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

Interim Report in follow-up to the review of Canada's Sixth Report

August 2013

Introduction

1. On May 21 and 22, 2012, Canada appeared before the United Nations Committee against Torture ("the Committee"), for the review of Canada's sixth periodic report on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("the *Convention*"). The Committee issued its Concluding Observations for Canada on June 25, 2012.[1]

2. Canada accepts the Committee's invitation, in paragraph 30 of its Concluding Observations, to submit its seventh periodic report under the Committee's optional reporting procedure by June 1, 2016.

3. At paragraph 29 of its Concluding Observations, the Committee requested follow-up information in response to the observations and recommendations contained in paragraphs 12, 13, 16, and 17. Canada provides the following information in response.

Recommendation 12

Security Certificates under the Immigration and Refugee Protection Act

The Committee recommends that the State party reconsider its policy of using administrative detention and immigration legislation to detain and remove non-citizens on the ground of national security, inter alia, by extensively reviewing the use of the security certificates and ensuring the prohibition of the use of information obtained by torture, in line with relevant domestic and international law. In that regard, the State party should implement the outstanding recommendations made by the Working Group on Arbitrary Detention following its mission to Canada in 2005, in particular that detention of terrorism suspects be imposed in the framework of criminal procedure and in accordance with the corresponding safeguards enshrined in the relevant international law (E/CN.4/2006/7/Add.2, para. 92).

Use of Security Certificates

4. The use of security certificates is exceptional. Currently there are only three individuals who are subject to a security certificate. Canada uses security certificates in exceptional circumstances when a permanent resident or foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, and when classified information is required to establish allegations of that individual's inadmissibility. For further details, Canada refers the Committee to the

[1] U.N. Doc. CAT/C/CAN/CO/6, on-line: www2.ohchr.org/english/bodies/cat/docs/CAT.C.CAN.CO.6.doc

information provided at paragraphs 56-69 and 132-133 of Canada's 2012 Response to the Committee's List of Issues ("Canada's 2012 Response to the Committee").[2]

5. In a notable new development, as the Committee is aware, in *Re Harkat*, Mr. Mohamed Harkat has challenged the constitutionality of the new security certificate regime. The Federal Court dismissed the constitutional challenge. Since the submission of Canada's 2012 Response to the Committee, the Federal Court of Appeal also dismissed the constitutional challenge, and specifically, concluded that the enhanced procedures in the new regime ensure a fair process and that the scheme is constitutional.[3] The Supreme Court of Canada will consider the *Harkat* case in the fall of 2013.

Ensuring the prohibition of the use of information obtained by torture, in line with relevant domestic and international law

6. Canada refers the Committee to the information provided at paragraphs 7 and 65 of Canada's 2012 Response to the Committee, specifically explaining that the Federal Court is responsible for determining whether a security certificate has been issued on a reasonable basis by the Ministers of Citizenship and Immigration and Public Safety. The Federal Court reviews the decision in relation to all the information presented to it. This includes "reliable and appropriate" information presented by the Ministers. However, pursuant to section 83(1.1) of the *Immigration and Refugee Protection Act* ("IRPA"), such information does not include "information that is believed on reasonable grounds to have been obtained as a result of the use of torture within the meaning of section 269.1 of the *Criminal Code*, or cruel, inhuman or degrading treatment or punishment within the meaning of the Convention Against Torture".

Procedural safeguards relating to detention under the security certificate regime

7. Detention under the security certificate regime is only sought if a certificate has been issued and if there are reasonable grounds to believe that the person is a danger to national security or to the safety of any person, or that the person is unlikely to appear at a proceeding or for removal. Detention procedures are subject to appropriate procedural safeguards, enacted by statute, that ensure that Canada complies with its international obligations.

8. There are effective mechanisms for regular and meaningful judicial review, set out in the IRPA, to ensure that individuals' liberty is constrained to the minimal extent necessary. Review of the detention of an individual subject to a security certificate is conducted by a judge of the Federal Court. The judge will only order an individual's continued detention under the security certificate regime if the judge is satisfied that the individual's release with conditions would be injurious to national security, that it would endanger the safety of any person, or that the person is unlikely to appear at a proceeding or for removal. Detention is not a punitive measure.

