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

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Committee against Torture

Communication No. 370/2009

Decision adopted by the Committee against Torture at its forty-eighth session, 7 May–1 June 2012

Submitted by:	E.L. (represented by counsel, Mr. Carlos Hoyos-Tello)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	14 January 2009 (initial submission)
Date of decision:	21 May 2012
Subject matter:	Risk of deportation of complainant to Haiti
Procedural issues:	Inadmissibility *ratione materiae* and *ratione personae*
Substantive issues:	Deportation of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture
Articles of the Convention:	3 and 22

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-eighth session)

concerning

Communication No. 370/2009

Submitted by:	E.L. (represented by counsel, Mr. Carlos Hoyos-Tello)
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	14 January 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 21 May 2012,

Having concluded its consideration of complaint No. 370/2009, submitted to the Committee against Torture by E.L. 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 against Torture

1.1 The complainant, Mr. E.L., was born in 1961 in Haiti and is a Haitian national. He claims that his removal to Haiti would constitute a violation by the State party of article 3 of the Convention. The complainant is represented by counsel, Mr. Carlos Hoyos-Tello.

1.2 On 11 February 2009, in application of rule 108, paragraph 1, of its rules of procedure, the Committee asked the State party not to deport the complainant to Haiti while his complaint was being considered. On 28 December 2009, in the light of the information submitted by the State party, the Committee decided to withdraw its request for interim measures.

The facts as submitted by the complainant

2.1 The complainant arrived in Canada on 21 November 1990 and became a permanent resident, sponsored by his first wife. On 9 April 2003 he was found guilty of assault and given a two-year suspended sentence. On 12 June 2006 he was found guilty of another offence, thereby violating the conditions of his suspended sentence, and was fined 50 Canadian dollars. On 29 June 2007 he was found guilty of importing narcotics, possession of narcotics for the purpose of trafficking, and possession of prohibited substances, and was

sentenced to 31 months in prison. On 11 December 2007 his permanent residency was revoked by Citizenship and Immigration Canada after he was declared inadmissible to Canada on grounds of serious criminality.

2.2 On 31 December 2007, after a deportation order had been issued, the complainant applied for refugee status. The application was dismissed because of his inadmissibility on grounds of serious criminality. On 21 April 2008 both his pre-removal risk assessment (PRRA) application and his humanitarian and compassionate (H&C) application were rejected. On 27 May 2008 the deportation was temporarily suspended in order to allow the Federal Court to carry out a judicial review of the negative decisions on the PRRA and H&C applications. On 5 January 2009 the Federal Court rejected both applications. The court held that the complainant had not submitted any evidence to substantiate his claim that neither medical care by a competent cardiologist nor instruments for replacing his pacemaker batteries were available in Haiti. Such evidence should have been submitted by the complainant himself, the court found.

2.3 On 16 January 2009 the complainant received a letter from the Canada Border Services Agency informing him that he would be deported on 18 February 2009. The complainant's counsel applied for a stay of deportation in order to be able to prove that the medical facilities required to replace the complainant's pacemaker were not available in Haiti. In support of his application, the complainant claimed that evidence of the lack of medical equipment existed but that he had been unable to submit it at the time of the PRRA and H&C applications because he had been in prison and had not had the means to assemble the evidence. He presented a letter from the Consulate-General of Haiti in Montreal, dated 9 May 2008, which confirmed that, in view of the current state of medical technology in Haiti and the nature of the complainant's illness, the complainant would not be able to receive the medical care he required in Haiti. The complainant submitted another letter, dated 22 May 2008 and signed by a cardiologist in Canada, which stated that the complainant had worn a Medtronic KDR 733 Kappa pacemaker since June 2000, which would need to be replaced in June 2010. The cardiologist added that there was no Medtronic service in Haiti.

