



# 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. 568/2013\*, \*\*

<i>Communication submitted by:</i>	H.S. (represented by counsel, Rajwinder Singh Bhambi)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of complaint:</i>	16 November 2013 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 19 November 2013 (not issued in document form)
<i>Date of adoption of decision:</i>	15 November 2019
<i>Subject matter:</i>	Deportation to India
<i>Procedural issues:</i>	Exhaustion of domestic remedies; level of substantiation of claims; abuse of the right to file a submission
<i>Substantive issue:</i>	Non-refoulement
<i>Articles of the Convention:</i>	1, 3

1.1 The complainant is H.S., a national of India born in 1989, who at the time of submission was residing in Canada and was awaiting deportation to India, following the rejection of his asylum application. He claims that his return to India would constitute a violation by Canada of articles 1 and 3 of the Convention. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 13 November 1989. The complainant is represented by counsel.

1.2 On 19 November 2013, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, asked the State party not to expel the complainant to India while his complaint was being considered by the Committee. The State party acceded to the request. On 5 September 2014, the Committee, acting through the same Rapporteur, denied the request of the State party, dated 27 February 2014, to lift the interim measures.

\* Adopted by the Committee at its sixty-eighth session (11 November–6 December 2019).

\*\* 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 and Bakhtiyar Tuzmukhamedov.



1.3 At its fifty-eighth session (25 July 2016–12 August 2016), the Committee decided to postpone its consideration of the communication in order to seek clarifications from the State party on the availability of domestic remedies.

1.4 On 28 September 2018, the State party informed the Committee that, on 1 August 2018, it had expelled the complainant to India.

#### **Factual background<sup>1</sup>**

2.1 In his initial communication, the complainant submitted that he had been born to a Sikh family in a village in Jammu, India. In 2000, his paternal uncle came under the influence of a Sikh terrorist organization called Khalistan Zindabad Force. In March 2000, the Indian authorities charged his uncle with possession of arms and ammunition, but he was acquitted by a court in October 2002. The complainant submits that, starting in 2009, the Indian authorities again took an interest in his uncle. They arrested and tortured him in 2009 and 2010 because of his perceived links with terrorists. On both occasions, his uncle was released after the payment of a bribe.

2.2 According to the complainant, on 18 November 2010, while he was with his uncle, the police conducted a raid. His uncle managed to escape from the scene but the complainant was arrested. He was taken to a police station and tortured there. Police officers interrogated him on the whereabouts of his uncle and other militants. Police officers kicked, punched and slapped him, stripped him naked and beat him with belts and sticks. They applied a roller to his thighs and pulled his legs apart. He was hung upside down from the ceiling and was beaten severely. Police officers submerged his head in a water tub and applied electric shocks to his genitals and temples. He fainted twice while being tortured.

2.3 On 21 November 2010, following the intervention of influential locals and the payment of a bribe, the complainant was released. He was ordered to regularly report to the police. On the same day, the complainant was hospitalized for a day and continued treatment at home until 4 December 2010. A letter from a doctor at the Kanav Bone and Joint Clinic in Jammu, dated 10 September 2012, states that the complainant was under medical attention for stress, fever, pain, bruises and swellings all over his body, particularly on his legs, buttocks and soles of his feet. He was also having breathing problems.

2.4 The complainant submits that, on 22 March 2011, the police raided his home and arrested him, alleging that he was supporting and sheltering militants. He was again taken to a police station and tortured in the same way as previously. The complainant states that he still has the sequelae of torture, such as stiches, burn marks and an amputated right toe. He was released on 26 March 2011 after the intervention of influential locals and the payment of a bribe. This time, the complainant was ordered to report to the police every month and to bring information about persons of interest. He was threatened to be killed if he failed to comply. The police took his fingerprints, photos and signature on blank pieces of paper. The complainant was hospitalized between 26 and 28 March 2011 and then treated at home for 12 days.

2.5 The complainant states that, as a result of police harassment, he was forced to go into hiding in Punjab for one month and then spent a further three months in New Delhi while making arrangements for a visa to travel to Canada. He left India on his own passport and arrived in Canada on 15 August 2011 on a student visa.