[2] U.N. Doc. CAT/C/CAN/Q/6/Add.1, online: www2.ohchr.org/english/bodies/cat/docs/CAT.C.CAN.Q.6.Add.1_en.pdf
[3] 2012 FCA 122, [2012] 3 F.C.R. 635, online: http://canlii.ca/t/fr330.

9. The first review is conducted 48 hours after initial arrest and subsequently at least once every 6 months. The Federal Court judge takes into consideration the specific circumstances of each individual in determining which conditions should be imposed upon release (and subsequently, which conditions remain appropriate upon review), based on an individualized assessment of the level of danger the individual poses and/or if they are unlikely to appear for proceedings or for removal.

10. Currently, all three individuals who are subject to a certificate are on release with conditions, which have been significantly reduced over time by judges of the Federal Court.

11. No Canadian court has found that an individual's detention under the security certificate regime amounted to cruel or unusual treatment or punishment contrary to section 12 of the *Canadian Charter of Rights and Freedoms*. Canada refers the Committee to the information provided at paragraphs 60-61 of Canada's 2012 Response to the Committee, concerning detention in the security certificate context.

Recommendation 13

Immigration detention

The Committee recommends the State party to modify Bill C-31, in particular its provisions regulating mandatory detention and denial of appeal rights, given the potential violation of rights protected by the Convention. Furthermore, the State party should ensure that:

(a) Detention is used as a measure of last resort, a reasonable time limit for detention is set, and non-custodial measures and alternatives to detention are made available to persons in immigration detention; and

(b) All refugee claimants are provided with access to a full appeal hearing before the Refugee Appeal Division.

Detention in the immigration context

12. Bill C-31, the *Protecting Canada's Immigration System Act* ("PCISA"),[4] received Royal Assent on June 28, 2012. The PCISA does not significantly change the detention regime that applies in the vast majority of cases. An explanation of the regular regime is available online: www.cbsa-asfc.gc.ca/media/facts-faits/007-eng.html

13. The PCISA provisions relating to immigration detention affect only a small and exceptional subset of foreign nationals: "designated foreign nationals". The PCISA

[4] S.C. 2012, c. 17, online: http://laws-lois.justice.gc.ca/eng/AnnualStatutes/2012_17/.

authorizes the Minister of Public Safety to designate an arrival as irregular only in specific circumstances where the use of immigration detention is necessary. In particular, the Minister may make a designation when, having regard to the public interest, the Minister:

- is of the opinion that the assessment of the claims of the foreign nationals in the group cannot be conducted in a timely manner (including because of challenges in determining the identities or admissibility of the foreign nationals); or

- has reasonable grounds to suspect that their arrival results from a human smuggling offence committed for profit, or for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

14. If the Minister designates an arrival as irregular, those foreign nationals who entered Canada as part of the group become "designated foreign nationals". Designated foreign nationals who are 16 years or older at the time of arrival are subject to mandatory initial arrest and detention in order to give border authorities sufficient time to conduct investigations into the identity and admissibility of those who have arrived.

15. There are a number of safeguards to ensure that detention in such cases continues no longer than is necessary, including:

- Regular detention reviews before the quasi-judicial and independent Immigration Division of the Immigration and Refugee Board ("IRB"). These reviews must be held within 14 days of initial detention and subsequently at intervals of 6 months from the previous review. At these reviews, the Immigration Division can order release if satisfied that grounds for detention no longer exist. The burden is on the Minister to demonstrate, on a balance of probabilities, that there are reasons warranting continued detention. On all reviews after the initial 14-day review, the Immigration Division must consider whether alternatives to detention are available;

- The Minister's authority to grant release to a designated foreign national on application by the detainee if the Minister is satisfied that exceptional circumstances exist, or on the Minister's own initiative if he or she is satisfied that the grounds for detention have ceased to exist;

- Legislative provision for release where a foreign national is determined to be a refugee or person in need of protection by the IRB; and

- The availability of judicial review in Federal Court to challenge decisions, either of the Immigration Division ordering continued detention or of the Minister declining to grant release.