The complaint

3.1 The complainant claims that his personal situation and state of health mean that he should not be deported, especially given that he has two young children (born in 2002 and 2005) and that his wife has psychological problems brought on by his detention and by fears of his forced removal to Haiti. The complainant also submits a document confirming that his pacemaker will need to be replaced in 2010 and that there are no Medtronic services in Haiti.

3.2 He submits that, as a criminal deportee having lived abroad for many years, he would be at greater risk of being kidnapped by criminal gangs, who would see him as a rival who had accumulated considerable wealth during his long stay in Canada. He points out that the Immigration and Refugee Board applies a moratorium on removals to Haiti, but the moratorium does not apply to persons considered to be major criminals or a threat to society. He cites the Committee's concluding observations in respect of Canada (May 2005), in which the Committee expressed its concern at the exclusion of certain categories of persons considered as criminals from international protection against the risk of torture or cruel and inhuman treatment. The complainant cites the case of two Haitian nationals; one was removed from Canada and has not been heard of since, while the other has also

submitted a complaint to the Committee, requesting interim measures to suspend the order to remove him to Haiti.[1]

3.3 The complainant appends to his complaint a number of press articles showing that returned Haitians are systematically detained in appalling conditions and are given no food, water or medical care, which in the complainant's case could prove fatal. The articles also describe how the Government of Haiti denies all returnees the right to obtain a Haitian passport for eight months following their return. The complainant alleges that, as attested to by the two letters submitted in support of his application for a stay of the deportation order, he would be unable to have his pacemaker replaced or receive proper medical care in Haiti, especially since there is a risk that he would not have a passport for the first few months following his return. He argues that, on the basis of all these considerations, there is a real and personal risk that his deportation to Haiti would put his life in danger.

State party's observations on admissibility and the merits

4.1 On 24 July 2009, the State party submitted its observations on the admissibility and the merits. The State party considers the complaint to be incompatible with the Convention, since the alleged risks do not constitute torture for the purposes of admissibility under article 22, paragraph 2, of the Convention. The State party also maintains that the complaint has not been sufficiently substantiated, since it is based on mere theory and contains no evidence of a personal risk of torture in the event of the complainant's removal. As a subsidiary argument, the State party considers that the complaint should be dismissed on the merits, since there is no serious reason to believe that the complainant's removal to Haiti would expose him to a real, personal and imminent risk of torture.

4.2 The State party notes that all the allegations made by the complainant in his complaint to the Committee were thoroughly examined by the Canadian authorities, which invariably concluded that they were unfounded. The State party points out that after obtaining permanent residency status, the complainant was found guilty on 1 May 2007 of importing and possessing narcotics — namely 1.9 kg of cocaine — for the purposes of trafficking. He was sentenced to 31 months in prison on 29 June 2007. In the light of this conviction, the Canada Border Services Agency issued an inadmissibility report in respect of the complainant, and referred his case to the Immigration Division of the Immigration and Refugee Board for investigation. On 31 December 2007, following a hearing at which the complainant was given the chance to present the evidence he considered relevant, the Immigration Division confirmed the complainant's inadmissibility on grounds of serious criminality, in accordance with article 36, paragraph 1 (a), of the Immigration and Refugee Protection Act, and issued a removal order against him. As a result of the removal order, the complainant lost his Canadian permanent residency status.

4.3 The complainant then claimed refugee status, which was refused on 9 January 2008 on the grounds of his inadmissibility to Canada, in accordance with article 101, paragraph 2 (a), of the Immigration and Refugee Protection Act and article 33, paragraph 2, of the Convention relating to the Status of Refugees. Both his pre-removal risk assessment (PRRA) application and his humanitarian and compassionate (H&C) application were turned down on 21 April 2008. The PRRA officer considered that the complainant had not provided sufficient evidence to show that he was personally at risk of being tortured, in danger of his life or at risk of being subjected to cruel and unusual treatment. The same officer dismissed the risk of his being detained and added that even if he were detained, there was nothing to suggest that a family member would not be able to obtain his release.

