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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2732/2016*, **

Communication submitted by:	S.J., a.k.a. S.A.A. (represented by counsel, Ben Liston)
Alleged victim:	The author
State party:	Canada
Date of communication:	17 February 2016 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 17 February 2016 (not issued in document form)
Date of adoption of decision:	8 November 2019
Subject matter:	Forcible removal to the United States of America to serve a prison sentence; lack of access to an effective remedy; risk of cruel, inhuman or degrading punishment; arbitrary detention
Procedural issues:	Incompatibility; non-exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Right to a remedy; prevention of cruel, inhuman or degrading punishment; arbitrary detention
Articles of the Covenant:	2 (3), 7, 9 and 10 (1)
Articles of the Optional Protocol:	2 and 3

1.1 The author of the communication is S.J., a.k.a. S.A.A., a national of Somalia born on 1 January 1959.[1] She claims that the State party has violated her rights under articles 2 (3),

* Adopted by the Committee at its 127th session (14 October–8 November 2019).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi. In accordance with rule 108 of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.

[1] The author's communication claims at various times that she was born on 1 January 1947. The authorities of the United States have verified that she was actually born 12 years later, and all of her legal documentation from the United States confirms this.

7, 9 and 10 (1) of the Covenant. The Optional Protocol entered into force for the State party on 19 August 1976. The author is represented by counsel.

1.2 Since the author's removal was scheduled for 17 February 2016 (11 a.m. EST), she requested the Committee to issue interim measures for the State party to suspend her removal pending the consideration of her communication by the Committee. On 17 February 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to issue a request for interim measures.

The facts as submitted by the author

2.1 The author fled Somalia to Kenya in 1992, a year after her husband was murdered. While in Kenya, the author was recognized as a Convention refugee by the United Nations High Commissioner for Refugees, and was subsequently selected by the United States of America for resettlement, along with five of her children. The author entered the United States with her children on 22 November 1996, and was granted permanent resident status in that country from that date. Her Permanent Resident Card was set to expire on 4 October 2016. All her children are now citizens of the United States.

2.2 On 12 November 2008, the author was indicted in Columbus, Ohio, on felony charges of trafficking in and possession of a controlled substance – specifically, 6.8 kg of khat (*Catha edulis*). Khat is a stimulant narcotic derived from a flowering plant native to the Horn of Africa and the Arabian Peninsula. It has been compared to coca leaves, coffee and a mild amphetamine. It is prohibited in a number of countries, including the United States, Canada and many countries in Europe.[2] On 23 January 2009, the author was convicted of the possession charge but acquitted on the trafficking charge by the Franklin County Court of Common Pleas in Columbus. The author was convicted for aggravated possession of a Schedule I drug, a second-degree felony.

2.3 Following a *nunc pro tunc* motion brought by the defence, the County Court amended the conviction reducing it from a second-degree to a third-degree felony. The County Court imposed a sentence of community control for three years. The prosecutor appealed to the Court of Appeals of Ohio. The Court of Appeals found a procedural breach and returned the matter to the County Court. The County Court again decided to amend and reduce the original conviction to possession of drugs in the third degree and again imposed a sentence of community control for three years. The prosecutor appealed to the Court of Appeals again, a procedural breach was found and it was once more returned to the County Court.

2.4 On 18 December 2012, the author appeared before the County Court for a third time. On 3 September 2013, the author was finally convicted since the Court upheld the original conviction. The author was sentenced to a mandatory minimum penalty of two years' imprisonment, and was scheduled to begin serving her sentence on 27 November 2013 at a correctional facility in Ohio. The author failed to appear for the beginning of her incarceration. She appealed to the Court of Appeals; however, her appeal was dismissed.

2.5 On 4 December 2013, the author entered Canada at a land-border crossing, seeking protection from the cruel and degrading punishment she would have faced if she remained in the United States. The author entered Canada under her own name, using a United States resident card. On 5 December 2013, officials in Ohio issued a warrant for the author's arrest.

