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

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Committee against Torture
Forty-sixth session
9 May–3 June 2011

Decision

Communication No. 395/2009

Submitted by:	H. E-M. (represented by counsel, Marie-Hélène Giroux)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	17 August 2009 (initial submission)
Date of present decision:	23 May 2011
Subject matter:	Deportation of the complainant to Lebanon
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Non-refoulement
Articles of the Convention:	3, 22 (2 and 5 (b))
Rules of Procedure:	107 (b), (c) and (e)

[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 (forty-sixth session)

concerning

Communication No. 395/2009

Submitted by:	H. E-M. (represented by counsel, Marie-Hélène Giroux)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	17 August 2009 (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 23 May 2011,

Having concluded its consideration of complaint No. 395/2009, submitted on behalf of Mr. H. E-M. 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 on admissibility

1.1 The complainant is Mr. H. E-M., born in 1966, a Lebanese national residing in Canada. He claims that his deportation to Lebanon would constitute a violation by Canada of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Marie-Hélène Giroux.

1.2 On 24 August 2009, the Committee, at the complainant's request, and through its Special Rapporteur on New Complaints and Interim Measures, requested the State party to refrain from deporting the complainant to Lebanon while his complaint was under consideration.

Factual background

2.1 The complainant played an important role within the Lebanese "Shia" party; his brother, Mr. H. E-M., was a prominent party leader. In 1989, in the town of Bourj-el-Barajneh (south-western part of Lebanon) the complainant and his brother were fired at by Hizbullah forces. Several months later, members of the Syrian army went to the family home and threatened the complainant's family. Following this incident, the complainant's brother left Lebanon to settle in Canada. The complainant, for his part, fled the region for Beirut. In 1993, tensions with the Syrian army intensified. The complainant's brother, who

was in Canada, called him and asked him to collect information on the Syrian army's activities in West Beirut. That November, the complainant was arrested by members of the Syrian army and detained in Ramlet-el-Baida (Beirut) for seven days. He was severely beaten in detention. In July 1994, the complainant's brother returned to Lebanon for a family visit; a week after his arrival, he was arrested by the Syrian army. The complainant's brother was detained at Adra in the Syrian Arab Republic for more than two years. Following this incident, and aware that he too was being sought by the Syrian army, the complainant went into hiding for two years with one of his sisters in the southern part of the country. In April 1996, the complainant left the country with his brother's two children in order to seek asylum in Canada. On 18 December 1998, Canada granted him refugee status; on 8 December 2000, he obtained permanent resident status in Canada.

2.2 On 15 November 2007, the complainant was sentenced to two years' imprisonment for aggravated assault following a knife attack on his ex-wife. On 13 December 2007, while serving his prison sentence, the complainant was sentenced to 30 additional days' imprisonment for harassing his ex-wife by mobile phone.

2.3 On 19 June 2008, the Canada Border Services Agency (CBSA) informed the complainant of its intention to request an Opinion from the Canadian Minister of Citizenship, Immigration and Multiculturalism as to whether the complainant posed a danger to the Canadian public under article 115 (2) (a) of the Immigration and Refugee Protection Act.[1] On 20 March 2009, the Minister rendered a Danger Opinion in respect of the complainant. This Danger Opinion assessed his propensity to violence, citing violent incidents against his ex-wife during the course of their marriage, as well as allegations of threats against his brother in 1998 (which had not led to a conviction), and three discipline offences committed by the complainant while in prison. Such convictions and behaviour, the Opinion claimed, would allow a host country to deny refugee status protection under article 33 (2) of the Convention relating to the Status of Refugees. With regard to the risk of torture which the complainant would allegedly be running in the event of his deportation to Lebanon, the Opinion notes that the situation in Lebanon has changed since the complainant was first granted refugee status. Hizbullah is reportedly now the protective force for Shiite Muslims in the country (the complainant being Shiite) and the Syrian forces withdrew from Lebanon in 2005. Since then they have no longer controlled Lebanese territory. Based on the above, the Opinion weighs the danger that the complainant poses to the Canadian public against the risk to which he would be exposed in the event of his deportation to Lebanon, and concludes in favour of the complainant's deportation to Lebanon and of withdrawal of his permanent resident status.