16. Canada does not set time limits for immigration detention. In *Charkaoui v. Canada (Citizenship and Immigration)*,[5] the Supreme Court of Canada implicitly rejected the

[5] [2007] 1 S.C.R. 350, online: http://canlii.ca/t/1qljj.

necessity of imposing strict timelines for immigration detention and instead emphasized the need for regular, ongoing and meaningful review to ensure that immigration detention only occurs when it is necessary and justified. Furthermore, Canada views the timelines for detention reviews before the Immigration Division as reasonable.

Access to the Refugee Appeal Division

17. PCISA established a Refugee Appeal Division (RAD) within the IRB. The RAD will provide an opportunity for most failed claimants to appeal a negative decision of the Refugee Protection Division (RPD). Proceedings in the RAD will primarily occur through written submissions with decisions typically made by a single member panel.[6] Claimants with a right of appeal will be able to ask the Federal Court to review a RAD decision. More information on the RAD is available online: www.irb-cisr.gc.ca/Eng/reform/Pages/rac31sr-radsar.aspx

18. There will be no access to the RAD for a number of specified groups. This, coupled with faster processing timelines which would lead to faster removals, is intended to deter abuse of the system. For the most part, these groups of claimants will have come to Canada either from a Designated Country of Origin, which is generally a non-refugee producing country such as those in the EU, or via a country with which Canada has a Safe Third Country Agreement (i.e., the United States). Also excluded from accessing the RAD would be individuals whose claims have no credible basis or are manifestly unfounded, as determined by the IRB, and those who arrive as part of a designated irregular arrival.

19. Canada emphasizes that despite these limited restrictions on access to the RAD, refugee claimants in Canada have access to effective remedial review processes as outlined below. These processes ensure that Canada fulfills its international obligations to provide effective remedial processes for the prevention of *refoulement*.

20. Subject to certain ineligibility periods, failed refugee claimants have the right to apply for a pre-removal risk assessment, in order to present new evidence that arose after the RPD's refusal decision or that the claimant could not reasonably have been expected to present at the administrative tribunal stage. The Minister has the authority to exempt foreign nationals from the ineligibility periods in appropriate circumstances.[7]

21. Furthermore, all claimants can ask the Federal Court to judicially review a negative administrative tribunal decision. Failed claimants can also apply to the Federal Court for a stay of removal pending the determination of their application to the Federal Court for leave and for judicial review, as was the case prior to the creation of the RAD under PCISA.

[6] The IRB Chairperson may, in some instances, direct that an appeal be decided by a three-member panel; decisions by a three-member panel will be binding for the RPD and for RAD single member panels.
[7] Additional information on the PRRA is available online: www.cic.gc.ca/english/refugees/reform-ppra.asp. See also: www.cic.gc.ca/english/refugees/inside/prra.asp.

Recommendation 16

Torture and ill-treatment of Canadians detained abroad

In the light of the findings of the Iacobucci Inquiry, the Committee recommends that the State party take immediate steps to ensure that Abdullah Almalki, Ahmad Abou Elmaati and Muayyed Nureddin receive redress, including adequate compensation and rehabilitation. Furthermore, the Committee urges the State party to promptly approve Omar Khadr's transfer application and ensure that he receives appropriate redress for human rights violations that the Canadian Supreme Court has ruled he experienced.

Abdullah Almalki, Ahmad Abou Elmaati and Muayyed Nureddin

22. Canada provided information on the Iacobucci Inquiry[8] at paragraphs 325-327 of its 2012 Response to the Committee. In recent years, Canada has made a number of changes to guidelines and policies regarding information sharing among different agencies, and it has enhanced training for consular officials. These changes respond to many of the concerns raised in both the O'Connor Commission[9] and Iacobucci Inquiry reports.

23. With respect to Messrs. Almalki, Elmaati and Nureddin specifically, these matters are currently the subject of litigation before Canadian courts, so Canada is unable at this time to provide further information on its response to Commissioner Iacobucci's findings in relation to them.

Omar Khadr

24. On September 29, 2012, Mr. Omar Khadr, a Canadian citizen, was transferred from Guantanamo Bay, Cuba, into Canadian custody by the United States (U.S.) pursuant to Canada's *International Transfer of Offenders Act*.[10]

Recommendation 17

Intelligence information obtained by torture

The Committee recommends that the State party modify the Ministerial Direction to CSIS to bring it in line with Canada's obligations under the Convention. The State party should

[8] The full name of the Iacobucci Inquiry is the "Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin". Its Final Report is available online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/en/documents/final-report.htm.

