



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

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## Committee against Torture

### Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 1118/2022\* \*\*

<i>Communication submitted by:</i>	B.S. (represented by counsel, Helmut Blum)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Austria
<i>Date of complaint:</i>	8 December 2021 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 25 January 2022 (not issued in document form)
<i>Date of adoption of decision:</i>	4 November 2022
<i>Subject matter:</i>	Risk of torture or other ill-treatment in case of deportation to India (non-refoulement)
<i>Procedural issue:</i>	Admissibility – exhaustion of domestic remedies
<i>Substantive issues:</i>	Torture and cruel, inhuman or degrading treatment or punishment
<i>Articles of the Convention:</i>	3 and 16

1.1 The complainant is B.S., a national of India born in 1992. He claims that Austria has violated his rights under article 16 of the Convention due to his nearly 10-month detention in Austria, without contact with the outside world. In addition, he claims that the State party would violate article 3 of the Convention if it were to extradite him to India where he risks to be subjected to torture and other ill-treatment. The complainant urged the Committee to request that the State party halt his extradition to India until the Constitutional Court of Austria had resolved his pending asylum case. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 26 November 2018. The complainant is represented by counsel, Helmut Blum.

1.2 On 25 January 2022, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested that the State party not extradite the complainant to India while his complaint was under consideration.

\* Adopted by the Committee at its seventy-fifth session (31 October–25 November 2022).

\*\* The following members of the Committee participated in the examination of the communication: Todd Buchwald, Claude Heller, Erdogan Iscan, Liu Huawen, Maeda Naoko, Ilvija Pūce, Ana Racu, Abderrazak Rouwane, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.



**Facts as submitted by the complainant**

2.1 The complainant is a national of India and a member of the Sikh ethnic group. In 2018, he left India legally and entered Austria in March 2019, whereupon he applied for internal protection under Austrian asylum law. The Federal Office for Immigration and Asylum rejected his application for asylum on 11 April 2019. The Federal Administrative Court<sup>1</sup> dismissed his appeal against that decision in its judgment of 5 September 2019, which became final on 10 September 2019.

2.2 At the end of 2019 and beginning of 2020, the complainant learned from Indian newspapers that the Indian criminal authorities had identified him as the head of an Indian terrorist group reportedly advocating for the secession of the State of Punjab from India or the creation of an independent Sikh state.<sup>2</sup> The complainant believes that the charges were fabricated in order to prepare an extradition case against him. He subsequently submitted a new asylum claim.

2.3 His renewed claim for asylum was rejected by the Federal Office for Immigration and Asylum on the basis of *res judicata*. The complainant appealed the negative asylum decision to the Federal Administrative Court. In a decision dated 27 July 2021, the Federal Administrative Court rejected his appeal.

2.4 On 8 September 2021, the complainant submitted an appeal to the Constitutional Court. On 21 September 2021, the Constitutional Court granted a suspensive effect to the complainant's application. The suspensive effect, however, does not protect the complainant from extradition to India.

2.5 On 18 September 2020, Interpol India submitted a request to the Austrian authorities requesting the complainant's arrest and extradition to India.<sup>3</sup> On 23 March 2021, the Linz Regional Court complied and ordered the arrest of the complainant to secure his subsequent extradition to India.<sup>4</sup> The complainant has been in custody since that time. He has not been granted the right to make telephone calls to his relatives or members of the Sikh community. During his 10-month detention, he has been allowed visits by his defence counsel, but has been denied other contact with the outside world.

2.6 On 13 August 2021, the Linz Regional Court authorized the extradition of the complainant to India. The complainant filed a complaint to the Linz Higher Regional Court.<sup>5</sup> On 12 October 2021, the Linz Higher Regional Court held a public oral hearing, during which the complainant asserted that he would not be granted a fair trial in India since the case against him was fabricated.<sup>6</sup> He submitted evidence to the Linz Higher Regional Court to substantiate the claim that the Indian authorities had tortured individuals to create the case against him, including a statement from M.S. to the effect that the complainant was the head of a terrorist organization, which M.S. later denounced.<sup>7</sup> The complainant also provided evidence to prove that his father, K.S., had been tortured in December 2020, resulting in fractured limbs.

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<sup>1</sup> Referred to as "Bundesverwaltungsgericht" by the complainant.

<sup>2</sup> Copies of the newspaper articles were submitted to the Committee.

<sup>3</sup> Arrest warrant No. 320 of the Special Court of the National Investigation Agency, Sahibzada Ajit Singh Nagar, Mohali, dated 18 September 2020.

<sup>4</sup> In its decision of 12 October 2021, the Linz Higher Regional Court stated that the Linz Regional Court imposed custody for extradition due to the risk of escape and committing a crime in accordance with the provisions of the Federal Act of 4 December 1979 on Extradition and Mutual Assistance in Criminal Matters.

<sup>5</sup> Referred to as "Oberlandesgericht Linz" by the complainant.

<sup>6</sup> In its decision of 12 October 2021, the Linz Higher Regional Court stated that a general allegation about the lack of the rule of law was not sufficient to prove that a fair trial was not possible in the requesting State.

<sup>7</sup> In its decision of 12 October 2021, the Linz Higher Regional Court stated that the (alleged) withdrawal of the testimony of M.S. did not reveal any major concerns about the suspicion given the other incriminating evidence against the complainant, including an 88-page indictment against the complainant containing a detailed description of the evidence, in addition to a list of witnesses and documentary evidence encompassing several pages.

