



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

Distr.: General
5 April 2019

Original: English

Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 784/2016*, **, ***

<i>Communication submitted by:</i>	F.K.A. (represented by counsel, Zoheir Snasni)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of complaint:</i>	7 November 2016 (initial submission)
<i>Date of present decision:</i>	15 November 2018
<i>Subject matter:</i>	Complainant's deportation to Pakistan
<i>Procedural issues:</i>	Lack of substantiation of claims; non-exhaustion of domestic remedies; incompatibility with the Convention
<i>Substantive issue:</i>	Risk of torture in case of deportation to country of origin
<i>Articles of the Convention:</i>	3 and 22

Decision under article 22 (7) of the Convention against Torture

1.1 The author of the communication is F.K.A., a national of Pakistan, born on 3 June 1985 in Pakistan. The complainant is subject to forcible removal from Canada to Pakistan, following the dismissal of her application for a judicial review of the negative decision by the Refugee Protection Division on her asylum claim. She requested that interim measures be granted to suspend her deportation to Pakistan, considering that her forcible removal to Pakistan would constitute a violation by Canada of articles 3 and 22 of the Convention against Torture.

1.2 On 23 November 2016, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party not to expel the complainant to Pakistan while the complaint was being considered. On 18 May 2017, the State party requested that the Committee lift its request for interim measures. On 24 July 2017, the Committee, acting through its Rapporteur on new

* Adopted by the Committee at its sixty-fifth session (12 November–7 December 2018).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

*** An individual opinion by Committee member Abdelwahab Hani (dissenting) is annexed to the present decision.



complaints and interim measures, denied the request of the State party to lift the interim measures.¹ The complainant is represented by counsel, Mr. Zoheir Snasni.

Facts as presented by the complainant

2.1 In January 2009, after her studies, the complainant joined the local branch of the Sunday Times, the English newspaper, in Lahore.² She worked in the newspaper as Assistant Editor. Her responsibilities included reporting, editing and writing.³ The complainant worked on articles about topics such as women's fashion, which were illustrated with pictures of "western type" models. She asserts that the newspaper was famous for being "too outspoken and liberal", as extremists and the Taliban in Pakistan have a very conservative idea about the position and role of women in society.

2.2 Because of her contribution to such articles and mostly because the complainant was chosen to be the face of the newspaper in some events to increase the reputation of the journal,⁴ she has become a target of the Taliban and other extremists. Although the threats were not initially directed at her personally, other collaborators, including her supervisor, Masuma Malhi, were implicated. The staff were asked by the newspaper's management to wear "eastern clothes" and to cover their faces when commuting to and from the office, and they were accompanied by guards everywhere they went.⁵

2.3 In August 2009, the complainant began to receive personalized threats. First, the tyres of her car were slashed. Then, her driver received an envelope containing pictures of her, disfigured with a red marker. The envelope also contained threats of an acid attack and warnings that she won't always be able to hide. The newspaper also often received different kinds of threats. At the end of August 2009, the journal published an article regarding an event held by a charity foundation; its founder was a progressive politician, who was hated and sought after by the Taliban. Pictures of her along with that politician illustrated the article. After the publication of that article, she received more threats, through text messages and phone calls on her personal cell phone. She had to change her number twice but to no avail. She was again threatened with being disfigured or being subjected to an acid attack for "showing her face so brazenly to men".

2.4 In January 2010, the threats against her intensified after the journal's publication of a scandalous picture⁶ of a model taken during Karachi fashion week. She was followed several times by strange men on bikes, and once, when stopped at a traffic light while in a car driven by one of the newspaper's guards, someone banged on the window and yelled at her to get out. The complainant decided to leave the country since, by the end of 2009, her parents had also begun to receive threats.

2.5 On 22 June 2010, she arrived in Canada with a student visa. Following her departure, her parents frequently received phone calls asking where she was hiding. They even had to move to Dubai for a while, as they were scared for their lives.⁷ After that, her parents had to move from time to time to avoid threats.

