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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. 798/2017**, ***, ****

Communication submitted by:	B.S. and N.K. (represented by counsels, Anne Castagner and Stewart Istvanffy)
Alleged victims:	The complainants
State party:	Canada
Date of complaint:	13 January 2017 (initial submission)
Document references:	Decisions taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 24 January 2017 (not issued in document form)
Date of adoption of decision:	23 July 2021
Subject matter:	Deportation to India
Procedural issues:	Non-exhaustion of domestic remedies; non-substantiation of claims; abuse of the right to file a submission
Substantive issue:	Risk of torture or other cruel, inhuman or degrading treatment or punishment, if deported to country of origin (non-refoulement)
Article of the Convention:	3

1.1 The complainants are B.S., a national of India born in 1967, referred to hereafter as "the first complainant", and his wife N.K., a national of India born in 1970, referred to hereafter as "the second complainant". They claim that Canada would violate their rights under article 3 of the Convention if it removed them to India. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 13 November 1989.

1.2 On 1 May 2017, the State party submitted its observations on admissibility and requested the Committee to consider the admissibility of the communication separately from its merits. On 25 January 2018, the Committee, acting through its Rapporteur on new complaints and interim measures, rejected the State party's request.

* Reissued for technical reasons on 24 March 2022.

** Adopted by the Committee at its seventy-first session (12–30 July 2021).

*** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Claude Heller, Erdoğan İşcan, Liu Huawen, Ilvija Pūce, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing.

**** A joint opinion (dissenting) by Committee members Diego Rodriguez-Pinzón and Liu Huawen is annexed to the present decision.

1.3 On 13 December 2018, in application of rule 114 (1) of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from deporting the complainants to India while their communication was being considered by the Committee. On 29 March 2019, the State party requested the Committee to lift the interim measures. On 21 May 2019, the Committee, acting through the same Rapporteur, granted the State party's request.

Facts as submitted by the complainants

2.1 On 1 January 2008, the Uttar Pradesh Police raided the complainants' farmhouse and inquired about a man named Gurpreet Singh. The first complainant informed them that his family and a servant were the only people residing there, and that the servant was absent until 5 January 2008.

2.2 The police returned on 6 January 2008, raided the house again and inquired about the servant. The first complainant explained that he did not know the servant's whereabouts. The first complainant was brought to a police station and was accused of cooperating with a terrorist.

2.3 The police stated that the servant was in fact Mr. Singh, a member of Babbar Khalsa, a terrorist organization, who had escaped from police custody and who had been involved in a bomb attack and in the planning of further terrorist acts. The police tortured the first complainant in an attempt to obtain confessions regarding his links with terrorists. He was forced to sign three blank pages. On 10 January 2008, he was released after his in-laws paid a bribe. He received medical treatment for three days.

2.4 The complainants decided to leave their son with his grandmother while they left the area to hide with relatives about 1,000 kilometres away in Punjab. On 25 February 2008, the local police raided the hiding place and the complainants were brought to a police station. The first complainant was beaten during the night to reveal the whereabouts of Mr. Singh and his colleagues. On 26 February 2008, the complainants were brought to Uttar Pradesh. The first complainant was hanged upside down and electric shocks were administered to make him confess his links with terrorists.

2.5 A relative secured the release of the second complainant on 1 March 2008 and of the first complainant on 3 March 2008. After his release, the first complainant was admitted to a clinic for three days. While he was there, he learned that his wife had been raped while in police custody. She was forced to sign some documents and was taken to the doctor for a check-up.

2.6 The second complainant wanted to commit suicide but the first complainant assured her that he would initiate court proceedings against the police. On 10 March 2008, he went to Bareilly Courts and discussed the situation with legal counsels. They indicated that they would be unable to proceed against the police and that the chances of success were non-existent. Upon hearing this, the complainants decided to leave India. The police called the first complainant to the police station in May, July, August and September 2008. On each occasion, the police threatened to kill him and his family if he did not facilitate the arrest of Mr. Singh and his associates. On 19 November 2008, the complainants left for the United States of America and entered Canada on 28 November 2008. On 22 January 2009, they applied for asylum there.

2.7 The mother of the first complainant continues to be harassed and threatened by the police. This has been corroborated by villagers and a counsel from whom she sought help.