[1] Communication No. 367/2008, removed from the Committee's list of communications on 22 November 2010.

The officer also dismissed the allegation that the health services in Haiti were not equipped to replace the complainant's pacemaker batteries, noting that access to medical care was less difficult in Port-au-Prince, the complainant's hometown.

4.4 On 9 May 2008 the complainant applied for leave and for judicial review. On 4 June 2008 the Federal Court of Canada granted the complainant a stay of removal while those applications were being considered. On 5 January 2005 the Federal Court of Canada rejected the applications for leave and judicial review of the PRRA and H&C decisions. The Court held that it fell to the complainant to establish a link between his personal situation and the general conditions prevailing in his country, which he had not done. The Court noted that it could not, in the context of an application for judicial review, consider new evidence that had not been submitted previously to the immigration officer. The Court consequently rejected the argument that the health services in Haiti were not equipped to replace the complainant's pacemaker batteries.

4.5 On 31 January 2009, the complainant submitted an application for an administrative stay of removal to the Canada Border Services Agency, once again alleging that the health services in Haiti were inadequate. He substantiated the application with the same evidence that had been submitted to the Committee, namely a letter from the Vice-Consul of Haiti in Montreal and a letter from a cardiologist in Canada. Consequently, the complainant's file was referred to a doctor approved by Citizenship and Immigration Canada for a medical opinion. The approved regional doctor attached to the Canadian mission in Port of Spain, Trinidad and Tobago, was also consulted. After checking, the specialists concluded that cardiac health services were available in Haiti, and located a hospital, with a team of specialists consisting of two cardiologists and a surgeon, where the complainant would be able to have his pacemaker checked and its battery replaced. The name of the hospital and the relevant contact details were given to the complainant. In view of the fact that the necessary health services were available in Haiti, the application for an administrative stay of removal was rejected.

4.6 With regard to the admissibility of the complaint, the State party notes first of all that under article 3 of the Convention there must be substantial grounds for believing that a complainant would be in danger of being subjected to torture. In accordance with the Committee's jurisprudence, such danger must be personal and real and must not be based on mere theory or suspicion. The State party recalls also that it falls to the complainant to establish that his complaint is admissible prima facie under article 22 of the Convention. The State party notes that the alleged danger of being kidnapped, tortured and killed by Haitian criminals, and the evidence in support of that claim, were thoroughly examined by the Canadian authorities. No new information has been submitted to the Committee to support the claim that he is well known in Haiti and would be quickly identified by criminals as a drug-trafficker. In addition, there is nothing to prove that persons removed to Haiti on grounds of criminality were in any particular danger of being kidnapped, as the claimant alleges. The State party cites the report of the Secretary-General on the United Nations Stabilization Mission in Haiti, which states that there has been a decline in the number of kidnappings.[2] Furthermore, the risk of kidnapping applies to the entire population. The State party concludes that even if the danger were real it would not fall within the scope of article 3 of the Convention, since kidnapping does not constitute torture. Aside from the issue of the intensity of suffering inflicted, acts of torture must be inflicted or instigated by State agents. There was nothing to show, however, that Haitian officials were involved in such kidnappings. Lastly, kidnappers appear to be motivated by greed, and not by any of the grounds mentioned in article 1 of the Convention.

[2] The State party cites United Nations document S/2009/129, paras. 17 and 25.