[9] The full name of the O'Connor Commission is the "Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar". Its Final Reports are available online: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/26.htm.

[10] S.C. 2004, c. 21, online: http://canlii.ca/t/lh5b.

strengthen its provision of training on the absolute prohibition of torture in the context of the activities of intelligence services.

25. Canada remains firmly committed to implementing its obligations with respect to the prevention and prosecution of torture and cruel, inhuman or degrading treatment. This extends to concerns with respect to information sharing with foreign entities. Canadian law prohibits the use of any statements established to have been made as a result of torture as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.[11]

26. As discussed in Canada's original submission, two Commissions of Inquiry – the 2006 O'Connor Commission and the 2008 Iacobucci Inquiry – raised concerns about the Government of Canada's information sharing practices with foreign entities.

27. In 2011 the Minister of Public Safety issued Ministerial Directions ("MDs") on "Information Sharing with Foreign Entities" to the Canadian Security Intelligence Service (CSIS), Royal Canadian Mounted Police (RCMP), and Canada Border Services Agency (CBSA). The intent of the MDs was to establish a coherent and consistent policy on decision-making processes regarding information sharing where there may be a risk of mistreatment. No changes to the MDs are anticipated.

28. As is clearly stated in the MDs, Canada neither promotes nor condones the use of torture or other unlawful methods of investigation, and opposes in the strongest possible terms the mistreatment of any individual by any foreign entity for any purpose.

29. The MDs reference Canada's legal obligations regarding information sharing with foreign partners. As the MDs make clear, Canada is aware of and meets its obligations under international law, including under the *Convention* and the *International Covenant on Civil and Political Rights*. Additionally, the MDs emphasize that torture is an explicit offence under the *Criminal Code* of Canada, and that the *Canadian Charter of Rights and Freedoms* affords strong protections against torture and other cruel, inhuman, or degrading treatment. The MDs reinforce that Canadian officials must and do comply with all of these legal obligations.

30. The MDs stipulate important procedural safeguards that agencies must have in place in order to share and use foreign entity information. First, agencies must take all reasonable measures to reduce the risk that any action on their part might promote or condone the use of mistreatment. Second, they must have in place reasonable and appropriate measures to identify foreign entity information that is likely to have been derived from mistreatment, and must properly characterize this information in any further dissemination of it.

31. In recognition of the seriousness with which Canada views this issue, the MDs ensure that senior officials become involved in the decision making process when there is a potential

[11] *Criminal Code* s. 269.1(4), online: http://laws-lois.justice.gc.ca/eng/acts/C-46/page-129.html#docCont; s. 83(1.1) IRPA (see para. 8 above) ; and s. 7 of the *Charter*, which protects the right to a fair trial in Canada.

risk associated with sharing information. The greater the risk, the higher the level of approval required. In the most serious cases, the matter must be referred to the Deputy Head; and at his or her discretion, to the Minister. As the MDs state, while a broad range of factors will be considered, decisions will be made only in accordance with "Canada's legal obligations".

32. As such, in Canada's view, the MDs provided to CSIS, RCMP and the CBSA are fully consistent with Canada's domestic and international obligations, and represent a principled and proportionate response to terrorism and other threats to national security, while at the same time promoting and upholding the values Canada seeks to protect.

33. The Committee may also wish to note that both the MDs and actual information sharing practices are subject to review as a matter of ongoing practice. For example the Security Intelligence Review Committee may, on its own initiative, review all CSIS activities and access any information held by it, with the exception of Cabinet documents. The Canadian government has also recently tabled Bill C-42, the *Enhancing Royal Canadian Mounted Police Accountability Act*, which proposes to replace the existing Commission for Public Complaints against the Royal Canadian Mounted Police with the proposed Civilian Review and Complaints Commission. This independent Commission would have new powers and authorities, strengthening the review of the activities conducted by the RCMP.

34. With respect to human rights training in the context of the activities of intelligence services, the Department of Justice provides training to officials at CSIS on Canada's international human rights obligations and other relevant legal topics. This training assists them in decision-making related to international information sharing. In addition, the Department of Justice periodically reviews this training to ensure it remains up to date and as complete as possible.