2.6 The complainant sought asylum in Canada on 9 September 2011, invoking a risk to his life and of torture or cruel and unusual treatment or punishment if returned to India. The Refugee Protection Division of the Immigration and Refugee Board of Canada rejected his application on 21 February 2013, on the ground that he had not established that there was a serious possibility of persecution, nor that it was more likely that he would be personally subjected to a danger of torture or face a risk to life or a risk of cruel and unusual treatment or punishment upon return to his country. The Refugee Protection Division noted the complainant had failed to mention in his personal information form the bi-monthly raids on his father's home by the police over a period of years, which he only claimed in his hearing. Furthermore, the complainant provided inconsistent testimony regarding when his uncle's

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<sup>1</sup> The factual background has been prepared based on the submissions of the complainant and those of the State party.

wife and children moved out of his father's home. These inconsistencies led the Refugee Protection Division to reject the complainant's claim of regular raids on his father's home.

2.7 The Refugee Protection Division also noted the complainant's testimony that he had been the only member of his family to be pursued regarding the location of his uncle. The Division also noted that he had not been formally charged and that he had been released after each alleged detention upon the payment of a bribe. Moreover, the complainant had spent one month in Punjab and a further three months in New Delhi without incident. Additionally, the complainant had been able to leave India in 2009 and also in 2011 on his own passport.

2.8 The Refugee Protection Division found that documentary evidence on conditions in India indicated that Sikhs who feared local police and who were of no interest to the central authorities were able to safely relocate to other parts of India. The Division found no support for the complainant's contention that he would be regarded with greater suspicion because he was from Jammu. It concluded that an internal flight alternative was available to the complainant, in particular in Mumbai or Bangalore, based on objective country reports and the complainant's profile as a person unlikely to be sought by authorities outside of his local area. The Division determined that the complainant was neither a refugee within the meaning of the Convention relating to the Status of Refugees nor a person in need of protection.

2.9 The complainant applied for leave to seek judicial review of the decision of the Refugee Protection Division to the Federal Court of Canada. On 14 August 2013, the Federal Court denied the complainant's application for leave.

2.10 The complainant states that, at around 11 p.m. on 28 October 2013, police in civilian clothing raided his parents' home in Jammu and arrested his father. They took him to a police station and tortured him to ascertain the complainant's whereabouts. His father was released from the police station the next day after the intervention of influential locals and the payment of a bribe.

2.11 On 27 November 2013, the complainant applied for a pre-removal risk assessment. Under section 112 (2) (b.1) of the Immigration and Refugee Protection Act, the application could not be processed, because fewer than 12 months had passed since the rejection of the asylum claim. The 12-month period of ineligibility for a pre-removal risk assessment expired on 21 February 2014. The complainant made a new application on 17 March 2014. The application was not accepted because the complainant had not yet been given a notification by the Canadian authorities that he could apply for a pre-removal risk assessment, as required under the Immigration and Refugee Protection Act and the Immigration and Refugee Protection Regulations.

2.12 On 29 February 2016, the complainant filed another application for a pre-removal risk assessment. His application was rejected on 23 May 2018 on the ground that there was insufficient evidence to conclude that he would be subjected to persecution, torture, a risk to his life or cruel and unusual treatment or punishment if returned to India. A representative of the Minister of Citizenship and Immigration found that the documents provided by the complainant, including affidavits from his father and two local councillors, a hospital note, several undated copies of photographs allegedly of the complainant and of his father, as well as reports on conditions in India, largely reiterated the evidence he had already provided in his asylum claim. Furthermore, the medical documentation contained no information as to how the complainant's injuries had been sustained and it had not been signed by a doctor. The submitted photographs were undated and devoid of any means of identification.