2.6 On 3 January 2014, the author made an in-land claim for refugee protection under the alias S.A.A. A hearing was scheduled before the Refugee Protection Division and during the course of preparation for her claim a biometric report matched her identity to her genuine name S.J. The author, who does not speak English, maintains that since she was not made aware of the date of her Refugee Protection Division hearing, she did not appear and her claim was abandoned. In November 2014, the author voluntarily appeared for an appointment with the Canada Border Security Agency and was detained. An application to

[2] In the United States, khat is a Schedule I drug under the Controlled Substances Act. In Canada, khat is a controlled substance under Schedule IV of the Controlled Drugs and Substances Act.

reopen her refugee claim was refused by the Refugee Protection Division on 17 March 2015.

2.7 On 2 April 2015, the author was advised that she was eligible to apply for a pre-removal risk assessment before being deported to the United States. On 2 June 2015, the Immigration Division of the Immigration and Refugee Board found the author to be inadmissible to Canada owing to her conviction in the United States. On 22 June 2015, a senior immigration officer denied the author's pre-removal risk assessment application. The decision was served on the author in person on 9 July 2015 and on counsel on 10 July 2015. On 14 July 2015, the author was served with a direction to report for removal to the United States, which indicated she would be removed on 16 July 2015. The author's counsel filed a letter with the Federal Court requesting an interim stay. The Judicial Review of the author's first pre-removal risk assessment decision was granted and the decision was sent back for redetermination by a different officer owing to minor flaws. The author's removal was stayed pending a reassessment.

2.8 On 2 October 2015, the author's legal counsel filed further written submissions and documentary evidence for her second pre-removal risk assessment. The author's updated assessment application reiterated her allegations of a risk if Canada were to remove her directly to Somalia. However, the application acknowledged that Canada was more likely to remove her to the United States, and so the primary focus was on alleged risks in that country owing to the two-year prison sentence, which was perceived by the author as amounting to cruel and inhuman punishment. On 8 January 2016, the author's second pre-removal risk assessment was denied. The pre-removal risk assessment officer concluded that any risk of deportation from the United States to Somalia was speculative as the author had for some time held permanent resident status in the United States as a refugee. In addition, she had not provided any evidence or plausible reason to believe that United States officials would consider her deportation to Somalia, rather than enforcing the sentence in Ohio.

2.9 On 15 January 2016, a Canada Border Security Agency officer attempted to serve the author with a decision on her removal; however, the author was unable to understand as she requires an interpreter. On the same day, counsel for the author phoned the Canada Border Security Agency, requesting a copy of the pre-removal risk assessment decision. On 1 February 2016, an application for leave and judicial review of the pre-removal risk assessment decision was filed with the Federal Court. The author was provided with a copy of the reasons for the decision on 11 February 2016 and she received personally a direction to report for removal scheduled for 17 February 2016. On 15 February 2016, the author filed a motion to stay her removal at the Federal Court, which was refused. The author requested the Federal Court to reconsider the removal decision, which was upheld by a judge of the Federal Court on 16 February 2016.

2.10 The author argues that she has exhausted all available domestic remedies in Canada and that she has not submitted a similar complaint before any other mechanism of international investigation or settlement.

The complaint

3.1 The author submits that, if she were removed to the United States, she would be arrested and detained and that her mandatory two-year sentence for possession of khat would constitute a cruel, inhuman and degrading punishment and would threaten to deprive her of her liberty in disregard of international standards.

3.2 The author's claim for refugee protection was declared abandoned as she failed to appear. On 15 January 2016, the author was visited by a Canada Border Security Agency officer who attempted to serve her with her negative pre-removal risk assessment decision but she was not provided with a copy of the reasons until 11 February 2016. On 15 February 2016, her motion for a stay of removal with the Federal Court was not accepted. As a result, the author submits that she faces removal from Canada without any opportunity for appeal or judicial review of the negative pre-removal risk assessment decision.

3.3 The author further claims that her removal from Canada would deprive her of her right to an effective judicial remedy against refoulement, contrary to the State party's obligations under article 2 (3), in conjunction with articles 7, 9 and 10 (1), of the Covenant.

3.4 Although the author can seek a judicial review of the negative pre-removal risk assessment decision, this does not have a suspensive effect on removal under Canadian immigration legislation, therefore it should not be considered as an effective remedy. However, the author's main claim against removal is that there are serious grounds to consider that she would face a risk of being subjected to cruel, inhuman or degrading punishment, in violation of article 7 of the Covenant, if imprisoned for two years on her return to the United States.