2.4 The complainant's application for leave and judicial review was denied by the Federal Court on 7 July 2009 on the grounds of failure to submit his case file. On 13 August 2009, the complainant was informed that CBSA would be authorized to proceed with his deportation as from 17 August 2009. Since 13 March 2009, the complainant has been held by the immigration services in pretrial detention pending his deportation.

The complaint

3.1 The complainant argues that his deportation would constitute a violation by Canada of article 3 of the Convention. Given that the State party granted him refugee status in 1998, it must be aware of the risks to which he would be exposed in the event of his deportation to Lebanon. As a well-known member of the Shia party opposing the Hizbullah political movement, he alleges that he would be subjected to torture and degrading treatment; members of the Shia party, he argues, are victims of systematic, serious and

[1] IRPA.

flagrant violations of their rights. The complainant adds that the Secretary-General of the United Nations stressed in one of his reports[2] that Hizbullah's maintenance of a paramilitary capacity posed a key challenge to the Lebanese Government. The Lebanese security forces are thus unable to contain Hizbullah and are not in a position to prevent violations against the complainant.

3.2 The complainant claims that the expulsion order is disproportionate to his crime, and that it contradicts the expert opinion that there is only a moderate risk of his reoffending. He also submits that his crime was an isolated incident committed in a state of inebriation and depression in the wake of his marriage break-up.

State party's observations on admissibility and merits

4.1 In a note dated 14 December 2009, the State party contests the admissibility of the complaint on the grounds that it is incompatible with the Convention, that it is insufficiently substantiated and that domestic remedies have not been exhausted. With regard to the merits, the State party denies any violation of article 3 of the Convention.

4.2 The State party recalls that the complainant, who obtained refugee status in 1998 and permanent resident status in Canada in 2000, was found guilty of aggravated assault and sentenced to 2 years' imprisonment on top of the 25 months already spent in pretrial detention. As a consequence of this conviction, CBSA issued a criminal inadmissibility report in respect of the complainant and transmitted his case to the Immigration Division of the Immigration and Refugee Board for investigation. On 25 April 2008, following a hearing at which the complainant was given the opportunity to speak, the Immigration Division determined that in accordance with domestic legislation,[3] the complainant should be effectively prohibited from Canadian territory owing to serious crime, and issued an expulsion order against him. As a result of this expulsion order, the complainant lost his permanent resident status in Canada. He appealed against the decision before the Immigration Appeal Division, but his appeal was rejected on the grounds of lack of jurisdiction.

4.3 When CBSA apprised the complainant of its intention to seek an Opinion from the Minister of Citizenship, Immigration and Multiculturalism regarding the danger the complainant might pose to the Canadian public, the complainant was told that he could, within the next 15 days, submit written comments and documentary evidence concerning the risks he would run if deported to Lebanon. The complainant refused to acknowledge receipt of this letter. On 8 August 2008, the complainant's counsel asked CBSA to extend the deadline for submitting written comments. This extension was refused since the request had already been transferred to the Minister. Counsel was, however, told that she could submit comments directly to the Minister. On 11 February 2009, CBSA provided the complainant with another opportunity to submit comments, but the complainant did not do so. Thus, at the time of issuance of the Minister's Opinion, on 20 March 2009, the complainant had still not submitted his comments on the risk to which he would be exposed if deported to Lebanon. The Minister accordingly based his Opinion on the information at his disposal and concluded that there was no risk of violation of article 3 of the Convention. Based on several documentary sources, the Minister's Opinion determined that since the end of the civil war in Lebanon in 1990, Hizbullah had not posed any danger to the civilian population, particularly to the Shiite community.[4] The State party stresses that the

[2] Press release SC/9653, 7 May 2009.

[3] IRPA, para. 36 (1) (a).

[4] These documentary sources included a report of the Integrated Regional Information Network (IRIN) of 17 December 2008, the United States Department of State report for 2008, a report of the

complainant's case is not that of an individual forced to return for reasons of criminality *despite* the genuine dangers to which he would probably be exposed; it is the case of an individual who, according to the Canadian authorities' investigations, runs no risk of torture if returned to his country of origin.