2.7 On 12 October 2021, the Linz Higher Regional Court rejected the complainant's complaint and confirmed the decision of the court of first instance.<sup>8</sup> There is no remedy available to appeal that decision. Pending approval by the Minister of Justice, the complainant can be extradited to India at any time.

2.8 The complainant believes that he faces a real risk to his life and health if extradited to India, including the possibility of extrajudicial killing, torture and other cruel or inhuman treatment. He also fears the prevailing conditions in Indian prisons, in light of reliable country information, including problems such as overcrowding, lack of sufficient medical services, the threat of the coronavirus disease (COVID-19) pandemic and the large number of unexplained deaths in police custody and prisons.<sup>9</sup> The complainant requested that the Linz Regional Court question two human rights experts to provide proof of these factors, but his request was denied.<sup>10</sup> He also claims that the reports that he filed as proof of the situation in Indian prisons were not properly considered by the Linz Higher Regional Court.<sup>11</sup>

### **Complaint**

3.1 The complainant claims that the State party would violate article 3 of the Convention if it extradited him to India. There are substantial grounds to believe that he would face a risk of torture or persecution by the authorities if extradited, given the history of acts of torture against prisoners in India, the conditions in Indian prisons, the alleged torture of the complainant's father, the alleged torture of M.S. to extract a confession against the complainant and the seriousness of the allegations raised against the complainant by the Indian authorities.

3.2 Furthermore, the complainant claims that his detention pending extradition for nearly 10 months in Austria, without any contact with the outside world, violates his rights under article 16 of the Convention.

3.3 Finally, the complainant alleges that he has been denied the right to a fair trial in Austria and that he would be deprived of that right in India as well.

### **State party's observations on admissibility and the merits**

4.1 On 24 March 2022, the State party submitted that the case remained urgent, since the complainant had been arrested pending extradition since 23 March 2021.

4.2 The statutory maximum period of detention is two years (section 178 (1) (2) of the Code of Criminal Procedure), yet detention has to be kept as short as possible (section 177 (1) of the Code of Criminal Procedure). Article 1 (3) of the Federal Constitutional Law on the Protection of Personal Liberty stipulates that personal liberty may only be restricted or deprived if and to the extent that this is not disproportionate to the purpose of the measure. In view of the provisions of section 9 (1) of the Code of Criminal Procedure concerning the length of proceedings and the fact that the complainant, as long as he is detained in Austria and not extradited, has no opportunity to comment on the substance of the allegations in India

<sup>8</sup> See the decision of the Linz Higher Regional Court dated 12 October 2021, in which the Court emphasized that the extradition procedure under European law allowed for the extraditing State to evaluate the reasons for extradition only if the complainant was able to demonstrate significant concerns by means of appropriately substantiated submissions that not only contradicted the assumption of suspicion, but immediately and unequivocally invalidated it. As the complainant's appeal did not counter with any substantive argument, the Court assumed that the extradition documents were conclusive.

<sup>9</sup> The complainant points to reports by Human Rights Watch and the United States Department of State, and the report of the Asian Centre for Human Rights from December 2018.

<sup>10</sup> Decision of the Linz Regional Court of 13 August 2021, in which the Court denied a request for evidence on the general and political situation in India from a human rights lawyer, G.S., and a representative of the Movement against Atrocities and Repression.

<sup>11</sup> In its decision of 12 October 2021, the Linz Higher Regional Court held that the extradited person must conclusively prove the considerable likelihood of a current, serious (weighty) danger, whereby the evidence must be sufficiently specific. The mere possibility of a threat of torture or inhuman or degrading treatment was not enough and, although human rights violations did occur, serious fears concerning a violation of rights in the present case of extradition had not emerged.

before its courts, a decision by the Committee is requested as soon as possible, with due regard to the time frame for extradition of the person concerned.<sup>12</sup>

4.3 The complainant, who is a follower of the Sikh religion, entered Austria unlawfully in March 2019 and applied for international protection on 21 March 2019. He stated that he had been persecuted due to his affiliation with the Khalistan movement. The Federal Office of Immigration and Asylum dismissed his application for international protection in its decision of 11 April 2019 with respect to both asylum and subsidiary protection. Concurrently, the Federal Office of Immigration and Asylum issued a return decision and declared that the complainant's deportation to India was permissible. The Federal Administrative Court dismissed the appeal against that decision in its judgment of 5 September 2019, which became final on 10 September 2019. Since the complainant did not leave Austria voluntarily, the Federal Office of Immigration and Asylum issued another return decision on 18 December 2019, including permission for deportation and a ban on entry for a period of two years. The decision became final and non-appealable on 20 January 2020. In its preliminary decision on the appeal of 27 January 2020 against that decision, the Federal Office of Immigration and Asylum rejected the complainant's appeal as being late. Subsequently, the complainant did not appeal to the Federal Administrative Court, leaving the decision on the permissibility of his deportation to India uncontested.

4.4 On 9 March 2020, the complainant submitted a second application for international protection. In the course of those asylum proceedings, the complainant presented new claims that the Indian police was linking him with the attacks committed in Tarn Taran on 4 September 2019 and that he feared being arrested and ill-treated by the police upon his return to India. As those asylum proceedings are still pending, the return decision, which became final on 20 January 2020, cannot be enforced. In its decision of 29 May 2020, the Federal Office of Immigration and Asylum rejected the subsequent application with respect to both asylum and subsidiary protection on the ground of *res judicata*. The complainant lodged an appeal against that decision with the Federal Administrative Court. On 25 March 2021, the Linz Regional Court notified the Federal Office of Immigration and Asylum of the fact that arrest pending extradition had been ordered against the complainant on 23 March 2021. In its judgment of 27 July 2021, the Federal Administrative Court dismissed the appeal of 29 May 2020 as unfounded. The Federal Administrative Court concluded that the facts and circumstances had not changed since the initial asylum proceedings had been concluded and that the new allegations of the complainant were not credible. In particular, the complainant was not the subject of a search warrant issued for a criminal offence in India.