2.8 The complainants' refugee claim dated 22 January 2009 was found to lack credibility and was rejected by the Refugee Protection Division of the Immigration Refugee Board on 27 July 2011. The Immigration Refugee Board noted that Mr. Singh had already been arrested in December 2007, after having initially escaped arrest in September 2007. It concluded that the complainants had no problems with the police in that connection. The Board stated that even if they accepted that the second complainant had been raped, it did not believe that it was for the reasons alleged. On 16 November 2011, the Federal Court dismissed the application for leave and for judicial review of the Board's decision.

2.9 On 23 January 2012, the complainants sought a pre-removal risk assessment, and on 23 February 2012, they applied for permanent residence based on humanitarian and compassionate considerations, submitting a humanitarian and compassionate grounds application, but to no avail. Applications for judicial review of both refusals were filed on 7 July 2012, and both were rejected by the Federal Court on 7 January 2013.

2.10 On 10 September 2013, the complainants submitted another humanitarian and compassionate grounds application, but to no avail. Their application for a judicial review of the refusal was filed on 16 April 2014, but it was rejected by the Federal Court on 28 August 2014.

2.11 On 29 January 2012, the complainants submitted a third humanitarian and compassionate grounds application, and on 11 February 2015, they applied for a second pre-removal risk assessment. Both claims were rejected. Their appeals, filed on 10 June 2015, were rejected by the Federal Court on 16 August 2015 and 13 October 2015, respectively. The complainants submitted that their current complaint is mainly contesting the last pre-removal risk assessment decision.

2.12 On 29 September 2016, the complainants submitted a fourth humanitarian and compassionate grounds application for permanent residence in Canada, which was rejected on 31 May 2017. Their applications for judicial review of the refusal were rejected. They further submit that the second complainant suffers from post-traumatic stress disorder due to the rape suffered, and she is undergoing treatment in Canada.

2.13 On 30 November 2018, the complainants applied for the fifth residence permit on humanitarian and compassionate grounds. Meanwhile, their deportation was scheduled for 17 December 2018. On 4 December 2018, a request for administrative stay of removal was filed. The request was denied on 6 December 2018.

Complaint

3. The complainants claim that, by deporting them to India, the State party would violate articles 3 of the Convention, because they would be at personal risk of being subjected to torture or other cruel, inhuman or degrading treatment. Since the Indian police were searching for them for allegedly supporting Sikh terrorists in Punjab and Uttar Pradesh, they would be arrested and potentially tortured if returned to India. The complainants claim that they have been in regular contact with their family and friends in their village in India, who have informed them that the police are still interested in them. The complainants also claim that their removal to India would have a negative effect on their mental health since both complainants suffer from the psychological after-effects of torture, and that such removal would constitute inhuman treatment.

State party's observations on admissibility and the merits

4.1 The State party submitted its observations on admissibility and the merits on 1 May 2017 and 29 March 2019. The State party submits that the complaint is inadmissible because the complainants did not properly apply for a pre-removal risk assessment, having only been eligible since 1 May 2016. The complainants' allegations relating to the potential mental health impacts of removal are incompatible with article 3 of the Convention, and their allegations have not been sufficiently substantiated.

4.2 The State party submits that the complainants' claims were considered and rejected as their account was found not to be credible. The complainants have had several opportunities to put forth new evidence before Canadian decision makers and to have their case considered by the courts. However, they were unable to demonstrate that they would face a risk of torture or other ill-treatment in India. The State party also submits that the complaint was without merit.

4.3 The State party recalls the facts of the case and explains how the competent Canadian decision makers assessed the complainants' asylum claim. On 27 July 2011, the Refugee Protection Division determined that the complainants were neither Convention refugees nor persons in need for protection. According to the Refugee Protection Division, the complainants' account of mistreatment in 2008 was fundamentally implausible, and it was

not supported by reliable documentary evidence. The Refugee Protection Division did not accept that the complainants had been sought by the police for alleged association with Mr. Singh. According to the numerous media reports, Mr. Singh had actually been arrested by the Indian police in December 2007, a fact that was inconsistent with the complainants' account of regular harassment between January and September 2008. Their claim of police harassment was not supported by reliable documents. The documents provided by the complainants about their physical and mental health established only that the complainants were experiencing undefined mental health issues, and that the second complainant may have been sexually assaulted in the past. Purported "psychological evaluations" that were provided to the Refugee Protection Division had been prepared by someone who was not a licensed psychologist.