2.6 On 17 August 2012, she applied for asylum once her student visa expired. On 30 March 2016, the Refugee Protection Division of the Immigration and Refugee Board of Canada rejected her claim for refugee protection.⁸ While not challenging the fact that she

¹ The complainant currently resides in Canada. She asserts that her removal is "imminent", without indicating a date for her deportation.

² The newspaper was owned by Mr Salmaan Tasseer, a politician who was the Governor of Pendjab at the time.

³ She provided the Committee with attesting affidavits from her former supervisor.

⁴ Copies of some of the articles, along with pictures, have been provided to the Committee.

⁵ The complainant does not provide further details.

⁶ The complainant does not explain why the image has been perceived as scandalous.

⁷ Further information is contained in affidavits from her sister and her father, dated 3 March 2016, provided as an annex to the complaint.

⁸ A copy of the notice to appear for a hearing is attached to the complaint. However, the complainant has not provided a copy of the decision. The reason for the slow processing of her claim is not explained. It is indicated that her claim for refugee protection was referred to the Refugee Protection Division on 17 August 2012.

worked as journalist for the Sunday Times, the Division considered that the complainant was not credible, that her behaviour was inconsistent with her alleged fear, and that she had not sought protection from the local authorities. The Division indicated that the complainant subsequently changed her initial version of facts, which she had provided on 18 September 2012.⁹ It also indicated that her explanation for not bringing those elements to the attention of the authorities earlier, which was that she felt she was under pressure, was not perceived as credible, as she had written her initial statement in Canada when she was free from further threats. The Division considered that her behaviour was not consistent, as she reportedly took the decision to leave Pakistan at the end of 2009, but she left only in June 2010. Regarding the evidence submitted, the Division stated that the affidavits from her former colleagues, which confirmed the problems she allegedly faced, were identical,¹⁰ and as the complainant was not able to explain why, it refused to attach any probative value to those documents. The Division also considered that it was not plausible that her parents were still receiving threats, as she had left Pakistan several years earlier. Finally, the Division considered that she lacked credibility since she had never sought protection from the authorities in her country, and her allegation that her “high-ranking boss” was in a better position to protect her than the police could not be considered sufficient.

2.7 The complainant applied to the Federal Court for a judicial review of the Refugee Protection Division decision, which was rejected on 25 August 2016. She claims that all the available domestic remedies have been exhausted, as the stay of deportation that can be granted by the Federal Court does not constitute an effective remedy.¹¹

The complaint

3.1 The complainant claims that by deporting her to Pakistan, Canada would violate her rights under article 3 of the Convention. She fears being at risk of being subjected to torture or cruel or inhuman treatment or punishment by the Taliban, as a result of her work as a journalist and of her being an emancipated woman. While in Pakistan, she was threatened with being subjected to an acid attack or eventually killed.

3.2 She emphasizes that she faced various forms of threats, that she had to be under the protection of the newspaper’s guards on all her travels, and that her parents still receive threats directed at her.

State party’s observations on admissibility and the merits

4.1 On 18 May 2017, the State party submitted observations on admissibility and the merits of the communication, including the request for lifting interim measures.

4.2 The State party submits that the communication is inadmissible on two grounds. First, it considers that the complainant failed to exhaust domestic remedies, as she did not apply for permanent residence on the basis of humanitarian and compassionate grounds. The State party submits that, had she applied for a permanent residence from outside of Canada, the complainant could have been allowed to remain in Canada as a permanent resident according to the assessment¹² by Citizenship and Immigration Canada. The State party recalls that the Ministry’s Department of Immigration, Refugees and Citizenship Canada, received the complainant’s application for permanent residence on compassionate grounds on 27 January 2017. However, her application was rejected on 13 February 2017, pursuant to article 25 (1.2) of the Immigration and Refugee Protection Act, as a person

⁹ According to the Refugee Protection Division decision, she notably mentioned, in addition, some political elements, which she described as relevant to explain the danger for journalists, especially women, in Pakistan.

¹⁰ The affidavits in question have not been provided to the Committee.

¹¹ Since the Refugee Protection Division stated that her claim had no credible basis, the Federal Court took no decision on staying her deportation.