4.4 On 22 April 2009, the complainant applied to the Federal Court of Canada for leave and judicial review of the Minister's Opinion. On 7 July 2009, this application was rejected owing to the complainant's failure to deposit his case file. On 12 August 2009, the complainant appealed against the order of 7 July 2009, alleging negligence on the part of his lawyers. On 17 August 2009, the Federal Court rejected his appeal, after hearing the complainant's counsel. The grounds for the rejection were based on the argument that negligence on the part of his lawyers could not justify quashing a Federal Court decision.

4.5 The State party maintains that the complainant's communication before the Committee is inadmissible insofar as it is incompatible with the Convention on three counts: the risks alleged by the complainant do not constitute torture within the meaning of article 1; the communication is not sufficiently substantiated; and the complainant, owing to lack of diligence, has failed to exhaust the available domestic remedies. On the first count, the State party recalls that torture, as defined by article 1 of the Convention, requires that suffering be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[5] However, in the State party's opinion, there is nothing to suggest that the complainant runs any risks at the hands of the Lebanese authorities. It submits, further, that the communication is insufficiently substantiated for the purposes of admissibility, since it fails to adduce evidence of a personal risk. None of the documents submitted by the complainant make it possible to identify the "Shia party" to which he refers. No mention is made of the nature of the complainant's alleged involvement in such a party, nor is any explanation provided as to why, as a Shiite, he would have anything to fear from Hizbullah, itself a Shiite party. None of the documents submitted by the complainant refer to any dispute between Hizbullah and a party by the name of "Shia", or to any persecution of Shiites by Hizbullah.

4.6 The State party contends that the complainant seeks to substantiate his allegations based primarily on the fact of his being granted refugee status by Canada in 1998. However, refugee status was granted to the complainant on the basis of claims totally different from those put forward in his communication before the Committee. In particular, his application for asylum of 1996 makes no mention of any "Shia party" or of any political affiliation on the part of the complainant. On the contrary, in the request he implied that his family was in fact uninvolved in politics and that it was precisely his brother's refusal to become involved that had led to Hizbullah's attack in the first place. The request also suggested that the complainant was not personally targeted, but that he risked injury because he was in his brother's vicinity. Moreover, the only risk alleged by the complainant in his 1996 asylum application was that of persecution by the Syrian forces. Even if the complainant had refused to join Hizbullah during the civil war, there is nothing to suggest, more than 10 years later, that this continues to constitute a threat to his safety. Even the evidence submitted by the complainant in his communication to the Committee indicates that Hizbullah does not forcibly recruit and is not prone to reprisals. This same evidence indicates that the protection provided by the State is usually adequate, particularly outside the southern part of the country.

International Crisis Group dated 15 May 2008 and a report on Lebanon of the Immigration and Refugee Board of Canada, of 31 October 2007.

[5] Communication No. 291/2006, *S.A. v. Tunisia*, para. 15.4.

4.7 Recalling the Committee's jurisprudence, as well as its general comment No. 1, the State party stresses, further, that it is the responsibility of the complainant to establish a prima facie case for the purpose of admissibility of his communication under article 22 of the Convention. The State party maintains that in this case, these conditions have not been met.

4.8 The State party also submits that the complainant has failed to exhaust the domestic remedies available and that he has not diligently pursued the availed remedies. The complainant was given several opportunities and several months in which to submit his allegations to the Minister for Citizenship, Immigration and Multiculturalism of Canada as part of the latter's investigation of the danger the complainant posed to the Canadian public and the risks to which he might be exposed in Lebanon. However, the complainant submitted no written comment in the context of that investigation. The complainant did not, moreover, pursue his application for leave and judicial review with due diligence, omitting to submit to the Federal Court the case file in support of his application. The State party stresses that pursuant to the Committee's own jurisprudence, mere negligence on the part of counsel cannot constitute justification for failure to exhaust domestic remedies.[6]

4.9 Besides its comments on admissibility, and on the same grounds, the State party maintains that the complainant's communication should be dismissed on the merits, claiming that it fails to constitute a violation of article 3 of the Convention.

