Canadian policy on deportation to torture:
Examples of "security certificate" detainees

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1. "Exceptional Circumstances"

Although Canadian immigration law – the Immigration and Refugee Protection Act (IRPA) - states that the law is to be applied in a manner that "complies with international human rights instruments to which Canada is signatory", and although Canada has signed the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in which there is a clear prohibition on returns to torture, Canada is taking the position that, in "exceptional circumstances," it can deport people who face torture.

IRPA allows immigrants in Canada to apply for "protection" if they are at risk of deportation to torture. This is a safeguard to prevent returns to torture, death or other mistreatment. However, people who have been labelled security threats are explicitly excluded from the right to apply for protection. It is this exception, backed up by a certain interpretation of the Suresh Supreme Court ruling, that Canada has invoked to deny protection to security certificate detainees and clear the way for their deportation to torture.

This Canadian policy and practice and its legal framework have been sharply criticised by the UN Committee against Torture (May 2005) and the UN Human Rights Committee (November 2005), which noted its concern with Canadian "policy that, in exceptional circumstances, persons can be deported to a country where they would face the risk of torture or cruel, inhuman or degrading treatment, which amounts to a grave breach of article 7 of the Covenant." The Committee recommended that Canada,

> "should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. Such treatments can never be justified on the basis of a balance between society's interests and the individual's rights under article 7 of the Covenant. No person, without any exception, even those suspected of presenting a danger to national security or the safety of a person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. [Canada] should clearly enact this principle into its law."

Canada has not, however, changed its policy or legislation.

2. "Diplomatic Assurances"

In addition, when considering deporting individuals who might be at risk, Canada regularly seeks "diplomatic assurances" from foreign governments that no harm will come to deportees. This practice has been exposed by a Human Rights Watch report of April 2004 as, at best, lacking credibility:

> "Some governments ... are returning alleged terrorist or national security suspects to countries where they are at risk of torture or ill-treatment. Governments have justified such acts by relying on diplomatic assurances—formal guarantees from the government in the country of return that a person will not be subjected to torture upon return. States secure diplomatic assurances in advance of return

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> and claim that by doing so, they comply with the absolute prohibition in international law against returning a person—no matter what his or her alleged crime or status—to a place where he or she would be at risk of torture or ill-treatment. Some states appear to be returning people based on diplomatic assurances with the knowledge that torture will be used upon return to extract information and confessions regarding terrorist activities and associations. ... The dangers of relying on diplomatic assurances as a safeguard against torture are apparent."
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> - *Empty Promises: Diplomatic Assurances No Safeguard against Torture*, www.hrw.org

It is known, for example, that the United States sought and obtained diplomatic assurances from Syria before sending Maher Arar to that country, where he was tortured brutally for a year. Canada's cynical use of diplomatic assurances was a focus of a second Human Rights Watch report, *Still at Risk* (April 2005), which specifically cited the cases of Adil Charkaoui and Mohammad Mahjoub (www.hrw.org).

In August 2005, the UN Special Rapporteur on questions relating to torture released a statement on diplomatic assurances, noting,

> "The fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk. ... the Special Rapporteur requests Governments to refrain from seeking diplomatic assurances and the conclusion of memoranda of understanding in order to circumvent their international obligation not to deport anybody if there is a serious risk of torture or ill treatment."

Canada has continued to seek "diplomatic assurances" to circumvent its international obligations not to deport anybody if there is a risk of torture or ill treatment.

3. Examples of "Security Certificate" Detainees

Four men are currently being detained without charge on secret evidence under a "security certificate", part of the Immigration and Refugee Protection Act (IRPA). A fifth man is out on bail under strict conditions. None have been convicted or even charged with any crime. None knows how or when the detention will end. They are all being held under threat of deportation to torture.

Below are details on four of their cases. Their situations are not unique: other migrants are being subject to similar treatment by Canada, including the fifth security certificate detainee, Mohamed Harkat.

Hassan Almrei, Syrian refugee
held without charge since October 2001 in Toronto

> "Given my experience, and what I lived through, and what I heard happening to other people in prison in Syria, I believe Mr. Almrei would face the same ordeal, if not worse. I still cannot believe that human beings treat human beings that way in Syrian prison. There is nothing that justifies sending people to countries where torture is commonplace."
>
> *- Maher Arar*

"Even if Mr. Hassan Almrei were to be at risk [of torture or cruel and unusual punishment], I am of the opinion, pursuant to s. 115(2)(b) of the Immigration and Refugee Protection Act, that he should not be allowed to remain in Canada on the basis of danger to the security of Canada."

- Minister's delegate, 23 Oct. 2003

This decision (23 October 2003) was reviewed by Federal Court Justice Edmond Blanchard, who concluded in March 2005 that it was "patently unreasonable," adding that the minister's delegate "rendered a decision based on erroneous findings of fact that she made in a perverse manner." The government was asked to write a new decision. Mr. Almrei is still waiting for the new decision.