4.4 The State party submits that the complainants have filed five applications for permanent residence on humanitarian and compassionate grounds. Four of those were rejected, and the fifth application is pending.

4.5 The State party submits that the fourth humanitarian and compassionate grounds application was rejected on 31 May 2017. The humanitarian and compassionate grounds officer concluded that the level to which the complainants had established themselves in Canada was not sufficient to warrant an exception to the usual rules for seeking permanent residence. The complainants had lived in India for over 40 years, and there was no evidence to suggest that they would have difficulties in re-establishing themselves there. They also made submissions based on their family members who were living in Canada. However, it was concluded that the best interests of the child did not warrant an exceptional grant of permanent residence, and the complainants could subsequently apply for family reunification. The complainants claimed that in India, they would not be provided with the necessary medical treatment. However, the humanitarian and compassionate grounds officer concluded that there was no evidence to suggest that treatment and medication in India would be unavailable and/or unaffordable. The State party notes that the complainants also failed to cooperate with efforts of State party officials to secure travel documents to India.

4.6 The State party submits that the complainants applied twice for a pre-removal risk assessment, and that both applications were rejected, on 24 May 2012 and 30 April 2015.

4.7 The State party notes that in their second pre-removal risk assessment, the complainants submitted essentially the same account and allegations of risk that they had in their previous domestic process. As summarized by the pre-removal risk assessment officer, the complainants claimed that they would be at risk of persecution and torture in India because the first complainant was a Sikh with alleged links to militants. They stated that he would be arrested immediately upon return. They also stated that the second complainant suffered from post-traumatic stress disorder as a result of the events that they had experienced before leaving for Canada, and they further noted that she would not get the care she required for her condition upon return to India.

4.8 The State party submits that the complainants provided some new evidence to support their applications, including four affidavits by persons from Uttar Pradesh. However, this evidence did not address the "fundamental implausibility" in their account, which is that Mr. Singh had already been arrested before the start of the alleged police harassment of the complainants. The one exception "an affidavit from the first complainant's mother" was given little probative value because it was considered simply as a declaration from someone close to the applicants and, as such, it was believed that it did not in and of itself provide objective proof of the allegations.

4.9 The complainants also provided three affidavits from the complainants' health-care providers in Canada, seeking to establish that the complainants suffered from severe anxiety, symptoms of post-traumatic stress disorder and depression, and that removal to India would have serious impacts on the complainants' mental health. However, those documents did not establish whether the complainants' symptoms were the result of the events alleged to have occurred in India. The pre-removal risk assessment officer acknowledged that removal might impact the complainants' mental health, but no documentation had been submitted on the health services available in India. Even so, such risks were not severe enough to meet the

threshold required in a pre-removal risk assessment, such as a risk of death, torture or other cruel or inhuman treatment or punishment.

4.10 The pre-removal risk assessment officer also examined reports of general country conditions in India, finding that torture, abuse and corruption remained serious problems, and that for Sikhs in India, there was a risk of serious human rights violations if they were involved in Sikh separatist activities or suspected of being supporters of Sikh militants. The pre-removal risk assessment officer concluded that the complainants did not demonstrate that if they returned to India, they would fall under one of those risk profiles. Therefore, generalized evidence had not been established to indicate that the complainants would face a personalized risk of torture or other serious human rights violations.

4.11 The State party submits that in relation to each of the two pre-removal risk assessment decisions, the complainants applied for leave from the Federal Court to seek judicial review, but their requests were rejected.

4.12 The State party adds that the complainants requested a deferral of their scheduled removal. An enforcement officer of the Canada Border Service Agency considered their request, and after evaluating the totality of the materials submitted, rejected it as no new risk was proffered and the grounds mirrored those invoked and duly considered in the applications processes for refugee determination, pre-removal risk assessment, and humanitarian and compassionate grounds.