2.13 On 17 March 2014, the complainant submitted an application for permanent residence on the basis of humanitarian and compassionate considerations. On 25 May 2018, the Minister of Citizenship and Immigration denied the application, referring to the conclusion of the Refugee Protection Division that the complainant had an internal flight alternative and to the rejection of his application for a pre-removal risk assessment dated 23 May 2018. The Minister of Citizenship and Immigration concluded that, while the complainant had integrated in Canada, he was able to resettle in India and there was insufficient evidence that he would face hardship there or that he would be targeted due to his Sikh religion.

2.14 On 27 July 2018, the complainant requested an administrative deferral of his removal, in which he claimed that, on 6 September 2014 and 13 and 24 July 2018, the local police had again arrested and tortured his father and his younger brother. In the same request, the complainant stated that, on 25 July 2018, the complainant's family had recovered a dead body from a road accident that was unidentifiable, but which they believed to be the corpse of the complainant's father, killed by the police. With his request, the complainant filed an affidavit, dated 26 July 2018, by the complainant, which reiterated the essence of his asylum account, as well as his fear of return to India.

2.15 Because the request did not specify a removal date and the Canada Border Services Agency had not yet scheduled such a date, it was never assessed. An Agency officer arrested the complainant on the same day because he had breached his release conditions, including reporting a change of address before changing and obtaining a valid travel document, and because there were reasons to believe he was a flight risk. The Agency official found a valid Indian passport upon searching the complainant, who was then placed in pre-removal detention. According to the State party, both the complainant and his counsel, who was present by telephone, failed to mention the present complaint and the Committee's interim measures request during a hearing to review his detention on 30 July 2018.

2.16 On 1 August 2018, the State party removed the complainant to India.

2.17 According to the State party, on 14 October 2018, counsel provided the Canada Border Services Agency with a copy of an affidavit, dated 25 July 2018, by the complainant, which he had given to the Indian consulate in Toronto to obtain an Indian passport. In the affidavit, the complainant declared that he had made a false claim for refugee protection and retracted his earlier position. The complainant also stated that he wanted to return to India as soon as possible to attend his father's funeral.

### **The complaint**

3.1 The complainant submits that, by removing him to India, the State party would violate article 3 of the Convention by putting his life at risk and exposing him to a risk of torture as defined in article 1 of the Convention, as well as a risk of cruel and unusual treatment or punishment. By rejecting the complainant's claim for refugee status, in spite of the evidence submitted to it, the Refugee Protection Division erred in law and in fact.

3.2 Affidavits by the complainant's father and two leaders of his village advised him not to return to India because of his perceived links with Sikh terrorists. The Indian security and intelligence agencies could, under false and fabricated charges, arrest, detain, abduct and/or kidnap the complainant, and they were actively looking for him.

3.3 The general human rights situation in India is characterized by abuses committed by police and security forces, including widespread extrajudicial killings, torture and rape. Corruption at all levels of Government leads to denials of justice. Other human rights violations include disappearances, frequent life-threatening prison conditions, arbitrary arrests and detention and lengthy pretrial detention. Reports indicate that the Government of India and its agents have committed arbitrary and unlawful killings, including extrajudicial killings of suspected criminals and insurgents, especially in areas of conflict, such as Jammu and Kashmir, but also elsewhere in the country.<sup>2</sup> Indian authorities do not protect religious minorities, such as Sikhs, including when they failed to respond to the 2002 Gujarat massacre.<sup>3</sup>

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<sup>2</sup> See United States of America, Department of State, "Country reports on human rights practices for 2012: India" and "International religious freedom report for 2012: India"; Amnesty International, *Amnesty International Report 2013: The State of the World's Human Rights* (London, 2013); Human Rights Watch, *World Report 2010* (New York, 2010) and *World Report 2012* (New York, 2012); India, Ministry of Home Affairs, National Crime Records Bureau, *Crime in India 2012* (New Delhi, 2013); Asian Centre for Human Rights, "Torture in custody", 24 June 2004; and Frontline Punjabi Youth, "Torture methods of Punjab police", 13 January 2018.

<sup>3</sup> The author mentions, inter alia, Human Rights Watch, *World Report 2010* and *Compounding injustice: the Government's failure to redress massacres in Gujarat* (New York, 2003), and a number of press articles on human rights violations committed against the Sikh minority.