¹² Following legislative changes to Canada’s refugee system in 2010, humanitarian and compassionate applications are no longer based on risk to life or risk of torture but may be relevant insofar as they are related to whether a complainant would directly and personally experience unusual and undeserved or disproportionate hardship in his or her country of origin.

cannot apply for permanent residence on humanitarian and compassionate grounds within 12 months of a negative decision by the Refugee Protection Division. Since her application for asylum was rejected by the Division on 30 March 2016, and the Federal Court dismissed her application for a judicial review of the negative decision by the Division on 25 August 2016, the complainant was not eligible to apply for permanent residence. The Department of Immigration, Refugees and Citizenship Canada notified the complainant of the negative decision by email on 28 February 2017. The State party submits that 12 months have passed since the complainant's application has been rejected and she is therefore eligible to submit a new application for permanent residence on humanitarian and compassionate grounds to the Department. The State party, nonetheless, observes that the complainant has not done so.

4.3 Second, the State party considers that the complainant also failed to apply for a pre-removal risk assessment. The State party recalls that persons in Canada, other than protected persons or persons who are recognized as "Convention refugees" by another country to which they may be returned, may apply for such an assessment if they are subject to an enforceable removal order.¹³ A person may apply for protection to the Minister within 15 days after notification of the removal decision.¹⁴ The State party recalls that the assessment is conducted by specialized, independent and impartial officers who are under the authority of Citizenship and Immigration Canada.¹⁵ The officers conducting the assessment determine whether the removal would expose the applicant to a risk of persecution as defined in the Convention on the Status of Refugees, to the danger of torture, to the risk of death or to being subjected to cruel or inhuman treatment or punishment if returned to their country of origin.¹⁶ According to the findings of the assessment, the officers may decide whether the applicant is a Convention refugee or a person in need of protection. The State party submits that the complainant has been eligible to apply for a pre-removal risk assessment since 29 March 2017, but has not done so. The State party also submits that if the Committee agreed to lift the interim measures, as requested by Canada, the Canada Border Services Agency could start the procedures to notify the complainant of her entitlement to apply for an assessment. The State party notes that, had she submitted the application for an assessment, her removal order would be subject to a stay of removal. The State party, however, notes that, pursuant to article 113 of the Immigration and Refugee Protection Act, an applicant whose claim for refugee protection has been rejected may present, in the context of an application for an assessment, only new evidence that arose after the rejection or which was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. The complainant would therefore be requested to present new evidence of a personal risk to the officers charged with any assessment. The State party further submits that the complainant could apply for leave to seek judicial review of the decision before the Federal Court of Canada in case of rejection of an application for assessment.¹⁷ Besides, the State party notes the views of the Committee in the case *Aung v. Canada* wherein it considered that the complainant, whose application for a pre-removal risk assessment was being processed by the Canadian authorities and who was granted a stay of removal, did not exhaust a remedy which was both available and effective.¹⁸ The State party also recalls the views of the Committee in the case *B.M.S v. Sweden*, in which it considered that the communication was inadmissible for non-exhaustion of domestic remedies, as the decision regarding the complainant's expulsion became statute-barred and therefore not enforceable, the complainant was no longer under a threat of being expelled to his country of origin, and there still existed an effective alternative remedy locally as he could submit a new asylum application and appeal negative decisions thereon.¹⁹ The State party also recalls that, in the case *L.Z.B v. Canada*, the Committee found that the complainants did not exhaust domestic

¹³ See the Immigration and Refugee Protection Act, art. 112.

¹⁴ Ibid.

¹⁵ As from 2016, Citizenship and Immigration Canada became known as Immigration, Refugees and Citizenship Canada.

¹⁶ Ibid., arts. 96, 97 and 98.

¹⁷ Ibid., art. 72.

¹⁸ See *Aung v. Canada* (CAT/C/36/D/273/2005), para 6.4.