4.13 The State party notes that the communication is also inadmissible since the complainants did not exhaust all available and effective domestic remedies, namely a third pre-removal risk assessment application, and their fifth humanitarian and compassionate grounds application, which is still pending.

4.14 The State party submits that the failure to apply for a third pre-removal risk assessment is crucial and is sufficient to make this complaint inadmissible, since the procedure involves direct and individualized consideration of any post-removal risks, including risks of torture. However, the complainants did not do so.

4.15 The State party observes that the pre-removal risk assessment is designed to consider the evidence such as the "new evidence" submitted by the complainants to the Committee, in particular new affidavits that speak to the current situation in Punjab, and letters from health-care providers in Canada. Despite forwarding those materials to the Committee, the complainants have chosen not to submit them to the domestic decision makers for the purpose of the pre-removal risk assessment. Moreover, the complainants have not even explained their failure to pursue a third pre-removal risk assessment.

4.16 The State party also submits that although a regulatory stay of removal is not available pending the determination of a subsequent pre-removal risk assessment, the applicant may request an administrative deferral of removal during that period, and a negative decision can be reconsidered by the Federal Court if a leave for review is granted.

4.17 The State reiterates that the complainants' fifth humanitarian and compassionate grounds application is still pending, and that process is an effective domestic remedy that is available to the complainants and that they should be required to exhaust prior to addressing the Committee.[1] Canada respectfully disagrees with some recent views in which the Committee declared that the humanitarian and compassionate grounds process was not an effective remedy that had to be exhausted for the purposes of admissibility.[2]

4.18 The State party observes that the complainants could apply for permanent residence on humanitarian and compassionate grounds. According to the subsection 25 (1) of the Immigration Refugee Protection Act, the Minister or the delegated senior immigration officer must examine that individual's circumstances.[3] While a regulatory stay of removal is not automatically available, an administrative stay of removal may be granted until a final

[1] See, e.g., *P.S.S. v. Canada* (CAT/C/21/D/66/1997), para. 6.2; and *L.O. v. Canada* (CAT/C/24/D/95/1997), para. 6.5.

[2] *Kalonzo v. Canada* (CAT/C/48/D/343/2008), para. 8.3; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

[3] Canada, Immigration and Refugee Protection Act, SC 2001, chap. 27, subsect. 25 (1).

decision is made on the application.[4] In addition, an applicant may request, from the Canada Border Service Agency, an administrative deferral of removal pending the determination of a humanitarian and compassionate grounds application. In addition, if such an application is negatively determined, the applicant can apply in the Federal Court for leave to have the decision judicially reviewed and can bring a motion for a judicial stay of removal pending the outcome of the leave and judicial review applications.

4.19 The State party adds that it respectfully disagrees with paragraph 34 of the Committee's general comment No. 4 (2017), in which the Committee seems to suggest that the only effective domestic remedy is one that would allow a complainant to remain in the sending State party based on a finding of risk, and for no other reason. The State party submits that it should not matter on which ground a complainant is allowed to remain in Canada, when the result "namely, protection from removal to the country where he or she claims to be at risk" is the same. The humanitarian and compassionate grounds process is a fair administrative procedure, grounded in law and subject to judicial review, which can result in an applicant being allowed to remain in Canada. This is an effective remedy available to the complainants, which they must exhaust.

4.20 The State party submits that the communication is inadmissible on two additional grounds. First, the complainants' allegations relating to the potential impacts of removal to their mental health are incompatible with the provisions of the Convention, and thus inadmissible under article 22 (2). These allegations do not concern an alleged danger of being subjected to torture as it is defined in article 1, and therefore do not activate the obligations of Canada under article 3 or any other provision of the Convention because the negative impacts that the complainants would allegedly experience in India would lack the requisite State connection to amount to torture, and the impacts alleged by the complainants would clearly not meet the threshold of "severe pain or suffering".

4.21 Secondly, the complainants have not sufficiently substantiated, for the purpose of admissibility, any of the allegations suggesting that they face a foreseeable, personal and real risk of torture in India. Therefore, the complaint is inadmissible under rule 113 (b) of the Committee's rules of procedure. The State party argues that the complainants' case did not face any instance of arbitrariness or any denial of justice in their domestic proceedings since the findings and the conclusions were prepared by competent and impartial domestic decision makers on the basis of an assessment of the complainants' allegations of risk, which were found not to be credible.