4.7 The State party considers that in alleging a risk of detention, the complainant is probably referring to the practice of preventive imprisonment of criminal deportees at the Port-au-Prince national penitentiary. This practice was abolished following a court ruling of 11 September 2006. Since then, Haitian policy has been to detain criminal deportees temporarily at an office of the Central Directorate of the Criminal Investigation Service near the airport for a period of up to 2 weeks. The aim of the preventive detention is to establish whether the individual has committed crimes in Haiti and to allow a family member to stand surety. The individual is then granted conditional release for a period of eight weeks to six months. The State party notes that this practice is not invariable. Since August 2008, 9 of the 23 persons deported from Canada to Haiti on the grounds of criminality were detained; from August 2007 to August 2008 the figure was 7 out of 15. According to the information available to the State party, none of the deportees were detained at the national penitentiary and there have been no complaints of any ill-treatment. In addition, the State party recalls that, according to the Committee's jurisprudence, mere arrest or detention does not as such constitute torture.[3] In the present case, the complainant does not allege that he is in danger of being tortured by the Haitian authorities and does not submit any evidence to show that the conditions of detention at the Central Directorate of the Criminal Investigation Service constitute torture.

4.8 The State party considers that the allegations relating to the complainant's wife and children are inadmissible *ratione materiae*, since they do not constitute torture under the Convention.

4.9 The allegations relating to the complainant's pacemaker have already been considered by the Canadian authorities in the context of his application for an administrative stay of removal. As stated in paragraph 4.5, Citizenship and Immigration Canada requested a medical opinion, which confirmed that the medical care required to maintain the complainant's pacemaker was available in Haiti and that, therefore, the complainant's allegations in that regard were not persuasive. The State party adds that, according to the Committee's settled jurisprudence, "the aggravation of the complainant's state of health that could possibly be caused by his deportation does not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention".[4] The scope of the non-refoulement obligation described in article 3 does not extend to situations of ill-treatment envisaged by article 16.[5] Consequently, this part of the complaint is incompatible with the Convention and is insufficiently substantiated for the purposes of admissibility.

4.10 The State party rejects the complainant's allegations on the merits, and notes that they were studied by independent and impartial national authorities, fairly and in compliance with the law. In the absence of proof of an obvious error, abuse of process, bad faith, obvious bias or serious irregularities in the procedure, the Committee should not substitute its own findings of fact for those of the Canadian authorities. Moreover, the Committee[6] has repeatedly stated that it is not for the Committee to question the evaluation of facts and evidence by national authorities.[7]

[3] The State party cites communication No. 57/1996, decision adopted 17 November 1997, *P.Q.L. v. Canada*.

[4] The State party cites communication No. 245/2004, decision adopted 16 November 2005, *S.S.S. v. Canada*, para. 7.3.

[5] The State party cites communication No. 228/2003, decision adopted 18 November 2003, *T.M. v. Sweden*, para. 6.2.

[6] The State party cites communication No. 193/2001, decision adopted 21 November 2002, *P.E. v. France*, para. 6.5; communication No. 282/2005, decision adopted 7 November 2006, *S.P.A. v.*

Complainant's comments on the State party's observations

5.1 Prior to submitting his comments, the complainant provided additional information on 13 and 16 September 2009 in support of his request for interim measures. He notes that he made a further application for an administrative stay of removal on 4 September 2009, which was rejected the very same day; he was concerned that the reply he received was identical to the letter rejecting his first application for an administrative stay, dated 9 February 2009, save for the following phrase: "The individual's pacemaker can be replaced in the Dominican Republic." That meant that his pacemaker could not be replaced in his home country, Haiti, but would have to be replaced in another country. There is no guarantee that the complainant will be able to travel to the Dominican Republic, especially in view of his criminal past. Following the rejection of his first application for a stay of removal, the complainant obtained two medical statements, dated 11 and 12 February 2009. One of the statements was from Medtronic Canada, informing the complainant that the company did not know of a clinic or doctor in Haiti authorized to provide Medtronic pacemaker support. The complainant stresses that he does not simply need medical care in Haiti: he needs there to be Medtronic equipment in Haiti. The applicant also mentions a letter, dated 14 September 2009, from a doctor at the Centre Hospitalier de l'Université de Montréal, who also casts doubt on the availability of medical staff trained to replace Medtronic pacemakers in Haiti.[8]