¹⁹ See *B.M.S v. Sweden* (CAT/C/49/D/437/2010), para. 6.2.

remedies, as they did not seek leave for judicial review of a negative decision arising from the pre-removal risk assessment, and that “these remedies are not mere formalities”.²⁰

4.4 In addition, the State party asserts that the complainant’s allegations are incompatible with the provisions of the Convention, since the mistreatment the complainant claims she had suffered does not amount to “torture” for the purposes of the Convention. The State party relies on the Committee’s jurisprudence according to which the issue of whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.²¹ The State party submits that the complainant has not demonstrated how the Government of Pakistan had whatsoever consented or acquiesced to the pain or suffering that might be inflicted to the complainant by non-State actors and why her allegations related to the extremist and Islamist groups would amount to exceptional circumstances in which article 3 of the Convention can apply also to the acts of non-State actors.²² To the contrary, the complainant repeatedly stated that she was threatened and sought after by extremists opposed to the Government of Pakistan.

4.5 Furthermore, the State party submits that the complainant has not sufficiently substantiated any of her allegations or provided any evidence that she faces a foreseeable, real and personal risk of torture from the Pakistani authorities or paramilitary groups in Pakistan, and that her removal to Pakistan would amount to a violation of article 3 of the Convention. The State party notes that the complainant has at no time sought the protection of the Pakistani authorities.²³ It recalls that, during her interview with the Refugee Protection Division, the complainant indicated that she did not lodge any complaint, as she considered that her “high-ranking boss” was the best person to protect her. The State party, however, notes that she did not demonstrate that the police could not protect her or that she could not receive police protection upon return to Pakistan if the same problems were to occur.

4.6 Furthermore, the State party recalls that the complainant’s allegations have been considered by competent and impartial domestic processes that did not find a personal risk for the complainant if returned to Pakistan, and that it is not for the Committee to weigh evidence or reassess findings of fact made by domestic courts or tribunals. The State party notes that the complainant failed to provide evidence to support any of her allegations, such as copies of threats that she allegedly received on her cell phone or a notification to her phone company to prove she had changed her phone number. In that context, the Refugee Protection Division officer found that her behaviour was inconsistent with her allegations, as she provided new information just the day before her interview with the Division; she never contacted the police and did not provide evidence that the police could not protect her. Moreover, the complainant applied for asylum only two years after her arrival in Canada. The State party claims that the complainant failed to demonstrate to the relevant Canadian authorities that she faces a foreseeable, real and personal risk of torture if returned to Pakistan and that her communication is therefore incompatible with article 22 (2) of the Convention and rule 113 of the rules of procedure of the Committee.

4.7 The State party also rejects the complainant’s arguments that her forcible removal to Pakistan would amount to a violation of article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, that the judicial review is not an effective remedy, as required under article 2 of the International Covenant on Civil and Political Rights, and that the existing procedures are inadequate. The State party considers

²⁰ See *L.Z.B v. Canada* (CAT/C/39/D/304/2006), para. 6.6.

²¹ See, for example, *L.J.R.C. v. Sweden* (CAT/C/33/D/218/2002), para. 5.2: “The issue of whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention, unless the non-governmental entity occupies and exercised quasi-governmental authority over the territory to which the complainant would be returned”.

²² See *L.J.R.C. v. Sweden*, para. 5.2.

²³ See, for example, *F.A.B v. Switzerland* (CAT/C/43/D/348/2008/Rev.1), para 7.4.

the above claims to be incompatible with article 22 (1) of the Convention against Torture. It further notes that the complainant had access to all available remedies to challenge decisions rejecting her application for asylum. The State party submits that the complainant seeks from the Committee the review of the evaluation of facts and evidence and of the interpretation of domestic legislation by the Canadian authorities. Besides, the complainant has not demonstrated that the domestic courts acted arbitrarily, were biased or in any way denied her access to justice. Accordingly, the complainant has not substantiated her claim even on a prima facie basis.

4.8 Finally, the State party considers that the communication is wholly without merit as there is no evidence to suggest that the complainant is at foreseeable, real and personal risk of torture in Pakistan.

Complainant's comments on the State party's observations

5.1 On 19 July 2017, the complainant submitted her comments on the State party's observation on admissibility and the merits.