4.22 The State party argues that the complainants have not provided sufficient evidentiary support for their allegations of past torture, a critical indicator of prospective risk. It is found implausible that the Indian police would have an interest in the complainants on the basis of their connection to Mr. Singh. It is also found implausible that, if the female complainant was raped, it would have been for the reasons alleged.

4.23 The complainants have also failed to substantiate their allegations that the police still have an interest in pursuing them, more than 10 years after their departure from India. The complainants' narrative that local police would seek and continue to seek their whereabouts is fundamentally implausible given the fact that Mr. Singh has already been detained.

4.24 The State party submits that updated and objective documentary reports concerning the country conditions in India demonstrate a marked improvement in the human rights situation for Sikhs in recent years, also the complainants could live safely in the other parts of India. The State party argues that the complainants do not have the profile of someone who is likely to be sought by the central authorities in India.

4.25 The State party submits that Canada does not accept the general applicability of the Committee's statement in general comment No. 4, namely that the so-called internal flight alternative is not reliable or effective.[5] Where State protection is available in other parts of the territory, the Committee's statement that an internal flight alternative would not be reliable or effective is incongruous with the wording and intent of article 3. If a complainant

[4] Canada, Immigration and Refugee Protection Regulations, SOR/2002–227, subsect. 233.

[5] Committee against Torture, general comment No. 4 (2017), para. 47.

can seek effective protection in one or more parts of the State, any risk of torture that he or she faces is not foreseeable, personal and real, as required by article 3. Moreover, an internal flight alternative is accepted to be a relevant consideration to the factual assessment of risk in both international and domestic refugee law in many rights-respecting countries, including Canada.

4.26 The State party submits that this complaint is without merit because the complainants have not presented sufficient, credible evidence that they face a foreseeable, real and personal risk of being subjected to torture if returned to India.

Complainants' comments on the State party's observations

5.1 On 13 May 2019, the complainants submitted their comments, reiterating that they would face a substantial risk of torture in case of return. They believe that there is substantial evidence of their past torture and of the risk of a recurrence. They disagree that the case is based on generalized evidence that does not establish personalized risk; there is a great deal of personal risk and very direct evidence of it. The complainants believe that given the ongoing interest of the police in them, as shown by the cumulative evidence produced, the risk is foreseeable, personal and real.

5.2 The complainants submit that it was unfairly considered that they were not in the need of protection because of an obstinate refusal to correct life-and-death mistakes when there was new evidence of the risk. A great deal of new evidence was submitted with the pre-removal risk assessment but refused in 2015. This case raises very clearly the lack of access to an efficient and effective procedure to correct initial errors in the refugee determination process. In addition, a new application would not stay their removal. They claim that the State party did not really discuss the substantial new evidence that was filed in 2015, including the diagnosis of post-traumatic stress disorder, the report of the lawyer from Sikh Human Rights Group and Lawyers for Human Rights International, and sworn declarations of a number of local officials and a member of the Legislative Assembly.

5.3 Finally, the complainants note that they have exhausted domestic remedies. Leave has been denied in the judicial review applications in both pre-removal risk assessment and humanitarian and compassionate cases on several occasions. They also note that no objective reports show that they have an internal flight alternative in India. This is subterfuge by the immigration authorities to permit the refusal of torture victims and to allow their return to a situation of total impunity in India.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering a claim 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.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged or is unlikely to bring effective relief.[6]

6.3 In this connection, the Committee notes the State party's argument that the complainants have been eligible to apply for a pre-removal risk assessment since 1 May 2016, and that the new process would allow them to present their new risk-related evidence, which has not previously been evaluated by the competent immigration authorities. It also notes the complainants' assertion that a new pre-removal risk assessment application would not correct

[6] See, e.g., *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2. See also general comment No. 4, para. 34.