5.2 On 4 October 2009 the complainant submitted his comments on the State party's observations. He recalled that in its concluding observations, the Committee had expressed its concern at the explicit exclusion of certain categories of persons posing security or criminal risks from the protection against refoulement provided by the Immigration and Refugee Protection Act 2002 (sect. 115, subsect. 2). The Committee had then recommended that the State party remove the exclusions in the Immigration and Refugee Protection Act 2002, thereby extending to currently excluded persons entitlement to the status of protected person, and protection against refoulement on account of a risk of torture.[9] The complainant thus claims that he cannot be deported to Haiti for having committed a crime in Canada; other individual cases show that persons who ran the risk of being tortured but had a criminal past had been deported, and they had not been heard of since.

5.3 Contrary to what is affirmed by the State party, there is no standard practice regarding the detention of returned persons. The abolition of the practice of preventive detention of criminal deportees at the Port-au-Prince national penitentiary is too recent to infer that there is no risk of arbitrary detention. Press articles submitted by the complainant show that people are arbitrarily detained in police stations, in inhuman conditions of detention, with no proper access to water, food or health care. In the complainant's case, such deficiencies could prove fatal. Even regular prisons have deficiencies in the provision of medical care, which would certainly put the complainant's life at risk. In this regard, the complainant refers to articles by the non-governmental organization Alternative Chance,

Canada, para. 7.6; and communication No. 148/1999, decision adopted 5 May 2004, *A.K. v. Australia*, para. 6.4.

[7] Following the State party's observations, the Committee decided to withdraw its request for interim measures on 4 August 2009.

[8] Following receipt of this additional information, the Committee asked the State party on 15 September 2009 to provide it with further details that would enable the Committee to determine whether the current state of medical technology in Haiti would allow the applicant's pacemaker battery to be replaced. Pending a reply from the State party, the State party was requested not to deport the applicant to Haiti.

[9] Concluding observations, Canada, CAT/C/CR/34/CAN, 7 July 2005, paras. 4 (d) and 5 (b).

which note the poor detention conditions in Haiti. The complainant considers that his life is also at risk outside prison, given the inadequate medical infrastructure in Haiti for the replacement of his pacemaker.

5.4 The complainant mentions the case of another individual who risked being returned to Haiti, and who also had a criminal past in Canada. The complainant considers that in this case the Federal Court had given more weight to the documents by Alternative Chance than to the assertions by a State official that he had not observed any cases of deportees to Haiti being detained or tortured.[10] In the present case, the Committee should also give more weight to the findings of a serious organization such as Alternative Chance than to an assertion in a press article that the new detention policy implemented following the court decision of 11 September 2006 had eliminated the risk of arbitrary detention in Haiti. The complainant therefore reiterates that it is too early to ascertain whether the measures taken by the Haitian authorities in that regard have been effective.

5.5 With regard to the statistics submitted by the State party on the number of returnees who had been detained, the applicant considers that even if only one person had been detained, the risk would still be real. The complainant agrees with the State party that mere arrest or detention does not constitute torture. However, being held in inhuman, degrading conditions, with no access to proper medical care or to one's medical file and no chance of a fair trial, does constitute torture and cruel and unusual treatment or punishment.

5.6 The complainant also refers to a document published on the website of Alternative Chance,[11] which describes United States case law relating to the non-refoulement of Haitian criminals. In one of the cases, a United States court had considered that a mentally disabled person who was HIV-positive ran the risk of being discriminated against and subjected to treatment equivalent to torture if he were deported. The complainant concludes that even if ordinary deportees do not run the risk of being tortured in the event of their return to Haiti, deportees who are ill, such as himself, do run such a risk because of the deliberate negligence of the Haitian authorities, which amounts to a violation of human rights. The complainant therefore considers that, contrary to the State party's claims, he has demonstrated that he would run a real, personal risk of being subjected to torture if he were deported to his country of origin.