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

4.1 In its observations on admissibility and the merits dated 12 June 2014, the State party recalls the facts of the complaint and explains how the Refugee Protection Division assesses claims for refugee status under the Immigration and Refugee Protection Act. During the hearing before the Refugee Protection Division, the complainant was represented by counsel and could provide documentary evidence and oral testimony. He had the opportunity to explain any omissions or inconsistencies in his evidence and to respond to any questions that the Refugee Protection Division had with regard to his claim. The Refugee Protection Division rejected the complainant's application and the Federal Court of Canada denied his application for leave to seek judicial review.

4.2 As for the complainant's application for humanitarian and compassionate considerations, such assessments consist of a broad, discretionary review to determine whether a person should be granted permanent residence for such reasons. The test is whether the complainant would suffer unusual and undeserved or disproportionate hardship if required to apply for permanent residence from outside Canada. The decision maker considers and weighs all the relevant evidence and information, including the complainant's written submissions. Decisions on humanitarian and compassionate grounds are subject to judicial review by the Federal Court.

4.3 Individuals subject to a removal order and who have not yet had a determination of their pre-removal risk assessments are notified that they may apply for such an assessment once their removal becomes operationally possible. If a first application for a pre-removal risk assessment is filed within 15 days of receiving the notification, the removal order is stayed while the application is being assessed. Although the complainant was, at the time of submission of the State party's observations, subject to a removal order, his removal was not imminent then.

4.4 Applications for pre-removal risk assessments are assessed by officers who are specially trained to assess risks and to consider the Canadian Charter of Rights and Freedoms and international human rights obligations relating to refugee protection. Where the Refugee Protection Division has already assessed a person's claim, a pre-removal risk assessment evaluates whether new facts, developments or evidence since the determination by the Division indicate a risk of persecution or torture, a risk to life or a risk of cruel and unusual treatment or punishment. Decisions on pre-removal risk assessments may, with leave, be judicially reviewed by the Federal Court. A judicial stay of removal pending the disposition of that application or the disposition of any application for judicial review of the decision may also be available.

4.5 The present complaint is inadmissible due to the complainant's failure to exhaust domestic remedies. In particular, at the time of submission of the State party's observations, no decision had yet been reached on the complainant's application for humanitarian and compassionate considerations. Although an administrative stay of expulsion is not available in the procedure to assess humanitarian and compassionate considerations, an application for judicial stay may be made pending the determination of the application for such considerations. The Committee has previously held that the possibility of lodging an application for humanitarian and compassionate considerations was among the domestic processes available to bring effective relief.<sup>4</sup> Furthermore, the complainant could apply for a pre-removal risk assessment once he received notification that he may do so. Also, it is possible to seek leave to apply for judicial review of a pre-removal risk assessment or decision on humanitarian and compassionate considerations, which the Committee has consistently recognized as a procedure that must be exhausted for the purpose of admissibility.<sup>5</sup> The Committee has considered past cases inadmissible in cases in which eligibility for a new risk assessment is reached after the complaint is filed.<sup>6</sup> It has also held that a pre-removal risk assessment application providing for a statutory stay of removal pending its consideration constituted an available and effective remedy.<sup>7</sup> Moreover, it

<sup>4</sup> *P.S.S. v. Canada* (CAT/C/21/D/66/1997), para. 6.2.

<sup>5</sup> *Yassin v. Canada* (CAT/C/43/D/307/2006), paras. 9.3–9.4; *L.Z.B. and J.F.Z. v. Canada* (CAT/C/39/D/304/2006), para. 6.6; *P.S.S. v. Canada*, para. 6.2; and *P.S. v. Canada* (CAT/C/23/D/86/1997), para. 6.2.

<sup>6</sup> *B.M.S. v. Sweden* (CAT/C/49/D/437/2010), para. 6.2.