Mahmoud Jaballah, Egyptian Refugee
held 9 months in 1999, released, re-arrested August 2001 and held without charge ever since

"It is my opinion that there are substantial grounds for believing that the applicant [Jaballah] would be killed or tortured should he be required to return to Egypt."

- Pre-removal Risk Assessment Officer, Immigration Canada, 15 August 2002

"Despite the PRRA officer's assessment, which I am obliged to accept, that Mr. Jaballah is at substantial risk, I am of the opinion, pursuant to para 113(d) of the Immigration and Refugee Protection Act, that his application for protection should be refused on the basis of danger to the security of Canada."

- Minister's delegate, 30 December 2003

Jaballah's protection decision (30 December 2003) was rejected as "patently unreasonable" by Federal Court Justice Andrew MacKay on 22 March, and the Minister was asked to rewrite it.

A new decision was issued in September 2005. The Minister's delegate affirmed that "there are substantial grounds for believing that the applicant would be tortured or killed should he be required to return to Egypt." The delegate then denied him protection.

In March 2006, the judicial review of the protection decision was released, upholding the lawfulness of the decision, but refusing to comment on the deportation issue.

Mohammad Mahjoub, Egyptian Refugee
held without charge since June 2000 in Toronto

"It is my opinion that, on the balance of probabilities, Mr. Mahjoub could suffer ill-treatment and human rights abuses after he is detained [if returned to Egypt]. ... However, it is my opinion that he should not be allowed to remain in Canada because he is a danger to the security of Canada as per section 115(2)(b) of the Act."

- Minister's delegate, 22 July 2004

This decision (22 July 2004) was the subject of a judicial review by Federal Court Justice Eleanor Dawson, who concluded that the decision was "patently unreasonable" and needed to be remitted to the government for another assessment, noting the minister's delegate "did not consider whether the avoidance of torture would constitute a good reason" for allowing Mahjoub to stay in Canada.

Adil Charkaoui, Permanent Resident of Canada
held without charge from May 2003 to February 2005, currently under strict conditions;
has not yet had any trial, not even the limited review permitted under the security certificate

> "On the assessment of Amnesty International, there exist serious grounds to believe that Mr. Charkaoui would be victim of torture, cruel and inhumane treatment; even a death sentence has become more than probable since the latest reform of the Moroccan penal code."
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> *- Amnesty International, 28 July 2003 (unofficial translation from French)*

> "... there exists a probability of torture, of threat to life, and of being subject to cruel and unusual treatment or sentence if he returns to Morocco."
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> *- Pre-removal risk assessment agent, Immigration Canada (21 August 2003 but withheld from Charkaoui until April 2004)*

> "... the extent of allegations reported by families and lawyers and the effective inability to challenge the admission of confessions alleged to have been coerced, leave us concerned about the risks that Mr. Charkaoui might face if he is compelled to return to Morocco."
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> *- Human Rights Watch, 25 March 2004*

> "I adopt a different point of view from that of the pre-removal risk assessement agent, because I was able to consult ... the document containing the assurances of the Moroccan authorities ... According to this document, I note that Mr. Charkaoui is not the object of any arrest warrant in Morocco and that the Moroccan authorities confirmed that they would not prosecute him. .... In the event that I have underestimated the risk that Mr. Charkaoui faces, I am convinced that he falls into the criteria established by the Suresh case ... Consequently, we should not permit him to remain in Canada."
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> *- Minister's delegate, August 2004*

Diplomatic assurances were sought by Canada on 18 February 2004. They were obtained in a letter from Morocco, 18 April 2004, which states that Morocco has laws against torture in compliance with international law, and in any case had no judicial proceedings against Charkaoui.

> "As we know all too well from the experience of Maher Arar, diplomatic assurances are no guarantee against torture. ... Morocco, together with Egypt and Jordan, are often cited as the three countries on which the United States relies to render suspects up to torture. A Canadian decision to refuse protection to Mr. Charkaoui raises serious questions about Canada's possible complicity with this practice of rendition."
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> *- International Civil Liberties Monitoring Group, 17 August 2004*

In February 2005, the Minister of Justice of Morocco suddenly announced that Morocco did have a warrant after all – issued but not executed - against Charkaoui since September 2004. Canada immediately denied that Morocco had a warrant for Charkaoui's arrest. The situation continues to be very murky, not least because the Moroccan prisoner whose confession seems to be the basis for Moroccan interest in Charkaoui has been reported in the media as saying that he was tortured and forced to sign the confession blindfolded. The situation certainly raises serious questions for Canada, particularly in light of the Arar, Al Malki and El Maati cases.

By March 2005, the Minister of Immigration was forced to announce that the August 2004 decision to deny protection to Mr. Charkaoui should be reassessed, in light of the developments. Mr. Charkaoui's case has been suspended ever since, awaiting a new decision. Meanwhile, he lives in limbo, under virtual house arrest, with the ever-present threat of being sent to torture.

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