State party's observations on admissibility and the merits

4.1 On 17 August 2016, the State party submitted its observations on admissibility and the merits of the communication, claiming that the author applied for refugee status in Canada under an assumed name, making false statements, and then failed to appear for the hearing. Her claim was deemed abandoned as of 19 March 2014.

4.2 Canadian officials eventually learned her true identity. Beginning in November 2014, the author was held in immigration detention because she was a flight risk. In her application for a pre-removal risk assessment, the author claimed a risk of cruel and inhuman punishment if returned to the United States, owing to the duration of her prison sentence. This claim was rejected in January 2016. The author was removed from Canada to the United States on 17 February 2016.

4.3 In her communication to the Committee, the author alleges that her removal to the United States was contrary to articles 7, 9 and 10 (1), read alone and in conjunction with article 2 (3), of the Covenant. The principal allegation is that the two-year prison sentence in the United States is cruel, inhuman or degrading punishment, owing to its grossly disproportionate duration and that the foreseeable conditions of her incarceration in the United States would be inadequate. The author also claims that she did not receive an effective remedy in Canada to prevent her refoulement.

4.4 First, the State party considers that the author's allegations are inadmissible in their entirety owing to incompatibility, because they fall outside the scope of its obligations under the Covenant. The State party is obliged to refrain from removing a foreign national where there is a real and foreseeable risk of irreparable harm, such as that contemplated by articles 6 and 7. No such risk existed in this case. The State party emphasizes that extraterritorial application of other Covenant provisions subsequent to a removal has not been supported by the Committee's jurisprudence.[3] When it comes to an allegation of a risk of violations of article 9 subsequent to a removal, such a risk would have to reach a severity amounting to inhuman treatment prohibited by article 7 of the Covenant, for example, when facing a prolonged arbitrary detention.[4] It was foreseeable that the author would be imprisoned in the United States for two years, and possibly less. The sentence is one of moderate duration and was imposed after a fair criminal trial with multiple appeals. The correctional system in the State of Ohio is safe and humane. It has a system for informal complaints and formal grievances, and a rigorous mechanism for regular and unannounced inspections of correctional facilities. It demonstrates an absence of cruel, inhuman or degrading treatment or punishment, or any other kind of irreparable harm. The State party argues that a high threshold is required for a particular treatment or punishment to be considered cruel, inhuman or degrading. Some form of severe pain or suffering, whether physical or mental is typically required to meet the threshold, or at least some form of adverse physical or mental effects,[5] or conditions of intense physical and mental suffering.[6]

[3] *Z. v. Denmark* (CCPR/C/116/D/2422/2014), para. 6.4.

[4] General comment No. 35 (2014) on liberty and security of person, para. 57.

[5] *Vuolanne v. Finland* (CCPR/C/35/D/265/1987), para. 9.2. See also *T.V. and A.G. v. Uzbekistan* (CCPR/C/116/D/2044/2011), para. 7.10 ("mental and physical suffering"); general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment; and HRI/GEN/1/Rev.1, p. 31, para. 5 ("The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim").

As the Committee has stated, for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.[7] The mere fact that an individual is sentenced to a term of imprisonment cannot be cruel, inhuman or degrading punishment.[8] Accordingly, the State party submits that the foreseeable two-year prison sentence in the United States is not the kind of "irreparable harm" that would engage the State party's obligations under the Covenant to refrain from author's removal, and that the author's allegations under articles 9 and 10 of the Covenant are incompatible with the scope of the obligations of Canada in the removal context.

4.5 The State party adds that the present communication is inadmissible and without merits, taking into account the author's treatment following her removal. At the time of the State party's submission, the author had been serving her prison sentence and could be released after serving 80 per cent of the term, as early as August 2017. According to publicly available information, the author is an inmate at the Ohio Reformatory for Women, which is a safe and humane facility with many rehabilitation programmes available. There is no reason to believe that the author is in solitary confinement or any other restrictive detention classification.