the mistakes in the assessment of their allegations. It takes note of the State party's observation that although a regulatory stay of removal is not available pending the determination of a subsequent pre-removal risk assessment, the applicant may request an administrative deferral of removal during that period, and a negative decision could be reconsidered by the Federal Court if a leave for judicial review were granted. The Committee takes note of the complainants' indication that on 4 December 2018, a request for administrative stay of removal was filed with no success. However, the Committee observes that the complainants presented new risk-related evidence[7] to it that the State party did not assess through the pre-removal risk assessment procedure, which provides the applicants with the possibility of having direct and individualized consideration of any post-removal risks. As for the fact that the complainants do not find it effective to apply for a third pre-removal risk assessment, the Committee recalls its case law, according to which the mere doubt about the effectiveness of domestic remedies does not absolve the complainant from the duty to exhaust them, in particular when such remedies are reasonably available.[8]

6.4 In the light of the information before it, the Committee considers that, in the present case, the complainants since 2016 had an available and effective remedy that was not exhausted. The Committee thus concludes that the communication should be declared inadmissible under article 22 (5) (b) of the Convention.

6.5 In the light of this finding, the Committee does not deem it necessary to examine any other inadmissibility grounds.

7. 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 complainant and to the State party.

[7] The evidence consists of new affidavits that speak to the current situation in Punjab, and letters from health-care providers in Canada.

[8] See, e.g., *X v. Canada* (CAT/C/67/D/791/2016), para. 6.6.

Annex

Individual opinion of Committee members Diego Rodríguez-Pinzón and Liu Huawen (dissenting)

1. In the present case, we respectfully disagree with the Committee's inadmissibility decision based on the nature of the domestic remedies available to the authors of the communication to protect them from being deported to India. The complainants are not required to exhaust domestic remedies that are not effective to protect them from deportation if they will face a risk of torture or other cruel, inhuman or degrading treatment. Pursuant to articles 3 and 22 of the Convention, available remedies must allow for suspension of the deportation while a final decision is still pending in the domestic proceedings. Therefore, once such proceedings cease to allow for suspension of expulsion or deportation, they are no longer effective for purposes of the protections required by article 3 of the Convention, and the complainants are not required to exhaust them. As the State party indicated in the present case, a regulatory stay of removal is not available pending the determination of a subsequent pre-removal risk assessment, and the applicant will have to request an administrative deferral of removal during that period (para. 4.16). Consequently, such subsequent pre-removal risk assessment does not have suspensive effect and, therefore, we consider that the authors did not have to exhaust such remedy and the communication should have been admissible.

2. The Committee has consistently stated that domestic legal remedies designed to challenge deportation orders must have suspensive effect if there is a risk that the deportee is at risk of torture or ill-treatment. Otherwise, the legal remedies cannot be considered effective within the meaning of international human rights law.

3. First and foremost, the Committee expressly indicated in paragraphs 13, 18 (e) and 41, read in conjunction with paragraphs 34 and 35, of general comment No. 4 (2017), that domestic legal remedies to challenge deportation orders must have suspensive effect if there is a risk that the deportee could be subject to torture or ill-treatment. In particular, in paragraph 41, the Committee states that guarantees and safeguards should include the right to recourse against a decision of deportation within a reasonable time frame, for a person in a precarious and stressful situation and with suspensive effect on the enforcement of the deportation order.

4. The Committee has also stated in its case law that domestic legal remedies to challenge deportation orders must have suspensive effect. The Committee has considered that a complaint is admissible although the authors of the communications did not exhaust all domestic remedies, stating that such remedies were ineffective because they did not have suspensive effect to halt the deportation procedures.[1] The Committee has in fact dealt with the nature of the pre-removal risk assessment in Canada in its prior case law, finding in *N.S. v. Canada* that it did not have suspensive effect, and that it therefore did not have to be exhausted and that the case was admissible.[2] The determination of the Committee in the current case runs counter to its previous findings in *N.S. v. Canada*.

5. The standards of the Inter-American human rights system are especially relevant in the instant case, as required by article 16 (2) of the Convention, owing to the fact that Canada is also a member State of the Organization of American States and is bound by the American Declaration on the Rights and Duties of Man. The regional system also recognizes this important safeguard in deportation proceedings. For example, the Inter-American Commission on Human Rights has indicated that the appeal for review must have suspensive effects and must allow the applicant to remain in the country until the competent authority

[1] *Arana v. France* (CAT/C/23/D/63/1997), para. 6.1; and *Sorzábal Díaz v. France* (CAT/C/34/D/194/2001), para. 6.1.