5.7 With regard to the allegations concerning his pacemaker, the claimant criticizes the State party for having analysed the situation in an incomplete and superficial manner,[12] as can be seen from the superficial response to his application for an administrative stay of removal, dated 4 September 2009, which was identical to the letter rejecting the first application for an administrative stay, dated 9 February 2009, save for the following phrase: "The individual's pacemaker can be replaced in the Dominican Republic." The complainant would be surprised if he could be removed to one country and then authorized to travel to a third country for the treatment required by his heart condition. In his view, his criminal past precludes that possibility. Even if he managed to travel to the Dominican Republic after his return to Haiti, his deportation from Canada would be in violation of Canada's international obligations, which prohibit it from deporting a person on the assumption that he will subsequently be able to travel to a third country. With regard to the claim that suitable medical care is available in Haiti, the complainant refers the Committee to the information

[10] For reasons of confidentiality, the identity of the person in question is not mentioned.

[11] Paper entitled "Cases of respondents who fear imprisonment as criminal deportees to Haiti: updates in the law since *Matter of J-E-*", at: http://alternativechance.org.

[12] The complainant informs the Committee that he submitted an application to the Federal Court for judicial review of the decision refusing an administrative stay of removal, and that the application was still being processed when he submitted his comments to the Committee.

provided in his letters of 13 and 16 September 2012 (see paragraph 5.1 above). The complainant concludes that the risk analysis carried out by the Canadian authorities lacked impartiality and contained obvious errors.

Additional comments by the parties

6.1 On 17 December 2009 the State party replied that, from the complainant's comments, it appeared that he had not bothered to contact the Sacré-Coeur hospital, the contact details of which had been passed on by the State party, after checking that the hospital's specialists were able to check the operation of the complainant's pacemaker and replace the battery. Following the complainant's comments, the State party had contacted the hospital again, which confirmed that the Medtronic battery of the complainant's pacemaker could be replaced by a Biotronik battery, and that this could be done by specialists at the hospital. If necessary, the hospital could also fit the complainant with a new pacemaker equivalent to the KDR 733 Kappa, namely the Biotronik Axios model. The complainant's claims are therefore unfounded.

6.2 Contrary to the complainant's assertions, the Haitian and Canadian authorities are aware of the situation of one of the Haitian deportees he mentioned in his comments;[13] after being detained, the deportee was released, as noted by members of the Montreal police force who were on a temporary assignment in Haiti. The State party notes that an affidavit by the First Secretary (Immigration) and migration integrity officer at the Embassy of Canada in Port-au-Prince describes the current practice, in place since 2007, of Haitian authorities with regard to Haitian nationals removed from Canada on grounds of criminality. This detailed information contradicts, in a conclusive manner, the complainant's claim that the submissions by Canada are based on practices by the Haitian authorities that are too recent to be properly evaluated. The affidavit confirms that removed persons are not usually detained and that, if they are, the average length of detention is 5 days. The affidavit goes on to state that there is no reason to believe that such persons are treated badly during detention or that they are held in inhuman conditions. The State party thus maintains that the complainant's allegations are inadmissible and that, in the alternative, they do not constitute a violation of article 3 of the Convention.[14]

6.3 On 27 February 2010 the complainant submitted that, following the earthquake in Haiti, 29 hospitals and other health centres had been partially damaged or destroyed; and that he had tried to contact the Sacré-Coeur hospital in Port-au-Prince but to no avail, which suggested that the hospital had been at least partially destroyed. The earthquake had also brought about a major crisis in the justice system, since a large number of inmates had escaped from prison. The complainant also reiterated the arguments submitted previously.

6.4 On 9 March 2010, the complainant submitted a copy of a letter from a doctor at the Hôtel-Dieu hospital of the Centre Hospitalier de l'Université de Montréal who considered that the only way to interrogate a Medtronic pacemaker without a Medtronic interrogation unit was to install a new Biotronik pacemaker in its place. However, in view of the risks accompanying all medical procedures, it would be prohibitive to replace a pacemaker designed to last more than eight years for the sole purpose of facilitating check-ups. It was therefore essential for the patient to have his check-ups performed at a place where Medtronic pacemakers could be interrogated.