4.5 The complainant submitted an appeal against that judgment to the Constitutional Court, pursuant to article 144 of the Federal Constitution. In its decision of 21 September 2021, the Constitutional Court granted the appeal suspensive effect. In its judgment of 30 November 2021, the Constitutional Court set aside the judgment of the Federal Administrative Court as it had rejected the application for international protection with respect to subsidiary protection. With respect to granting asylum, the Constitutional Court rejected the appeal. In its reasoning in relation to setting aside the judgment of the Federal Administrative Court, the Constitutional Court stated, in short, that the Federal Administrative Court had wrongfully assumed that there was no search warrant against the complainant in India and had therefore decided arbitrarily. Due to the judgment of the Constitutional Court, the issue of subsidiary protection must be reviewed by the Federal Administrative Court, which has yet to pronounce on the matter. Until the case is decided by the Federal Administrative Court, the complainant holds the legal status of an asylum-seeker and the above-mentioned return decision cannot be enforced.

4.6 As concerns the extradition proceedings, the State party submitted that, based on a judicial arrest warrant issued in India on 18 September 2020, an international search was initiated and a Red Notice was issued against the complainant. On 23 March 2021, the complainant was arrested in Linz. In its decision of 23 March 2021, the Linz Regional Court ordered that the complainant be arrested pending extradition on the grounds that there was a risk that he might abscond or commit an offence. By letter of 25 May 2021, the Indian authorities requested that the complainant be extradited for prosecution in specified criminal

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<sup>12</sup> Committee against Torture, general comment No. 4 (2017), para. 24.

proceedings. According to the extradition documents, the complainant is suspected of having had a leading role in a terrorist cell supporting the separation of the State of Punjab from India and creating an independent Sikh state (“Khalistan”). In addition, he had allegedly participated in several terrorist attacks in India. In India, the complainant has been accused of various criminal offences, including criminal conspiracy, promoting enmity among different groups and terrorism-related crimes, for which the (maximum) sentence is life imprisonment.

4.7 In its decision of 13 August 2021, the Linz Regional Court declared the complainant’s extradition permissible. The reasoning included that, in Austria, the charges made against the complainant in India constituted crimes of participating in a terrorist organization and training for terrorist purposes, as defined in section 278b of the Criminal Code of Austria. The complainant had not been able to plausibly demonstrate that he would be at risk of treatment in violation of human rights and the rule of law in his home country. On the basis of the current country information available to the Federal Office of Immigration and Asylum, no systematic discriminatory prosecution and sentencing practices could be ascertained with respect to India. In the State of Punjab, Sikhs constituted approximately 60 per cent of the population and a significant proportion of public servants, judges, soldiers and police officers. They were also eligible for high-ranking positions. With respect to the risk of torture, the Linz Regional Court stated that, due to his Sikh affiliation, the complainant was not exposed to a risk of persecution per se. As could be seen from the country information, there were currently no indications that Sikhs were arrested arbitrarily or ill-treated due to their religious affiliation alone. The family of the complainant, all members of the Sikh religious community, including a brother who actively practised the religion, were still in the State of Punjab and none of them was affected by arbitrary persecution. When questioned, the complainant stated that he had been imprisoned twice for several days in India. He mentioned no ill-treatment or torture in that connection. According to his statements, he had even been acquitted after his release and legal proceedings. That acquittal showed that he was not persecuted on the ground of his religion or because they wanted to frame him, which would have been “easy” at that time. When questioned, he had not explained why there would be a serious risk of torture in India after his extradition.

4.8 In a letter dated 6 September 2021, the Embassy of India to Austria confirmed that under the laws of India none of the offences of which the complainant was accused were subject to the death penalty. If extradited, the complainant would be detained in a cell at the Central Jail Kapurthala with adequate sanitary facilities, ventilation and personal space. He would not have to face overcrowding or a violation of his privacy, and the prison provided clean water, medical facilities, meals and sufficient green areas.

4.9 The appeal lodged by the complainant against the decision of the Linz Regional Court was not granted by the Linz Higher Regional Court by decision of 12 October 2021. In its reasoning, the Linz Higher Regional Court stated that the Regional Court’s comprehensive consideration of the situation of human rights in India in general, and the situation in the State of Punjab in particular, had not revealed that, in the case of his extradition to India, the complainant would be exposed to a risk of torture or inhuman or degrading treatment or punishment, as defined in article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) or a violation of the right to a fair trial, as defined in article 6 of the same Convention. Against the background of the carefully substantiated decisions of the Linz Regional Court and the Linz Higher Regional Court, the complainant’s extradition was authorized by the Federal Minister of Justice on 17 December 2021.

4.10 In his communication of 8 December 2021 to the Committee, the complainant alleged a violation of the Convention on the grounds that, during his arrest pending extradition, he had not been allowed to receive any visitors for nearly 10 months. In addition, the complainant alleged that, if he were extradited, he would be exposed to a real risk of unlawful homicide, torture and other ill-treatment because India was not a State party to the Convention. He stated that Indian prisons were overcrowded, medical care was insufficient, proceedings were extremely protracted and deaths in prisons were not investigated by the judicial authorities. Finally, the complainant alleged that he had been denied his right to a fair trial in Austria and would be deprived of that right in India as well.