4.6 The communication is also inadmissible in its entirety because the author failed to exhaust all available and effective domestic remedies. She was afforded multiple opportunities to have Canadian decision makers assess her allegations of risk, but she failed to diligently pursue three domestic remedies. Most importantly, the author failed to appear for her hearings before the Refugee Protection Division, which would have been her primary opportunity to give oral testimony before an independent decision maker on the alleged risk. The author abandoned her initial claim for refugee status of 3 January 2014. The author has claimed that she was not aware of her initial Refugee Protection Division hearing, because she could not read English materials that were personally provided to her. She has also claimed that her legal counsel never notified her of the change in her hearing date. Nonetheless, the author had no fixed address at the time and knew she was not reachable at the address she had provided to authorities. In the State party's view, the author's account of why she abandoned her claim for protection is not credible. The most likely explanation is that the author intentionally failed to appear for the hearings from January to November 2014, hiding from her legal counsel and from Canadian authorities, because she was a fugitive, evading justice that was to be served in the United States and did not want her true identity to be discovered. Moreover, any errors allegedly made by the author's legal counsel do not excuse her own failure to diligently exhaust this remedy. Furthermore, the author failed to apply for permanent residence on humanitarian and compassionate grounds. In that context, the State party regrets the views of the Human Rights Committee and the Committee against Torture in some recent cases, in which each of the Committees considered that humanitarian and compassionate applications were not remedies that had to be exhausted for the purposes of admissibility.[9] In the State party's view, it should not matter on which grounds an author of a communication is allowed to remain in Canada, when it can achieve protection from removal to the country where the author alleges to be at risk. The humanitarian and compassionate application is a fair administrative procedure, subject to judicial review, that includes an assessment of relevant hardship factors if the individual is removed. Although the filing of a humanitarian and compassionate application would not have led to an automatic stay of removal pending assessment, the author could have either applied to the Federal Court for a judicial stay of removal pending the outcome of that assessment, or requested an administrative deferral of removal from the Canada Border Security Agency. Finally, the author failed to request

[6] *Mellet v. Ireland* (CCPR/C/116/D/2324/2013), para. 7.4.

[7] *Vuolanne v. Finland*, para. 9.2.

[8] Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR commentary*, 2nd ed. (Kehl am Rhein: N. P. Engel, 2005), pp. 166–167.

[9] *Warsame v. Canada* (CCPR/C/102/D/1959/2010), para. 7.4; *K.A.L. and A.A.M.L. v. Canada* (CCPR/C/104/D/1816/2008), para. 6.5; *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4; *Kalonzo v. Canada* (CAT/C/48/D/343/2008), para. 8.3; and *T.I. v. Canada* (CAT/C/45/D/333/2007), para. 6.3.

administrative deferral of her removal, even though the author and her counsel had become aware in mid-January 2016 that her second pre-removal risk assessment had been denied, and that her removal could therefore be imminent. On 11 February 2016, the author was informed in person that her removal had been scheduled for 17 February 2016. The author's communication does not explain the omissions to exhaust the two latter remedies.

4.7 Not only did the author fail to pursue available remedies, but she misled Canadian authorities on multiple occasions, on such matters as her name, date of birth and the country from which she had entered Canada. She also hindered the remedial process by refusing to accept receipt of decisions in response to her applications, including in regard to the second pre-removal risk assessment. The author consistently obstructed the fair and efficient functioning of the State party's domestic remedies against refoulement. By failing to diligently pursue the majority of remedies that were available to her in the Canadian immigration system, and being non-cooperative with other remedial processes, the author made it more difficult for the State party to consider her allegations of risk upon removal. The author's allegations with regard to a lack of access to the effective domestic remedies in Canada – invoking article 2 (3), in conjunction with articles 7, 9 and 10 (1) of the Covenant, because she did not have an Refugee Protection Division hearing that she attended and the Federal Court declined to hear her motion for a stay of removal in order to judicially review the second pre-removal risk assessment – are therefore not sufficiently substantiated.

4.8 If the Committee considered some aspects of the author's allegations to be admissible, the State party submits in the alternative that the author's communication is entirely without merit. There are no substantial grounds to believe that returning the author to the United States exposed her to a real and personal risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant. Therefore, the author's removal by the State party was in accordance with the Covenant, including the State party's obligations to provide effective remedies.

4.9 Finally, the State party reiterates that the author has not faced any ill-treatment following her removal to the United States, in the context of serving a sentence of a moderate duration imposed for a relatively serious offence, after years of appeals and other proceedings in which the author was represented by legal counsel. According to publicly available information, the author is an inmate at a safe and humane facility with many rehabilitation programmes available. Ohio correctional facilities have well-established mechanisms for inmate complaints, and they are subject to regular inspections by a legislated body. Therefore, this communication does not implicate the obligations of Canada under the Covenant as the removing State.

