. As part of the agreement, the complainant was required to provide new PRRA submissions by 5 November 2004, which was extended to 26 November 2004, while a stay of deportation was granted on 22 October

2004. The second PRRA was denied on 8 June 2005. The complainant was advised that he was to complete his departure requirements on 18 June 2005. An application for leave and judicial review of this PRRA decision was filed at the Federal Court on 30 June 2005. A motion to stay the removal was filed in the Federal Court on 8 July 2005. In the meantime, the complainant was notified by the Canada Border Services Agency that a travel document to Myanmar had been obtained on his behalf, and that he was scheduled to be deported on 18 July 2005[1].

2.6 On 15 July 2005 the Federal Court granted the stay of execution of the removal order, on the basis that the officer who performed the complainant's PRRA assessment had attributed little weight to the arrest warrant and had not clearly indicated whether the warrant was genuine or not.

2.7 In light of this finding, on 3 August 2005 the Special Rapporteur on new communications and interim measures of the Committee lifted the provisional interim measures previously issued by the Committee.

The complaint:

3.1 The complainant argues that he would be at risk of arbitrary arrest, beatings and torture if he were returned to Myanmar, where human rights violations within the meaning of article 3, paragraph 2, of the Convention are said to be frequent.

3.2 Counsel refers to the U.S. Department of State Report for Burma (2004) and its reports of the human rights violations in Myanmar, including the fact that in January 2004 seven students who had formed an illegal football 'union' were given sentences ranging from seven to fifteens years imprisonment. Counsel also provides reports from non-governmental sources containing information on the human rights situation in Myanmar, and that those suspected of pro-democratic political activity are killed, arrested and detained without trial. Counsel refers to evidence from a medical training program manager at the International Rescue Committee confirming that the Burmese government regularly detains those deportees that it believes left Myanmar for political reasons.

3.3 The complainant highlights that he has been active in pro-democratic Burmese groups since his arrival in Canada. Specifically, he is involved in the Action Committee for Free Burma, is a supporter of the National League for Democracy, the Burmese Children Fund as well as the Myanmar Heritage Cultural Association. There is currently a warrant out for his arrest in Myanmar for his involvement with the soccer 'union'. In addition, the complainant argues that the fact the Canadian authorities have applied for, and received, a passport on his behalf has alerted the Myanmar authorities.

State party's observations on admissibility:

4.1 On 21 December 2005, the State party contested the admissibility of the communication on two grounds. Firstly, it argues that the complainant has not exhausted domestic remedies. On 26 October 2005 the Federal Court granted the complainant's application for leave to apply for judicial review of the decision on his pre-removal risk assessment (PRRA). The hearing on the application for judicial review was scheduled for 24

[1] The State party subsequently informed the Committee that the removal order had not been enforced.

January 2006. If his application is successful, the complainant will be entitled to a new PRRA assessment. If the application is not successful, the decision of the Federal Court can be appealed to the Federal Court of Appeal if the Federal Court judge certifies that the case raises a serious question of general importance, under section 74(d) of the Immigration and Refugee Protection Act (IRPA). A decision of the Federal Court of Appeal can be appealed, with leave, to the Supreme Court of Canada. Further, if the judicial review is not successful, the complainant could also apply for a further PRRA on the basis of any new evidence that may have arisen since the last determination, although in that case he would not have the benefit of a statutory stay of removal. However, he could apply for a judicial stay of removal pending the disposition of that application. The State party refers to the jurisprudence of the Committee to find that judicial review is widely and consistently accepted to be an effective remedy[2].

4.2 In the view of the State party, the PRRA procedure is an effective remedy which should be exhausted, contrary to the Committee's jurisprudence[3]. The State party notes that during its examination the complainant would not be removed. If successful, the complainant will become a protected person and barring serious security concerns will be eligible to apply for permanent resident status, and ultimately citizenship. It also considers that the PRRA is more comprehensive than the 'post-determination refugee claimants in Canada' risk assessment, which had been considered as an effective remedy by the Human Rights Committee[4]. In the view of the State party, the Committee's decision in *Falcon Ríos* was based on the erroneous finding of fact that in the PRRA application in that case "it would only be any fresh evidence that would be taken into consideration, and otherwise the application would be rejected"[5]. It is correct that pursuant to section 113 (a) of the IRPA "an application whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection". However, the State party highlights that an exception has been read in by the Federal Court for those applicants whose claims for refugee protection had been rejected prior to the coming into force of the IRPA[6]. PRRA applications are considered by specially trained officers, trained to consider provisions of the Canadian Charter of Rights and Freedoms as well as of international human rights treaties. Further, the State party submits, contrary to the Committee's jurisprudence[7], that PRRA officers are independent and impartial, referring to the jurisprudence of the Federal Court of Canada[8]. Further, PRRA is said to be a remedy governed by statutory criteria for protection, conducted pursuant to a highly regulated process and in accordance with

[2] The State party refers to, *inter alia*, Communication No. 183/2001 *B.S.S. v. Canada*, Views adopted on 12 May 2004, paragraph 11.6.