4.11 The State party elaborated on the legal situation of the complainant and the available domestic remedies. The judgments and decisions of the Federal Administrative Court may be appealed to the Supreme Administrative Court and to the Constitutional Court, in conjunction with a petition for suspensive effect to prevent a potential extradition. Applicants can benefit from free legal aid in that context. A violation of rights guaranteed by the European Convention on Human Rights, in the course of criminal proceedings, may be objected to by filing a petition to the Supreme Court to reopen the criminal case pursuant to section 363a of the Code of Criminal Procedure, even if no decision of the European Court of Human Rights is available. This legal remedy is available for six months after the final domestic decision. According to the case law of the European Court of Human Rights, the petition to reopen the criminal case pursuant to section 363a of the Code of Criminal Procedure constitutes, in principle, an effective legal remedy against the alleged violation of the European Convention on Human Rights. Such a petition would be futile if the Supreme Court had denied the allegations of the appeal in the same criminal case before, such as for a nullity of appeal application. In its decision of 21 January 2008 (15 Os 117/07f), the Supreme Court extended that possibility to proceedings for extradition for the purpose of criminal prosecution. Since then, a petition to reopen a criminal case pursuant to section 363a (1) of the Code of Criminal Procedure has allowed the Supreme Court to protect fundamental rights in extradition proceedings as well. In this context, the Supreme Court verifies whether any impediments to extradition exist, including the principle of non-refoulement. The Supreme Court may suspend enforcement of the decisions appealed against, pursuant to section 362 (5) of the Code of Criminal Procedure.

4.12 The State party also referred to the complaint mechanisms concerning the conditions of detention, as provided for by section 106 of the Code of Criminal Procedure (against orders, decisions and omissions by public prosecutors) and the possibility to lodge an appeal pursuant to sections 87 ff. of the Code of Criminal Procedure (against court orders). Extraditions are regulated by the Federal Act of 4 December 1979 on Extradition and Mutual Assistance in Criminal Matters. Courts must verify the permissibility of an extradition based on the request for extradition and the related documents, in line with the formal assessment principle. The question of whether persons to be extradited are culpable of having committed the criminal offences of which they are accused is not assessed. The courts must comprehensively assess all statutory and public international law prerequisites and impediments to an extradition. An extradition is not allowed, *inter alia*, if, based on specific legal or factual circumstances, there are serious concerns that the criminal proceedings in the requesting State would not comply or have failed to comply with the principles of articles 3 and 6 of the European Convention on Human Rights. Extraditions to a State in which a person would have to face torture or inhuman or degrading treatment in the course of criminal prosecution are therefore prohibited. The person concerned must prove a significant probability of a current, serious (substantial) risk of treatment in violation of article 3 of the European Convention on Human Rights in a conclusive and sufficiently specific manner. In their assessment, the courts must resort to current, objective and reliable sources of information. An extradition for the purpose of prosecution on the ground of a criminal offence that is subject to capital punishment in the requesting State is permissible only if there is a guarantee that the death penalty will not be imposed (section 20 (1) of the Federal Act on Extradition and Mutual Assistance in Criminal Matters). Extradition for the purpose of enforcement of capital punishment is not allowed.

4.13 Section 13 of the Federal Act on Extradition and Mutual Assistance in Criminal Matters states that extradition prevails over other measures terminating residence, such as under the Asylum Act. A person cannot be expelled on the basis of other statutory provisions while extradition proceedings are pending against that person. On the other hand, extradition of asylum-seekers may be declared permissible and they may be turned over to the requesting State even while asylum proceedings are pending. Under national law, if extradition and asylum proceedings are both pending, suspension of an extradition until a decision has been handed down in asylum proceedings is not required.

4.14 As regards the admissibility of a complaint, in the context of article 3 of the Convention, the complainant must apply for remedies that are directly related to the risk of being subjected to torture in the requesting State and not for remedies that might allow the complainant to remain in the sending State party for other reasons. Moreover, the remedy

should be easily accessible and have suspensive effect in situations in which there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if deported to another country.<sup>13</sup> In the view of the State party, the prerequisite of having exhausted all available domestic remedies has not been fulfilled in the present case. First of all, the State party points out that the asylum proceedings before the Federal Administrative Court in the second set of proceedings have not yet been concluded. The State party also recalls that the return decision of 18 December 2019, including a determination on the permissibility of deportation to India, handed down by the Federal Office of Immigration and Asylum became final because the complainant, supported by a non-governmental organization active in the field of legal advice and representation, appealed against the decision too late. As stated above, the remedies the complainant may avail himself of against the still pending decision of the Federal Administrative Court are a petition for review to the Supreme Administrative Court and an appeal to the Constitutional Court, which would have to be submitted within six weeks and which may be combined with a petition for suspensive effect (and for being granted legal aid).