4.10 In conclusion, the State party reiterates that the author's allegations fall outside the scope of the State party's obligations under the Covenant, and are therefore inadmissible as incompatible pursuant to article 3 of the Optional Protocol and rule 96 (d) of the Committee's rules of procedure.[10] The State party also argues that, since the author has failed to exhaust all available and effective domestic remedies, this communication should be considered inadmissible in its entirety pursuant to article 5 (2) of the Optional Protocol and rule 96 (f) of the rules of procedure. The State party argues further that the author's claims with regard to a lack of access to effective domestic remedies, invoking article 2 (3) in conjunction with articles 7, 9 and 10 (1) of the Covenant, are not sufficiently substantiated and therefore inadmissible by virtue of rule 96 (b) of the rules of procedure. Finally, the State party requests that the Committee consider the author's allegations, including under articles 7, 9 and 10 (1) of the Covenant, to be entirely without merit.

Author's comments on the State party's observations on admissibility and the merits

5.1 On 12 January 2017, the author's counsel submitted that he would not file any further comments on the author's behalf with respect to this communication.

[10] The most recent Committee's rules of procedure (CCPR/C/3/Rev.11) reflect the invoked admissibility criteria in its rule 99.

5.2 In the light of the above, the Committee requested the author's counsel to inform it whether the author would wish to have her communication discontinued. Since the counsel did not have instructions from the author to eventually discontinue the communication, he requested that it be kept pending before the Committee and be considered on the basis of all previously furnished materials.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the State party's objections to the admissibility of the communication on the grounds that the author's claims that her removal to the United States to serve a two-year prison sentence amounts to cruel, inhuman or degrading punishment, in violation of articles 7, 9 and 10 (1), read alone and in conjunction with article 2 (3), of the Covenant, are inadmissible owing to incompatibility as falling outside the scope of the State party's obligations under the Covenant. The Committee also notes the State party's argument that when it removes a foreign national, the State party does not have an obligation under the Covenant to ensure that the person's rights under articles 9 and 10 (1) will be respected in the receiving State, unless the risk of prolonged incarceration and/or inadequate conditions of detention would amount to a risk of irreparable harm in violation of articles 6 or 7 of the Covenant. In this context, the Committee notes the State party's argument that it was foreseeable that the author would be imprisoned in the United States for two years or less, which represents a sentence of moderate duration that was imposed after a fair criminal trial with multiple appeals, and that the correctional system in the State of Ohio is generally safe and humane, in absence of inhuman or degrading treatment or punishment. The Committee recalls its jurisprudence that for punishment to be cruel, inhuman or degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty. The Committee observes the State party's claim that the foreseeable two-year prison sentence in the United States is not the kind of "irreparable harm" such as that contemplated under articles 6 and 7 of the Covenant,[11] which would entail the State party's obligation under article 2 of the Covenant not to deport the author from its territory. In this connection, the Committee notes that the author's allegations under article 7 of the Covenant do not provide sufficient arguments that would enable the Committee to conclude that the author's imprisonment in the United States would amount to an irreparable harm.[12] In particular, the Committee observes a lack of evidence by the author that she would suffer any cruel, inhuman or degrading punishment in the context of serving a lawful sentence, following her removal to the United States on 17 February 2016. Accordingly, the Committee considers that the author's communication falls short of substantiating her allegations that the State party violated articles 7, 9 and 10 (1), read alone and in conjunction with article 2 (3), of the Covenant, by removing the author to serve a two-year sentence in the United States, since the author has not established that a risk of violations alleged would amount to an irreparable harm, such as that contemplated in articles 6 and 7 of the Covenant,[13] while she had access to domestic remedies, which were available and effective, and she has not sufficiently supported her assertions that she would suffer ill-treatment following her removal. The Committee therefore finds that the communication is inadmissible under article 2 of the Optional Protocol.

[11] General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

[12] *O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.5.

[13] General comment No. 31.

6.4 In the light of the above finding, the Committee does not consider it necessary to examine separately the State party's arguments that the communication is also inadmissible as all available domestic remedies have not been exhausted.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

(b) That the present decision shall be transmitted to the State party and to the author.