[3] The State party refers to Communications No. 133/1999, *Falcon Ríos v. Canada*, Views adopted on 23 November 2004, paragraph 7.4 and No. 232/2003, *M.M. v. Canada*, admissibility decision of 7 November 2005, paragraph 6.4.

[4] The State party refers to Communication No. 604/1994, *Nartey v. Canada*, inadmissibility decision of 18 July 1997, paragraph 6.2; Communication No. 603/1994, *Badu v. Canada*, inadmissibility decision of 18 July 1997, paragraph 6.2; Communication 654/1995, *Adu v. Canada*, inadmissibility decision of 18 July 1997, paragraph 6.2.

[5] Communication No. 133/1999, *Falcon Ríos v. Canada*, Views adopted on 23 November 2004, paragraph 7.5.

[6] The State party refers to *Nikolayeva v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 708; *Cortez v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 725.

[7] The State party refers to Communication No. 232/2003, *M.M. v. Canada*, admissibility decision of 7 November 2005, paragraph 6.4.

[8] *Say v. Canada (Solicitor General)*, 2005, FC 739. The State party also refers to numerous Canadian Federal Court cases.

extensive and detailed guidelines. It is subject to judicial review, and there is no authority for the proposition that a discretionary remedy cannot be an effective remedy, for purposes of admissibility[9].

4.3 Further, the complainant has not yet filed an application on the basis of humanitarian and compassionate considerations, which the State party maintains would also be an available and effective domestic remedy. The assessment of a humanitarian and compassionate application, under section 25 of the IRPA, consists of a broad, discretionary review by an officer who determines whether a person should be granted permanent residence in Canada for humanitarian and compassionate reasons. The test is whether the person would suffer unusual, underserved or disproportionate hardship if he had to apply for a permanent resident visa from outside Canada. The assessing officer considers all the relevant information, including the person's written submissions. A humanitarian and compassionate application can be based on allegations of risk, in which case the officer assesses the risk the person may face in the country to which he would be returned. Included in the assessment are considerations of the risk of being subjected to unduly harsh or inhumane treatment, as well as current country conditions. In the event that such an application is granted, the person receives permanent residency subject to medical and security screening which can eventually lead to Canadian citizenship.

4.4 For the State party, the humanitarian and compassionate consideration application is also an effective remedy which should be exhausted, contrary to the Committee's jurisprudence[10]. The State party argues that the simple fact that a remedy is discretionary does not necessarily mean that it is not effective[11]. It invokes a judgment of the European Court of Human Rights in which the court determined that a discretionary remedy available to unsuccessful refugee claimants in Germany to prevent removal to a substantial risk of torture was adequate to fulfill Germany's obligations under article 3 of the European Convention on Human Rights[12]. Furthermore, while the decision adopted in humanitarian and compassionate applications is technically discretionary, it is in fact guided by defined standards and procedures and must be exercised in a manner consistent with the Canadian Charter of Rights and Freedoms and Canada's international obligations. In the event that the application is refused, the person can make an application for leave to apply for judicial review to the Federal Court on the standard of "reasonableness *simpliciter*", which means that the 'discretion' is far from absolute.

4.5 The State party challenges the Committee's reasoning in *Falcon Ríos* 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 stay where he is"[13]. The State party argues that article 3 of the

[9] *T.I. v. United Kingdom*, App. No. 43844/98, Reports of Judgments and Decisions, 2000-III; Communication No. 250/2004 *A.H. v. Sweden*, inadmissibility decision of 15 November 2005. The State party also refers to Communication No. 939/2000, *Dupuy v. Canada*, inadmissibility decision of 18 March 2005, paragraph 7.3 (HRC), concerning the effectiveness of judicial review of an application for mercy to the Minister of Justice.

[10] The State party refers, *inter alia*, to Communication No. 133/1999, *Falcon Ríos v. Canada*, Views adopted on 23 November 2004, paragraph 7.3.

[11] The State party refers to Communication No. 169/2000, *G.S.B. v. Canada*, discontinued by letter of the Committee dated 25 November 2005, in which a failed refugee's humanitarian and compassionate consideration application was granted.

[12] *T.I. v. United Kingdom*, App. No. 43844/98, Reports of Judgments and Decisions, 2000-III, paragraph 460.

[13] Communication No. 133/1999, *Falcon Ríos v. Canada*, Views adopted on 23 November 2004, paragraph 7.4.

Convention obliges states not to expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. If an individual is permitted to stay in Canada, it follows that he will not be returned to the country where he alleges to be at risk. It should not matter on what grounds a person is not removed[14]. The State party invokes the Committee's decision in *A.R. v. Sweden*[15] where it was determined that an application for a residence permit, which could be based on humanitarian grounds but which could be decided on the grounds of a risk of torture was a remedy required to be exhausted for the purposes of admissibility. The State party argues that since a humanitarian and compassionate application may also be based and approved on the ground of risk the person may face in the country to which he would be returned, it meets the requirements set out by the Committee.