4.15 With regard to the extradition proceedings, there is the possibility to reopen the criminal case pursuant to section 363a of the Code of Criminal Procedure, which may be resorted to within six months of the final domestic decision by the court of last instance on the basis of an effective appeal and in relation to the subject matter of the appeal. Accordingly, the complainant may still submit a petition, pursuant to section 363a of the Code of Criminal Procedure, to the Supreme Court for review of the decision taken by the Linz Higher Regional Court on 12 October 2021, within a time limit of six months after notice of the decision was served. The complainant has been represented by a lawyer and the decision of the Linz Higher Regional Court was served on the latter. The State party assumes that domestic appeals in extradition proceedings are exhausted only after a petition to reopen a case pursuant to section 363a of the Code of Criminal Procedure has been submitted to the Supreme Court and a decision handed down. The complainant has not even alleged that the application of such a remedy would take an unreasonably long time to complete or that it is unlikely to bring effective relief (article 22 (5) (b) of the Convention). Specifically, this remedy is recognized as effective by the European Court of Human Rights.

4.16 Insofar as the complainant complains about his detention conditions in Austria, the State party points out that he has made no specific allegations regarding whether the public prosecutor or a court has decided to restrict visits to which he is entitled. The complainant may either raise an objection to orders, decisions or omissions by public prosecutors on the ground of infringement of rights, pursuant to section 106 of the Code of Criminal Procedure, or lodge an appeal against orders, decisions or omissions by the courts pursuant to sections 87 ff. of the Code of Criminal Procedure. As far as can be seen from the communication, the complainant has neither resorted to any of these (effective) remedies nor substantiated why they would not be or have not been effective in his case.

4.17 Finally, the complainant has complained about a violation of his right to a fair trial both with respect to the proceedings in Austria and to the criminal proceedings in India. An assessment of whether, beyond the prohibition of torture, the criminal proceedings against the complainant in India meet the requirements of a fair trial is not within the scope of the Convention. The complaint appears to be inadmissible *rationae materiae* to that extent. With respect to the proceedings before the Austrian courts, the complainant only raises issues concerning evaluation of evidence, namely that his request for an expert to be appointed to assess the political and human rights situation in India was not allowed and that the reports and documents produced by him were not taken into consideration. Based on his general allegations, which he failed to substantiate in more detail, the complainant ignored the fact that the Linz Higher Regional Court had dealt with all of those concerns in detail and comprehensibly substantiated the reason why it did not consider the referenced documents as relevant to the present case or arrived at conclusions that differed from those of the complainant. The State party points out again that the complainant may submit a petition, pursuant to section 363a of the Code of Criminal Procedure, to the Supreme Court within a time limit of six months after notice of the decision taken by the Linz Higher Regional Court

<sup>13</sup> Ibid., paras. 34–35.

on 12 October 2021 was served. Against this background, there appears no need for further consideration of the present communication by the Committee, due to non-exhaustion of available domestic remedies.

4.18 For reasons of legal prudence, the State party has, however, also submitted its observations on the merits. The complainant mainly alleges that, in the case of his extradition to India, he would be exposed to a real risk of being killed, subjected to torture or other degrading or inhuman treatment because India is not a State party to the Convention, Indian prisons are overcrowded and medical care is insufficient. In the present case, the Austrian courts carefully examined, on the basis of the Federal Act on Extradition and Mutual Assistance in Criminal Matters and the relevant case law of the Supreme Court and the European Court of Human Rights, whether the prerequisites for extradition of the complainant to India were fulfilled and whether there were any impediments to his extradition. For that purpose, the courts thoroughly dealt with the complainant's allegations that he would be at risk of torture or inhuman or degrading treatment in his home country. In doing so, they relied on current and objective country information, which reflected the most recent reports of renowned non-governmental organizations such as Freedom House and Human Rights Watch. They clarified the points considered material by the Committee, namely a foreseeable, personal, current and serious risk of being subjected to torture in India. Considering the general situation of human rights and the situation of Sikhs in India, the Linz Regional Court, for instance, arrived at the conclusion that no systematic discriminatory prosecution or sentencing practices could be identified with respect to Sikhs. The complainant was in no danger of being persecuted in India on the ground of being a member of the Sikh community alone, because Sikhs were neither arrested nor ill-treated arbitrarily solely on the basis of their religious affiliation. None of the members of his family who lived in India were affected by arbitrary persecution. Although, according to his own statements, the complainant had been imprisoned several times, he did not allege that he had been subjected to ill-treatment or torture while detained. According to the Linz Regional Court, nothing in the case file showed that the complainant would be at risk of torture. The Linz Higher Regional Court also rebutted the outdated case studies and reports produced by the complainant by means of the current country information on the general situation of human rights in India and, in particular, in the State of Punjab. The Linz Higher Regional Court also arrived at the conclusion that, even though there were violations of human rights, the complainant was not seriously at risk of a violation of his rights under article 3 of the European Convention on Human Rights. Even though it could not be excluded that proscribed investigative methods were used, the courts in India were not allowed to admit any statements obtained under torture.

4.19 In addition, the Indian authorities had provided guarantees in writing that the complainant could expect adequate detention conditions (adequate sanitary facilities, ventilation and personal space). Finally, considering the extremely serious charges brought against the complainant, the potential maximum sentence of life imprisonment could not be considered unreasonable. The complainant had neither substantiated that there would be no prospect of release or review of his detention in India nor were there any indications to suggest that there would not be. Moreover, the Linz Higher Regional Court was able to assess, at its hearing on 12 October 2021, the allegation made by the complainant to the effect that, in December 2020, his father had been tortured by the police; it concluded that the release letter of the Parkash hospital neither indicated where the patient had suffered his injuries nor that they had been caused by prison staff. However, it allowed the conclusion that medical care would be provided in any case. Consequently, the Linz Higher Regional Court was right to conclude that there was no conclusive evidence of the fact that the complainant would be at a serious risk of torture or inhuman or degrading treatment or punishment in the case of his extradition to India.