5.2 As regards the exhaustion of domestic remedies, the complainant rejects the State party's observation, arguing that she did not submit a new application for permanent residence on humanitarian and compassionate grounds owing to the length of time required for that application process, which can take up to six months, while not providing any suspensive effect. She therefore considers that the procedure is an ineffective remedy, as it does not prevent her deportation to Pakistan. The complainant further submits that, if she had applied for a pre-removal risk assessment, she would have had to present only new evidence that arose after the dismissal of her request for refugee status. She submits that she could not have provided new information to the Canada Border Services Agency, as she did not have any such new information. She also claims that the officers who conduct such assessments are not independent, impartial or competent in dealing with issues involving human rights. Besides, the complainant notes that the Federal Court of Canada has consistently held that the Immigration and Refugee Board of Canada has a discretionary power over asylum matters.²⁴ The Federal Court of Canada can reject a decision of the Immigration and Refugee Board only when the Court observes a breach of procedure or error of law. The complainant therefore holds there would be no grounds to re-examine her case. Consequently, she considers that she had exhausted all the domestic remedies that could have been effective.

5.3 As regards the State party's assertion of a lack of substantiation, the complainant claims that she submitted evidence to support her allegations in the form of copies of newspaper articles and written testimonies.²⁵ She asserts that her allegations have not been fully examined by the authorities, arguing that she was persecuted by members of Islamist groups in Pakistan for almost seven years. She explains that her parents had to move temporarily to Dubai as a result of their fear of being harassed and attacked. As the United Arab Emirates does not grant permanent residence, they moved back to Pakistan, where her mother died of illness in 2014. The complainant submits that she could not even go to Pakistan to attend her mother's funeral. As a journalist and a modern woman, she fears being targeted by Islamist groups and subjected to harassment, violence and death threats if she were to return to Pakistan, which could cause her irreparable harm.

5.4 In addition, the complainant rejects the State party's observation that she did not seek protection from the police in Pakistan. In an affidavit dated 26 July 2017,²⁶ the complainant claims that the newspaper where she worked did lodge official complaints to the police, but she did not meet any police officer who would initiate investigations before her departure to Canada. She claims not to have been offered any protection when she tried to get help from the state authorities, although the police confirmed that the complaints were received and considered, but were not deemed to be of sufficient gravity, as none of

²⁴ The Immigration and Refugee Board of Canada is a Division of the Ministry of Immigration, Refugees and Citizenship Canada.

²⁵ The complainant submitted affidavits from her colleagues, but the State party considered that they were not credible, as they were almost identical.

²⁶ Submitted on 27 July 2017.

the incidents resulted in physical injury. However, the complainant does not submit any evidence in that regard.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any complaint submitted 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.²⁷

6.3 The Committee takes note of the fact that the complainant applied for refugee status, which was rejected by the Refugee Protection Division on 30 March 2016, that she applied for a judicial review of the Division's decision to the Federal Court, which was rejected on 25 August 2016, and that she applied for permanent residence on compassionate grounds on 27 January 2017, which was rejected on 13 February 2017. The Committee takes note of the State party's argument that the complaint should be declared inadmissible under article 22 (5) (b) of the Convention on the grounds that the complainant has failed to exhaust all available domestic remedies, in particular an application for permanent residence on humanitarian and compassionate grounds and an application for a pre-removal risk assessment.

6.4 The Committee recalls its jurisprudence that a humanitarian and compassionate application is not an effective remedy for the purposes of admissibility pursuant to article 22 (5) (b) of the Convention, given its discretionary and non-judicial nature²⁸ and the fact that it does not stay the removal of a complainant.²⁹ Accordingly, the Committee does not consider it necessary for the complainant to exhaust the application for permanent residence on the basis of humanitarian and compassionate grounds for the purpose of admissibility.³⁰

6.5 As for the complainant's failure to apply for a pre-removal risk assessment, the Committee notes the State party's observation that the Canada Border Services Agency considers applications for such assessments of persons in Canada, whose claims for refugee status have been rejected, and are subject to an enforceable removal order, and who may present new evidence that arose after the dismissal of their claims, or which was not reasonably available, or could not reasonably have been presented, at the time of the rejection. The Committee also notes that the complainant has been eligible to apply for such an assessment since 29 March 2017 (para. 4.3), and could subsequently apply for a judicial review of a negative decision arising from the assessment to the Federal Court, but has not done so. The Committee takes note of the complainant's argument that the domestic remedies in question would not constitute an effective remedy in her case, as she could not provide new evidence to the Border Services Agency, and that she perceived the assessment process as lacking independence.