6.5 On 16 March 2011, in response to the complainant's most recent allegations, the State party submitted the medical opinion of a doctor approved by the High Commission of

[13] See paragraph 5.4 above.

[14] Following the clarification provided by the State party, the Committee withdrew its request for interim measures on 28 December 2009.

Canada to Trinidad and Tobago, who had been in touch several times with the Sacré-Coeur hospital to discuss the complainant's case. In the letter, the doctor confirmed that the hospital was still able to perform check-ups on all Medtronic pacemakers, despite the earthquake of 12 January 2010. The doctor added that even if the hospital did not have the necessary equipment to perform a check-up on a specific Medtronic model, it would be possible to do so by remote interrogation using an ordinary mobile phone, which would connect any Medtronic pacemaker to appropriate testing equipment located elsewhere.

6.6 The State party adds that the request for judicial review of the second rejection of the complainant's application for an administrative stay was rejected on 29 April 2010, and that consequently domestic remedies have been exhausted. Following the Committee's withdrawal of its request for interim measures on 28 December 2009, the State party could therefore deport the complainant to Haiti. However, following the earthquake of 12 January 2010, it had announced a moratorium on removals to Haiti, on humanitarian grounds. This measure applies to all persons who are the subject of a removal order. As a result, the complainant's removal had been suspended. The State party reiterates its previous submissions that the complainant's allegations are inadmissible and, in the alternative, unfounded.

6.7 On 1 July 2011 the complainant submitted a new letter from the doctor at the Centre Hospitalier de l'Université de Montréal, which cast doubt on how easy it was to carry out remote check-ups on pacemakers. The complainant considers that this technical aspect is important, given the situation in Haiti following the earthquake. On 6 and 18 August 2011 the complainant informed the Committee that his deportation was set to take place on 22 August 2011.

6.8 On 10 October 2011 the complainant stated that he had been detained after his arrival in Haiti, and freed following the intervention of a police inspector he knew. On 23 August 2011 he visited the Sacré-Coeur hospital, which confirmed that — contrary to the State party's claims — Biotronik equipment could not interrogate Medtronic pacemakers. The complainant asked the medical staff to give him a certificate confirming that they could not perform the check-ups, but they refused. The complainant notes that his next medical appointment is scheduled for 24 November 2011 and that if no solution is found he should be allowed to return to Canada to receive treatment.[15]

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any complaint submitted 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), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

7.2 The Committee also notes that all domestic remedies have been exhausted pursuant to article 22, paragraph 5 (b), and that the State party has not contested this.

7.3 With regard to the State party's allegations of incompatibility with article 1 and of the unfounded nature of the complainant's allegations, the Committee notes that the

[15] The complainant, via his counsel, provided no more information to the Committee on this matter. On 27 February 2012, the secretariat requested updated information about the complainant's situation. On the same day, the complainant's counsel confirmed by telephone that the complainant had not contacted him since that date.

complainant's allegation is based on the risk of being subjected to treatment contrary to article 1 of the Convention, on the basis of a wide range of factors such as the risk of being targeted by criminal gangs, the risk of treatment contrary to article 1 while in detention, his state of health and the general situation prevailing in Haiti. The Committee considers that these allegations are closely bound up with the merits. The Committee therefore declares the complaint admissible and proceeds to its consideration on the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

8.2 The Committee must determine whether, in deporting the complainant to Haiti, the State party failed in its obligation under article 3 of the Convention not to expel or return (refouler) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