4.20 Furthermore, the State party refers to the fact that, in the asylum proceedings initiated by the complainant, it has not been possible to identify thus far any current, personal and serious danger for him in India. In November 2021, the Constitutional Court set aside part of the judgment of the Federal Administrative Court, without prejudging the outcome of a review by the latter Court, on the ground that pending criminal proceedings against the complainant in India had not been taken into consideration in its assessment of whether the prerequisites for being granted subsidiary protection had been fulfilled. Therefore, the State



party is of the opinion that the pending criminal proceedings against the complainant in India are no impediment to his extradition, also because the complainant is represented by a lawyer in India and has raised an objection against the charges brought against him.

4.21 The State party has also objected to the complainant's allegations of a violation of article 16 of the Convention, due to his detention conditions in Austria (lack of visits and contact during his arrest pending extradition for nearly 10 months). The complainant's allegation in this regard is merely a general one and contains no sufficiently specific explanation as to how visits or, in general, external contact requested by him had been denied. As far as can be seen from the case file, the complainant's legal representative only requested, in a written statement of 25 July 2022, clarification on how the complainant could establish contact with friends, acquaintances and family members. On 28 July 2022, the legal representative was informed in writing that, in view of the alleged offence, such visits were not possible. The legal representative then neither took legal action nor filed an application for such visits to be allowed. For the sake of completeness, it is to be noted that, due to the criminal offence of which he is accused, the risk posed by the complainant and his visitors to the security of the prison is assessed as high. Moreover, during a search of his cell, prohibited items were found (a mobile phone hidden in a toothpaste tube and a sharpened metal object). Furthermore, sympathisers of the complainant appeared at the appellate hearing before the Linz Higher Regional Court on 12 October 2021, one of whom had hidden a knife in his turban, which was seized by security staff at the entrance. In the opinion of the State party, it was therefore legitimate to restrict visits to the complainant. Apart from that, since 2020, statutory measures have been taken due to the COVID-19 pandemic to protect the particularly vulnerable areas of prisons. In order to contain the spread of the virus, visits to detainees have been restricted to a minimum due to amendment of the Code of Criminal Procedure (Federal Act on Accompanying Measures in the Administration of Justice due to COVID-19). Accordingly, visits to the complainant were in part restricted to phone or video calls during the period of detention pending extradition. An exception was made for visits from representatives of public agencies and support organizations and from legal counsel. The State party understands that the general restrictions on contact applicable in Austria in the case of arrest pending extradition are provided for by law and are appropriate and proportionate.

4.22 In conclusion, the State party reiterates that the present complaint should be considered inadmissible, pursuant to article 22 (5) (b) of the Convention. In the alternative, the Committee is invited to conclude that the rights of the complainant under articles 3 and 16 have not been violated.

### **Complainant's comments on the State party's observations**

5.1 On 18 May 2022, the complainant informed the Committee that the Linz Regional Court had, on 13 May 2022, refused to release him from detention pending extradition. The Court argued that the detention had not been unreasonably long thus far. He also stated that the Ministry of Justice expected a decision by the Committee by the end of June 2022.

5.2 The complainant recalls that he has been denied any telephone calls to, or visits from, family members and friends since March 2021. He assumes that those circumstances also amount to a violation of his right to a fair trial and not to be subjected to inhuman treatment. He requests that the Committee also assess these allegations.

5.3 On 11 July 2022, the complainant submitted additional comments, admitting that the State party's observations on his asylum proceedings were correct. The second asylum appeal of the complainant is still pending before the Federal Administrative Court. It is correct that the complainant is still viewed as an asylum-seeker by the Austrian authorities and that the return decision must not be enforced at the moment.

5.4 However, the pending asylum procedure has no effect on the possibility to enforce the extradition decision issued by the Linz Regional Court. Therefore, the complainant requested that the Minister of Justice postpone his extradition until the final decision in the asylum case

had been issued. The Office of the Minister of Justice responded that, under Austrian law, that was not possible.<sup>14</sup>

5.5 As regards the extradition proceedings, the complainant submitted that, even if the Embassy of India had confirmed, by letter dated 6 September 2021, that none of the offences the complainant was accused of were subject to the death penalty, there was no guarantee that the complainant would not be killed in police or court custody before being brought to trial. In that context, he referred to the arguments contained in the complaint to the Committee and the supporting evidence. There is no guarantee either that the complainant would be held in adequate sanitary conditions and free from overcrowding at the Central Jail Kapurthala. The reality in Indian prisons is totally different. Despite the letter from the Embassy of India, there is no guarantee against the risk of torture and inhuman treatment of the complainant in the Indian judicial system. After the extradition, nobody will take responsibility for the complainant and the Austrian authorities will argue that they have no legal competence to examine whether the pledges of the Embassy of India have been fulfilled, in particular as India is not a party to the Convention. In addition, the complainant refers to the recent expression of concerns by the former Prime Minister of the United Kingdom of Great Britain and Northern Ireland, Boris Johnson, about illegal detention, harassment and torture of a British Sikh activist for more than four years.<sup>15</sup>

5.6 Regarding the legal situation, the complainant filed an appeal with the Constitutional Court in the asylum case and was successful. The case is still pending before the Federal Administrative Court and the complainant cannot be expelled under asylum law to India as long as there has not been a new decision by the Federal Administrative Court. There is no additional remedy in the asylum procedure that could be used by the complainant. As mentioned above, the pending status of the asylum case does not protect the complainant from being extradited.