²⁷ See *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2. See also the Committee's general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, para. 34.

²⁸ See *Falcon Ríos v. Canada* (CAT/C/33/D/133/1999), para. 7.3.

²⁹ See *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.3; *J.M. v. Canada* (CAT/C/60/D/699/2015), para. 6.2; *A. v. Canada* (CAT/C/57/D/583/2014), para. 6.2; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4. See also *R.S.M. v. Canada* (CAT/C/50/D/392/2009), para. 6.3., and the Committee's general comment No. 4, para. 34.

³⁰ See *J.N.N. v. Canada* (CAT/C/64/D/615/2014), para. 6.4., *U.A. v. Canada* (CAT/C/63/D/767/2016), para. 6.4., and *S.S. v. Canada* (CAT/C/62/D/715/2015), para. 6.3.

6.6 The Committee notes that pursuant to the Immigration and Refugee Protection Act regulations, the complainant is not at risk of deportation during the ongoing consideration of the pre-removal risk assessment, as the enforceability of a removal order is stayed (see para. 4.3 above). In that connection, the Committee observes that the complainant has not attempted to submit any new evidence to meet the requirements under the Immigration and Refugee Protection Act,³¹ nor has she sought legal aid for the purpose of applying for an assessment. The Committee also notes that the complainant has not argued that she was represented by a State-appointed lawyer at the relevant time, recalling that errors or omissions made by a privately retained lawyer cannot normally be attributed to the State party.³² The Committee further recalls that 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 and have suspensive effect. While noting the complainant's argument that the application for an assessment would not represent an effective remedy in her case, the Committee considers that the complainant has not adduced sufficient elements which would justify her failure to avail herself of the possibility of applying for such an assessment and that would demonstrate that the assessment procedure would have been ineffective in this case.

6.7 Accordingly, the Committee is satisfied with the argument of the State party that, in this particular case, there were remedies, both available and effective, which the complainant has not exhausted.³³ In the light of this finding, the Committee does not deem it necessary to examine the State party's assertion that the communication is also inadmissible as incompatible with the Convention, or manifestly unfounded.

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.

³¹ See *Aung v. Canada*, para 6.4.

³² See *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.

³³ See *J.S. v. Canada*, para. 6.6., *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.6., *Shodeinde v. Canada* (CAT/C/63/D/621/2014), para. 6.8., and *U.A. v. Canada*, paras. 6.6.–6.7.

Annex

Individual opinion of Committee member Abdelwahab Hani (dissenting)

[Original: French]

1. The State party observes that “the complainant also failed to apply for a pre-removal risk assessment”. It recalls that “persons in Canada ... may apply for such an assessment if they are subject to an enforceable removal order” and that “a person may apply for protection to the Minister within 15 days after notification of the removal decision”. The State party makes application for this remedy conditional upon notification of the removal decision, which, in turn, appears to be conditional upon the State party’s request for the Committee to lift the interim measures taken (para. 4.3) – a request the Committee has denied.
2. Yet, the State party makes no reference to the service of any notification of a decision to remove, pursuant to an enforceable removal order. The complainant merely stated that her removal was “imminent”, without indicating a date for her deportation. The lack of notification makes it impossible for the complainant to apply for protection, thereby rendering this remedy inoperable.
3. The State party further notes that the complainant has been eligible to apply for a pre-removal risk assessment since 30 March 2016, the date on which her application for asylum was rejected, but that she has not exhausted this remedy.
4. The State party fails to point out that the complainant is eligible to apply for a pre-removal risk assessment only after a period of 12 months from that date, during which rejected asylum seekers are barred from formulating any appeal. This time frame is excessively long, in view of the complainant’s vulnerability as a rejected asylum seeker who began the asylum process five years previously.
5. Although praiseworthy in its intent, the pre-removal risk assessment nevertheless remains, in practice, a non-independent mechanism for the discretionary review of cases by officers of the Ministry. A rejected asylum seeker can substantiate his or her request for review only on the basis of new evidence.
6. Recourse to the pre-removal risk assessment is conditional upon receipt of notification from the Minister inviting eligible complainants to avail themselves of this option. Yet, the State party makes no reference to any such notification having been served on the complainant and has consequently failed to demonstrate that this remedy was, in fact, available to her.
7. The complainant draws attention to the low completion rate for pre-removal risk assessments. This observation was confirmed by the State party itself during the consideration of its seventh periodic report (CAT/C/CAN/7), when it reported that the rate of acceptance of the applications for pre-removal risk assessment that had been filed within the past five years stood at 5.2 per cent.¹ According to official statistics,² “the acceptance rate for PRRA has remained quite low”, ranging from 1.4 per cent in 2010 to 3.1 per cent in 2014,³ and representing an average annual rate of only 2 per cent.
8. In such circumstances, the rather low acceptance rate for pre-removal risk assessments has more to do with research into the probability of rare events and their