8.3 Without prejudice to its possible findings in this case, the Committee notes the information provided by the complainant that the State party declared a moratorium on the removal of Haitian nationals to their country of origin, but that it excluded persons who, such as the complainant, had criminal records. The State party has not challenged this information. The Committee recalls that under article 3 of the Convention, a moratorium on the removal of persons to countries in crisis should apply to everyone, without any distinction.[16]

8.4 In assessing the complainant's allegations under article 3, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of such assessment, however, is to determine whether the complainant would *personally* be in danger of being subjected to torture in Haiti. It follows that the existence in that country of a consistent pattern of gross, flagrant or mass violations of human rights does not in itself constitute sufficient grounds for determining that a particular person would be in danger of being subjected to torture if expelled to that country. Additional grounds must be adduced to show that the individual concerned would be personally at risk.[17] In considering the risk, the Committee will give considerable weight, pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned. However, the Committee is not bound by such findings, and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

8.5 The Committee recalls its general comment No. 1 on implementation of article 3 of the Convention in the context of article 22, which states that while it is not necessary to demonstrate that the risk of torture is highly probable, the risk must be personal and present. In this regard, the Committee has established in previous decisions that the risk of torture must be "foreseeable, real and personal".[18] As to the burden of proof, the Committee

[16] Concluding observations, Canada, CAT/C/CR/34/CAN, paras. 4 (d) and 5 (b).

[17] Communication No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; see also communication No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and communication No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

[18] Communication No. 203/2002, *A.R. v. the Netherlands*, decision adopted on 14 November 2003, para. 7.3; communication No. 285/2006, *A.A. et al. v. Switzerland*, decision adopted on 10 November 2008, para. 7.6; communication No. 350/2008, *R.T-N. v. Switzerland*, decision adopted on 3 June 2011, para. 8.4.

recalls that it is generally incumbent upon the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

8.6 The Committee notes that the complainant has not adduced evidence of a real, personal and foreseeable risk of torture after his removal to Haiti. Indeed, the complainant made a series of allegations that he was at risk of being tortured, but provided no persuasive evidence to corroborate the allegations, be they of kidnapping, the risk of torture or the risk of violation of the right to life while in detention. Furthermore, all the allegations submitted by the complainant were examined by the State party's authorities during the asylum procedure and in the proceedings before the Committee. With regard to the complainant's health, the State party has looked into the availability in Haiti of treatment appropriate for the applicant. The situation does not fall within the scope of article 1, and in respect of the risk to his health, cannot on its own fall under the scope of article 16 of the Convention.[19] The Committee also notes that the State party took this allegation seriously and carried out the necessary checks before proceeding with the complainant's removal. The Committee further notes that following his return to Haiti on 22 August 2011 the complainant was briefly detained, and did not submit any allegations of torture or ill-treatment to the Committee.

8.7 The Committee recalls that in accordance with its general comment on implementation of article 3 of the Convention, and with its jurisprudence, the State party does not have to show, when assessing the risk of torture in the case of a person being removed to a third country, that the risk is "highly probable", but it must be personal and present. In this regard, in previous decisions the Committee has determined that the risk of torture must be foreseeable, real and personal. Further, the Committee observes that considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of fact that are made by organs of the State party concerned. It must therefore be determined whether, at the time of assessing the risk run by the complainant, the State party carried out a thorough assessment of the complainant's allegations and took into account all the elements enabling it to assess the risk that was run. The Committee considers that in the present case the State party carried out the assessment in accordance with these principles.[20]

8.8 The Committee considers that the information submitted to the Committee does not show that the complainant ran a foreseeable, real and personal risk of being subjected to torture following his return to his country of origin.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, therefore concludes that the deportation of the complainant to Haiti does not constitute a breach of article 3 of the Convention.

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

[19] Communication No. 245/2004, *S.S.S. v. Canada*, para. 7.3.

[20] See general comment No. 1 on implementation of article 3 of the Convention in the context of article 22 (refoulement and communications) (1996), paras. 6, 7 and 9 (a) and, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.