5.7 The complainant admits that he did not file a petition to reopen the criminal case, pursuant to section 363a of the Code of Criminal Procedure. However, a petition pursuant to section 363a would not have been an effective remedy to protect the complainant from extradition to India, based on the decision by the Linz Regional Court. The petition under that provision has no suspensive effect. The complainant does not even have the right to apply for suspensive effect under the Code of Criminal Procedure. Moreover, the Supreme Court follows a very restrictive policy regarding the applicability of section 363a in extradition cases<sup>16</sup> as the request for suspension is not examined in the procedure under that section. In addition, the guarantees of article 6 of the European Convention on Human Rights are not examined within the asylum procedure.

5.8 Contrary to the arguments of the State party, the complainant has exhausted all available and effective remedies against the risk of extradition to India. The open asylum case does not protect the complainant from extradition and he refers to the letter of the Minister of Justice to support this assertion. He requests that the Committee consider the communication as admissible.

5.9 As regards the merits, the complainant refers to the initial arguments that substantiate the alleged risks if extradited. The State party has not been able to convincingly refute such assertions. In addition, he would not have the chance of a fair trial given his Sikh ethnicity and the political background of the case. The fate of the complainant's father and the death of the public prosecution's key witness in an Indian prison underline the risks the complainant would face if extradited. Therefore, the communication should be considered well founded as regards the merits.

5.10 Finally, the complainant submits that he has also suffered from the detention conditions. Although detained since March 2021, that is for more than 15 months, he has had no visit by a family member, friend or member of the Sikh community in Austria. He has

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<sup>14</sup> The letter, dated 15 February 2022, was submitted to the Committee.

<sup>15</sup> See [www.bbc.com/news/uk-scotland-glasgow-west-62003381](http://www.bbc.com/news/uk-scotland-glasgow-west-62003381).

<sup>16</sup> Supreme Court of Austria, decision 13 Os 139/12h, 14 February 2013, concerning protection against political persecution under section 19 (3) of the Federal Act on Extradition and Mutual Assistance in Criminal Matters.

only been visited by his lawyer, who is his only connection with the outside world, which should be considered as inhuman treatment or even torture. The exclusion of any visits cannot be justified by the rules to prevent the spread of COVID-19 either as, even during the pandemic, prisoners were visited by friends and family on a regular basis. Contrary to the arguments by the State party, there is no risk for the prison regime at all if visits to the complainant are granted. He is not dangerous. Allegations to the contrary are fabricated. Even if they were true, a prison setting allows for reasonable security measures to be taken to ensure that visits are safe for the complainant, visitors and staff.

#### **State party's additional observations**

6.1 On 7 September 2022, the State party submitted additional observations in response to the complainant's comments dated 11 July 2022.

6.2 The State party reiterates the explanations presented in its observations of March 2022, since the complainant's comments repeat the arguments already presented.

6.3 The State party emphasizes that an application under section 363a of the Code of Criminal Procedure would have been an effective remedy to initiate a review by the Supreme Court of the decision taken by the Linz Higher Regional Court on 12 October 2021, as already stated in its preceding observations. The complainant could have also invoked article 3 of the European Convention on Human Rights, which – like article 3 of the Convention – provides protection not only against inhumane conditions of detention, but also against a risk of a violation of the principle of non-refoulement. The complainant could also have made an application to the European Court of Human Rights to invoke violations of his right to a fair trial.

6.4 The State party adds that section 363a of the Code of Criminal Procedure is considered as an effective legal remedy against the alleged violation of the Convention also within the meaning of article 35 (1) of the European Convention on Human Rights, according to established case law of the European Court of Human Rights.<sup>17</sup>

6.5 The Supreme Court handles applications under section 363a of the Code of Criminal Procedure quite expeditiously: the average duration of proceedings under section 363a between 2018 and 2022 was between 3.5 and 4.3 months. In 2018, 63 applications under section 363a were submitted; in 2019, there were 51 applications; in 2020, 47 applications; in 2021, 39 applications; and, in 2022 up until July, there were 25 applications. The Supreme Court grants suspensive effect to the application upon request, on a case-by-case basis.

6.6 The State party requests that the Committee declare the present communication inadmissible, pursuant to article 22 (5) (b) of the Convention. Alternatively, the Committee is requested to find that the rights of the complainant under articles 3 and 16 of the Convention have not been violated.

#### **Additional comments by the complainant**

7.1 On 26 September 2022, the complainant submitted additional comments on the additional observations by the State party. He argues that article 22 (5) (b) of the Convention does not apply in circumstances in which the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of a violation of the Convention.

7.2 He asserts that a remedy under section 363a of the Code of Criminal Procedure has no automatic suspensive effect. If the complainant had resorted to such a remedy, he would have been extradited to India before the Supreme Court had decided on the case. The

<sup>17</sup> European Court of Human Rights, *Stecher v. Austria*, application No. 35449/16, Decision, 3 December 2019. Related conclusions can be found in commentaries for practitioners on the Code of Criminal Procedure, such as in the Vienna commentary on the Code of Criminal Procedure (Günther Rebisant, “§363a”, in *Wiener Kommentar zur StPO*, Helmut Fuchs and Eckart Ratz, eds. (Vienna, Mainz)), or Margarethe Flora, “§363a”, in *StPO: Strafprozessordnung – Kommentar, Band II*, §§ 210–517, 2nd ed., Christian Bertel and Andreas Venier, eds. (Vienna, Jan Sramek, 2020), paras. 8 ff.

procedure before the Supreme Court would have lasted very long as there is no statutory time limit for such a decision by the Supreme Court. In addition, a remedy under section 363a of the Code of Criminal Procedure only covers violations of the European Convention on Human Rights, not violations of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment itself. The argument of non-exhaustion of available domestic remedies is not applicable in the present case. The complainant holds that he has exhausted all relevant and effective domestic remedies in the context of his case.