4.6 Secondly, since the complainant is not in immediate danger of removal, the communication is also inadmissible under article 22, paragraph 2 of the Convention and Rule 107 (c) of the Rules of Procedure, as incompatible with article 3 of the Convention, and is manifestly unfounded under Rule 107 (b) of the Rules of Procedure.

4.7 On 10 February 2006 the State party informed the Committee that the author's judicial review application was granted on 27 January 2006. Pending the completion of the new PRRA, the complainant will have the benefit of a statutory stay of removal, and is therefore not presently at risk of removal to Myanmar. Therefore, the communication is inadmissible on the basis of non-exhaustion of domestic remedies.

Complainant's comments:

5.1 On 12 February 2006 counsel commented on the State party's observations. She notes that the complainant submitted his humanitarian and compassionate application on 17 January 2006. Further, on 27 January 2006 the Federal Court granted the judicial review and remitted the PRRA application to be determined by a new officer. New PRRA submissions were due on 17 March 2006.

5.2 The complainant argues that the PRRA is not an effective remedy for purposes of admissibility[16]. Although PRRA officers may be considered to be specially trained, they are not experts when it comes to official documents such as warrants or summons for arrests and do make erroneous findings in such regard. The fact that, in the present case, such an error occurred during the first PRRA is evidence that such findings are not an effective remedy for those facing arrest in countries such as Myanmar. The complainant further submits that although he is now subject to a new PRRA assessment, he cannot be sure that the new PRRA officer will not make the same erroneous finding in respect of the warrant and the risk. For this reason, counsel argues that the Committee should declare the communication admissible. In the alternative, should the Committee find that the communication is inadmissible, the Committee should suspend its decision until the new PRRA determination has been made.

[14] The State party refers to *T.I. v. United Kingdom* (App. No. 43844/98, Reports of Judgments and Decisions, 2000-III, paragraphs 458-459), where the European Court of Human Rights was concerned with whether there were "procedural safeguards of any kind" protecting the applicant from removal.
[15] Communication No. 170/2000, *A.R. v. Sweden*, inadmissibility decision of 23 November 2001, paragraph 7.2.
[16] Referring to Communication 232/2003, *M.M. v. Canada*, admissibility decision of 7 November 2005.

Issues and proceedings before the Committee:

6.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. The Committee has ascertained that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the individual has exhausted all available domestic remedies; this rule does not apply where it has been established that the application of the remedies has been unreasonably prolonged, or that it is unlikely, after a fair trial, to bring effective relief to the alleged victim.

6.3 The Committee takes note of the State party's contention that the complaint should be declared inadmissible under article 22, paragraph 5 (b), of the Convention since domestic remedies have not been exhausted, and since the complainant was granted a stay of removal and is not currently at risk of being deported. The Committee notes that the complainant's application for refugee status was refused, that pursuant to the new IRPA he has already completed two sets of PRRA procedures, and that he was granted a stay of removal each time. The Committee also notes the State party's statement that, when a refugee claim was rejected prior to the coming into force of the new IRPA, an exception has been made by the Federal Court for similar cases, which does not restrict PRRA submissions to new evidence that became available after the rejection of the refugee claim. The Committee recalls that the complainant subsequently applied for leave and judicial review of the second PRRA decision. On 15 July 2005, the Federal Court of Canada granted the stay of execution, on the grounds that the previous PRRA officer had attributed little weight to the arrest warrant and had not clearly indicated whether the warrant was genuine or not. Finally, on 27 January 2006 the Federal Court granted the judicial review and remitted the PRRA application to be determined by a new officer. In the view of the Committee, the decisions of the Federal Court support the contention that applications for leave and judicial review are not mere formalities, but that the Federal Court may, in appropriate cases, look at the substance of a case.

6.4 The Committee further notes that pursuant to section 232 of the IRPA Regulations the complainant is not at risk of deportation during the ongoing consideration of the new PRRA. It notes that the complainant has not addressed the State party's arguments about the effectiveness or availability of the PRRA, except to speculate that he cannot be sure that a third PRRA officer will not make new erroneous findings about the arrest warrant issued in Myanmar and the risks in that country. He has furnished no evidence that it would be unreasonably prolonged or unlikely to bring effective relief in his particular case. In light of this information, the Committee is satisfied with the arguments of the State party that, in this particular case, there was a remedy which was both available and effective, and which the complainant has not exhausted. Further, as the complainant is not presently at any risk of being deported, the Committee finds that the conditions in article 22, paragraph 5 (b), of the Convention have not been met.

6.5 In light of the foregoing, the Committee does not consider it necessary to address the effectiveness and availability of the humanitarian and compassionate ground application.

6.6 The Committee is therefore of the view that domestic remedies have not been exhausted, in accordance with article 22, paragraph 5 (b), of the Convention.

7. The Committee consequently decides:

(a) That the communication is inadmissible;

(b) That this decision shall be communicated to the authors of the communication and to the State party.

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