¹ See CAT/C/SR.1695, para. 34; and CAT/C/SR.1698, paras. 32, 33, 42 and 52.

² Evaluation of the Pre-Removal Risk Assessment Program, see: Finding No. 8 at <https://www.canada.ca/fr/immigration-refugies-citoyennete/organisation/rapports-statistiques/evaluations/programme-examen-risques-avant-renvoi/erar.html>.

³ Ibid., Figure 4.6.

random variables – along the lines of a Poisson distribution⁴ – than it does with the probability of an effective remedy that is accompanied by a reasonable probability of relief.

9. The State party further submits that the complainant could apply for leave to seek judicial review of a negative decision before the Federal Court of Canada⁵, which is not an appeal of the decision but rather a request to have the decision and the decision-making process reviewed.⁶ Such applications were filed in only 8 per cent of cases in the period 2009–2011 and in 11 per cent of cases in the period 2012–2014. Only 4 per cent of judicial review decisions were favourable during the period 2009–2014.⁷

10. A high proportion (26 per cent) of persons potentially eligible for a pre-removal risk assessment had been removed before the one-year bar expired,⁸ alongside a tendency noted during this period⁹ to facilitate removals in order to reduce the number of applications, thereby eliminating any potential suspensive effect.

11. Suspensive effect, as well as reasonable time frames, must be understood as applying to the entire procedure in the State party, in order to avoid lapses in protection. They must apply to the period during which there is a bar on applications for pre-removal risk assessment, as well as to the additional notification periods.

12. In spite of all the Committee's questions and criticisms on the subject of the pre-removal risk assessment, the State party maintained its position, namely, not to change the procedure in order to bring it into conformity with the provisions of the Convention and the Committee's jurisprudence.¹⁰

13. This being the case, the pre-removal risk assessment does not constitute an effective remedy for the purposes of admissibility, in accordance with article 22 (5) (b) of the Convention, for the following reasons: it was not made available, in practice, to the complainant; it is discretionary and non-judicial in nature;¹¹ it does not have suspensive effect in respect of expulsion;¹² its procedures, including the waiting period prior to eligibility, exceed "a reasonable time frame"; and it is highly unlikely that the complainant would obtain effective relief by this means.¹³ In short, it is not consistent with the criteria defined in general comment No. 4¹⁴ for an effective remedy.

14. Consequently, and in these specific circumstances, the complainant has exhausted all effective domestic remedies for the purposes of admissibility, in accordance with article 22 (5) (b) of the Convention.

⁴ Siméon-Denis Poisson, *Recherches sur la probabilité des jugements en matière criminelle et en matière civile : Précédées des règles générales du calcul des probabilités*, 1837, passage 81, p. 205.

⁵ *Ibid.*, art. 72.

⁶ See Evaluation of the Pre-Removal Risk Assessment Program, footnote 38.

⁷ *Ibid.*, Table 4.2.

⁸ *Ibid.*, para. 4.2.4.

⁹ *Ibid.*, para. 4.2.4.

¹⁰ See CAT/C/SR.1698, para. 33.

¹¹ See *Falcon Ríos v. Canada* (CAT/C/33/D/133/1999), para. 7.3.

¹² See *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.3; and *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4.

¹³ See *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2.

¹⁴ See general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 34.