7.3 The complainant recalls that he has not been allowed visits by family members, relatives and friends since the time he was detained awaiting extradition. Only his counsel has had the right to visit him. There is no reason for inhuman treatment of the complainant for such a long time.

7.4 Similar treatment can even be considered as amounting to torture of the complainant, which should be considered unlawful by the Committee. The acts of torture of the complainant have continued to the present day. A remedy under section 363a of the Code of Criminal Procedure would not have been effective against the alleged unlawful treatment of the complainant.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any complaint contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (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.

8.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. Nevertheless, this rule does not apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief.<sup>18</sup> The Committee notes that, in the present case, the State party has contested that the complainant has exhausted all available domestic remedies, both in the context of his application for asylum and extradition proceedings against him, as well as in relation to the disputed conditions of detention pending extradition.

8.3 The complainant claims that Austria would violate article 3 of the Convention if he were extradited to India as he would face a risk to his life or of persecution and ill-treatment, that the conditions of detention pending extradition have amounted to ill-treatment, in violation of article 16 of the Convention, and that his right to a fair trial has been or would be violated.

8.4 The Committee notes the complainant's argument that his initial application for asylum has been rejected, while admitting that the subsequent application for asylum remains pending before the Federal Administrative Court. The Committee also notes the complainant's argument that no further effective remedies have been available in relation to the authorization of extradition, since a remedy pursuant to section 363a of the Code of Criminal Procedure would not have suspensive effect, and the decision on extradition prevails over the decision on the asylum application.

8.5 The Committee notes the State party's argument that the remedies the complainant may resort to against the pending decision of the Federal Administrative Court on the asylum application are a petition for review by the Supreme Administrative Court and, in addition, an appeal to the Constitutional Court, which would have to be submitted within six weeks and which may be combined with a petition for suspensive effect (and for being granted legal aid). In the State party's view, those avenues still remain open to the complainant. As regards the decision on extradition, the Committee notes the State party's argument that the

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<sup>18</sup> Committee against Torture, general comment No. 4 (2017), para. 34.

complainant could have submitted a petition, pursuant to section 363a of the Code of Criminal Procedure, to the Supreme Court for review of the decision taken by the Linz Higher Regional Court on 12 October 2021, within a time limit of six months. The Committee observes that the complainant has been represented by a lawyer who was served notice of the decision of the Linz Higher Regional Court, and that the State party assumes that domestic appeals in extradition proceedings are exhausted only after a petition to reopen the case, pursuant to section 363a of the Code of Criminal Procedure, has been submitted and the Supreme Court has handed down a decision thereon. In that context, the Committee notes the State party's argument that the complainant has not even alleged that the application of such remedy would take an unreasonably long time to complete, while he asserted in the end that it was unlikely to bring effective relief. The State party has objected to the complainant's argument that such an appeal would be ineffective, due to the absence of automatic suspensive effect, and has provided statistics on the number of applications made to the Supreme Court under section 363a of the Code of Criminal Procedure. The complainant, however, refused to pursue that remedy because he doubted that he would be successful. The Committee recalls its jurisprudence that mere doubts about the effectiveness of a remedy do not absolve the complainant from the duty to exhaust it,<sup>19</sup> and that such doubts are not generally dispelled when the complainant fails to show that appeals would be unlikely to succeed.<sup>20</sup> The State party has further argued that the complainant did not resort to any available domestic remedies to challenge his conditions of detention. The Committee notes that this objection was not disputed by the complainant.

8.6 In the circumstances, the Committee considers that the State party should have an opportunity to assess all the evidence gathered by its asylum authorities, including upon appeal to the Federal Administrative Court, before the communication is submitted for examination under article 22 of the Convention. The Committee also considers that a petition pursuant to section 363a of the Code of Criminal Procedure has generally been available to the complainant, including a request to grant suspensive effect to the enforcement of his extradition. In that regard, the Committee cannot conclude that a review of the extradition decision in the present case, based on an appeal to the Supreme Court against the authorization to extradite the complainant given by the Linz Higher Regional Court, although entailing a discretionary suspensive effect, would be a priori ineffective. Finally, the Committee considers that the complainant failed to resort to any formal remedies to challenge the conditions of his detention pending extradition, nor to substantiate why they would not be or would not have been effective in his case. The Committee therefore finds that the complainant has not exhausted all available domestic remedies.

8.7 In light of the above, the Committee is not going to consider whether the claims of a violation of the fair trial standards both with respect to the proceedings in Austria and to the criminal proceedings in India are admissible *rationae materiae*, or whether the available domestic remedies in that regard have been exhausted.

9. The Committee therefore decides:

- (a) That the communication is inadmissible under article 22 (5) (b) of the Convention;
- (b) That the present decision shall be communicated to the State party and the complainant.

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<sup>19</sup> *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.5.

<sup>20</sup> *R.K. v. Canada* (CAT/C/19/D/42/1996), para. 7.2. See also *D.C. v. Switzerland* (CAT/C/73/D/889/2018), para. 9.4.