[2] *N.S. v. Canada* (CAT/C/59/D/582/2014), para. 8.2.

has adopted the required decision.[3] The Commission also recognized the importance of the suspensive effect in principle 50 (l) of its resolution 04/19.[4] In addition, the Inter-American Court of Human Rights, in its advisory opinion OC-21/14, indicated that the right to appeal the decision before a higher court with suspensive effect is part of the Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.[5]

6. It is worth mentioning that the standards of the European human rights system also recognize this safeguard in deportation cases. The European Court of Human Rights has ruled in numerous cases that individuals must have access to a remedy with suspensive effect in cases of deportation with a risk of torture or ill-treatment. For example, in *Čonka v. Belgium*, the Court held that the notion of an effective remedy under article 13 requires that the remedy could prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible. The Court further stated that consequently, it was inconsistent with article 13 for such measures to be executed before the national authorities had examined whether they were compatible with the Convention.[6] Referring to the *Čonka* case, the Court specified in *Gebremedhin [Gaberamadhien] v. France* that a foreigner facing deportation must have access to a remedy with suspensive effect where there are substantial grounds for believing that he or she would run a risk of torture or ill-treatment[7] contrary to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The Court confirmed the ruling in the *Čonka* case in later cases, such as *M.S.S. v. Belgium and Greece* and *Hirsi Jamaa and others v. Italy*.[8] Furthermore, in *Olaechea Cahuas v. Spain*, the Court considered that the legal remedy available to the applicant to obtain a stay of the deportation order was ineffective because it did not have suspensive effect. Thus, it dismissed the argument of the Government of Spain that the case was inadmissible for the applicant's failure to exhaust domestic remedies.[9] Moreover, in *de Souza Ribeiro v. France*, the Court rejected the Government's objection of non-exhaustion of domestic remedies, stating that the legal remedies were ineffective as they had no suspensive effect to halt the removal of the applicant.[10]

7. It must also be noted that the Court of Justice of the European Union adopted the approach of the European Court of Human Rights in the *Abdida* ruling when it stated that domestic legal remedies must have suspensive effect in respect of a return decision whose enforcement could expose the third country national concerned to a serious risk of grave and irreversible deterioration in the individual's state of health, which would amount to inhuman or degrading treatment. The Court of Justice of the European Union referred to two cases of the European Court of Human Rights: *Gebremedhin [Gaberamadhien] v. France* and *Hirsi Jamaa and others v. Italy*.[11]

[3] Inter-American Commission on Human Rights, *Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection*, OEA/Ser.L/V/II, doc. 255, 5 August 2020, para. 197 (f).

[4] Inter-American Commission on Human Rights, resolution 04/19 of 7 December 2019.

[5] Inter-American Court of Human Rights, advisory opinion OC-21/14 of 19 August 2014, para. 116.

[6] European Court of Human Rights, *Čonka v. Belgium*, judgment of 5 February 2002, Application No. 51564/99, para. 79.

[7] European Court of Human Rights, *Gebremedhin [Gaberamadhien] v. France*, judgment of 26 April 2007, Application No. 25389/05, paras. 58 and 66.

[8] European Court of Human Rights, *M.S.S. v. Belgium*, judgment of 21 January 2011, Application No. 30696/09, para. 293; and European Court of Human Rights, *Hirsi Jamaa and others v. Italy*, judgment of 23 February 2012, Application No. 27765/09, para. 205.

[9] European Court of Human Rights, *Olaechea Cahuas v. Spain*, judgment of 10 August 2006, Application No. 24668/03, paras. 32–36.

[10] European Court of Human Rights, *de Souza Ribeiro v. France*, judgment of 13 December 2012, Application No. 22689/07, para. 100.

[11] Court of Justice of the European Union, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, Case C-562/13, judgment of 18 December 2014, paras. 52–53.

8. Overall, the suspensive effect in domestic proceedings seeking to remove, expel or deport a person to another country where he or she risks torture or cruel, inhuman or degrading treatment is a crucial safeguard underlying article 3 of the Convention. It is very important for the Committee to uphold such central guarantee and preserve the international standards recognized by the Committee and other international human rights bodies.