Complainant's comments

5.1 In counsel's reply, dated 23 December 2009, to the State party's observations on the admissibility and merits of the application, counsel maintains that the complainant continues to this day to run a risk if deported. Despite the official withdrawal of Syrian forces from Lebanon, Hizbullah's importance and influence has continued to grow, especially since the end of the recent conflict with Israel in 2006. The risk to the complainant has thus not diminished, since it was his refusal to become involved with the militias, Hizbullah included, which was the cause of his injuries in 1989. Despite the participation of sections of Hizbullah in the Government of Lebanon, the acts committed by this militia against individuals who oppose it are no less violent or arbitrary today. Counsel refers to several cases of unlawful detention by Hizbullah forces reported in the United States Department of State report for 2008. Counsel cites three cases respectively involving a member of the French Socialist Party, some Brazilian journalists and five employees belonging to a company carrying out a study in Beirut's southern neighbourhoods.

5.2 Counsel adds that Hizbullah's current participation in the Lebanese Government means that the State party cannot exclude the possibility that the complainant, if detained in Lebanon, may be subjected to practices prohibited under article 1 of the Convention, since such practices may be perpetrated by State officials belonging to Hizbullah or inflicted at their instigation.

5.3 With regard to the exhaustion of domestic remedies, counsel notes that the complainant acted with due diligence, and that it was his lawyer who omitted to submit the applicant's case file to the Federal Court in the context of his application for leave and judicial review.

5.4 On 29 January 2010, counsel sent the Committee a copy of her application for criminal assessment of the complainant for the purposes of determining the danger he posed to the public. This assessment finds a reduced risk of reoffending owing to encouraging factors connected with the complainant's family context and his lack of previous criminal

[6] Communication No. 307/2006, *E.Y. v. Canada*, para. 9.4.

convictions. The report mentions the fact that the complainant would be willing to undergo clinical therapy aimed at further reducing the danger he poses.

Issues and proceedings before the Committee

6.1 Before considering a claim submitted 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, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement.

6.2 Pursuant to article 22, paragraph 5 (b), of the Convention, the Committee must ascertain that the complainant has exhausted all available domestic remedies; this shall not be the rule if the application of remedies has been unreasonably prolonged or would be unlikely to bring the alleged victim effective relief.

6.3 The Committee notes that in the State party's opinion, the communication should be ruled inadmissible on the grounds that the complainant was given numerous opportunities to submit evidence that he was personally at risk of torture if he returned to Lebanon, and that at no stage of the appeal did he submit any written comments; also, that he subsequently did not pursue his application for leave and judicial review with due diligence, omitting to submit to the Federal Court a case file in support of his application. The Committee notes that in the State party's opinion, the complainant cannot use his lawyer's negligence as a pretext for eschewing his responsibility to exhaust domestic remedies. The Committee takes note, also, of the complainant's argument that he did act with due diligence, but that it was his lawyer who omitted to submit the file to the Federal Court, and that he cannot consequently be blamed for this negligence.

6.4 The Committee recalls its consistent jurisprudence whereby errors made by a lawyer privately hired by the complainant cannot normally be imputed to the State party.[7] The Committee notes, moreover, that the complainant was on several occasions during the domestic procedures requested to provide proof that he continued to be personally at risk of torture in the event of his expulsion to Lebanon; that the complainant has never availed himself of such opportunities, nor explained his failure to do so. Thus, without being required to address the other claims made by the parties, the Committee concludes that the complainant has not availed himself of opportunities to exhaust all domestic remedies, remedies which are now closed as a result of the prescription of remedies in domestic law.

6.5 The Committee is thus of the opinion that domestic remedies have not been exhausted as required by article 22, paragraph 5 (b) of the Convention.

7. The Committee against Torture consequently decides:

(a) That the communication is inadmissible;

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

[Adopted in English, French (original version) and Spanish. Will subsequently be issued in Arabic, Chinese and Russian in the annual report of the Committee to the General Assembly.

[7] Communication No. 284/2006, *R.S.A.N. v. Canada*, para. 6.4; communication No. 307/2006, *E.Y. v. Canada*, para. 9.4.