<sup>7</sup> *Aung v. Canada* (CAT/C/36/D/273/2005), paras. 6.3–6.4.

would be open to the complainant to submit any new evidence he presents to the Committee in support of any application for a pre-removal risk assessment, including the affidavits by his father and the councillors. The complainant has not argued before the Committee that the pre-removal risk assessment process would be an ineffective remedy. In other cases, the Committee has expressed its view that new evidence emerging after the conclusion of domestic proceedings must first be subjected to domestic review to allow the authorities to examine the evidence.<sup>8</sup> The Committee has consistently stated that it is for domestic tribunals, and not the Committee, to evaluate facts and evidence.<sup>9</sup>

4.6 Furthermore, the complaint is also inadmissible because it is manifestly ill-founded. First, the complainant has not provided evidence to sufficiently substantiate a real and personal risk of torture in Jammu. Second, conditions in India are such that, even if the complainant could be said to face a real risk of torture in Jammu, which the State party contests, he has an internal flight alternative elsewhere in India.

4.7 As to the complainant's claim that local police officers in Jammu tortured him on two occasions while in custody, incidents of past torture are not, in and of themselves, evidence substantiating a future risk of torture. However, the complainant has not provided sufficient evidence to substantiate that he is a victim of torture. He has not submitted any objective, contemporaneous documents attesting to his medical treatment, as the letter from the doctor of the Kanav Bone and Joint Clinic was issued some 18 months after the most recent event described. The complainant has provided police reports, court transcripts and the judgment of the Jammu Court, which all involve proceedings against his uncle and/or his uncle's co-accused and which took place in 2000. According to the complainant's own account, his uncle was acquitted of all charges in 2002 and experienced no further problems with the police until 2009. The newspaper article dated 18 March 2000 similarly relates to proceedings involving his uncle in 2000. This evidence fails to substantiate that the complainant was tortured in 2010 and 2011.

4.8 As regards the affidavits by the complainant's father and two councillors, they recount the events leading up to the complainant's departure from India and include a brief statement about the complainant being tortured on both occasions that he was detained. No further details are provided about these events. In addition, the affidavits of the councillors declare that the complainant's "parents" were detained and tortured by police during the alleged incident in October 2013. Conversely, the affidavit provided by the father states that only he was taken into custody, leaving doubt as to the objective corroboration of evidence provided by the complainant's close relative with a subjective interest in him remaining in Canada. Furthermore, none of the submitted documents identifies any future risk of torture that the complainant may face elsewhere in India.

4.9 Overall, the evidence provided is neither contemporaneous nor sufficiently detailed to corroborate the complainant's account of his detention and torture by local police. Neither is there objective documentary evidence, such as an arrest warrant or indictment, to substantiate his claim that the police would continue to pursue him in Jammu or elsewhere in India. The complainant appears to be the only member of his family to have been pursued regarding the whereabouts of his uncle. He spent one month in hiding in Punjab and a further three months in New Delhi without incident before leaving India on his own passport.

4.10 Furthermore, it is unnecessary for the Committee to consider the general human rights situation in India, because the complainant has not established that he would be at personal risk upon return.<sup>10</sup> Nevertheless, recent and objective documentary reports demonstrate a marked improvement in the human rights situation of Sikhs to the extent that there is no general risk of ill-treatment on return solely on the basis of one's real or perceived political opinion.<sup>11</sup> India is a secular republic in which religious freedom is respected by the Government.<sup>12</sup> Citizens are not required to register their faith.<sup>13</sup> While the

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<sup>8</sup> *K.K.H. v. Canada* (CAT/C/15/D/35/1995), para. 5; and *A.E. v. Switzerland* (CAT/C/14/D/24/1995), para. 4.

<sup>9</sup> The State party cites, inter alia, *S.P.A. v. Canada* (CAT/C/37/D/282/2005), para. 7.6.

<sup>10</sup> *V.N.I.M. v. Canada* (CAT/C/29/D/119/1998), para. 8.5.

<sup>11</sup> United Kingdom of Great Britain and Northern Ireland, Home Office, "Operational guidance note: India" (May 2013), para. 3.9.13.

<sup>12</sup> See United States, Department of State, "International religious freedom report for 2012: India".

majority of the 19 million Sikhs in India live in Punjab, there are thriving Sikh communities all over India and Sikhs are free to practise their religion and have access to education, employment, health care and housing across the country.<sup>14</sup> Many Sikhs hold positions of prominence, including recently a Sikh Prime Minister and a Sikh head of the army.<sup>15</sup> Sikhs are free to move to any state in India; they do not face legal or procedural difficulties in relocating and are not required to register their residences when doing so.<sup>16</sup> While proof of residence may be required to purchase land, to renew one's passport or to register on the electoral roll, none of these actions require interaction with the police.<sup>17</sup> Moreover, Sikhs who move from Punjab to other parts of India are not normally viewed with heightened suspicion, nor harassed by local police, simply because of their religion or regional origin.<sup>18</sup> Country reports do not suggest that the situation is different for Sikhs from Jammu. Country reports submitted by the complainant do not suggest that Sikhs from Jammu face particular challenges in relocating within India. There exists no general risk of ill-treatment for Sikhs who are returned to India.<sup>19</sup> Only the highest-profile Sikh militants are at risk of arrest or of being pursued outside of Punjab.<sup>20</sup> These include individuals who are either perceived leaders of a militant group or suspects in a terrorist attack.<sup>21</sup> An individual would not normally be considered a high-profile militant simply as a result of having strong political views, being politically active or having a family member who is believed to be a high-profile militant.<sup>22</sup>

4.11 Moreover, even where a country report indicates that Sikhs who hold or advocate particular political opinions may be subject to harassment, detention, arbitrary arrest or torture, such occurrences are typically confined to Punjab.<sup>23</sup> Country reports<sup>24</sup> indicate that the actions of local police in Punjab are most often not politically or religiously motivated towards a particular group or cause; rather, police in that region fabricate charges under the guise of suppressing threats in order to extract bribes. While some reports indicate that local police would pursue targeted individuals across state borders, subjecting them and their families to ill-treatment, other sources state that Punjabi police would require a court order and inter-state cooperation to do so, making such cases rare.<sup>25</sup> Therefore, where an individual's fear is based on treatment at the hands of local police and the individual lacks any profile of interest to the central Indian authorities, internal relocation to other areas of India is a feasible option for managing alleged risk of future harm.<sup>26</sup>

4.12 The State party would not be removing the complainant to Jammu in particular, but to another region in India, where he can avail himself of an internal flight alternative. His characteristics, including his education in mechanical engineering and the fact that he speaks Hindi, do not render him unable to live safely in other parts of India and he has provided no evidence that he would be perceived as a high-profile militant or terrorist suspect. Furthermore, as the complainant states in his personal information form, he resided in New Delhi for three months and one month in Punjab immediately prior to his arrival in Canada, without incident. The complainant has not substantiated his claim that authorities

<sup>13</sup> United Kingdom, Home Office, "Operational guidance note: India", para. 3.9.15.

<sup>14</sup> Ibid. and Immigration and Refugee Board of Canada, "India: situation of Sikhs outside the state of Punjab, including treatment by authorities; ability of Sikhs to relocate within India, including challenges they may encounter (2009–April 2013)" (Ottawa, 13 May 2013).

<sup>15</sup> United Kingdom, Home Office, "Operational guidance note: India", para. 3.9.12.

<sup>16</sup> Immigration and Refugee Board of Canada, "India: situation of Sikhs", para. 3.

<sup>17</sup> Ibid, para. 3.1.

<sup>18</sup> See United States, Bureau of Citizenship and Immigration Services, "India: information on relocation for Sikhs from Punjab to other parts of India" (16 May 2003).

<sup>19</sup> United Kingdom, Home Office, "Operational guidance note: India", para. 3.9.13.

<sup>20</sup> Reference is made, inter alia, to the Immigration and Refugee Board of Canada (Research Directorate), "India: information from four specialists on the Punjab" (Ottawa, 17 February 1997).

<sup>21</sup> Ibid.

<sup>22</sup> See United States, Bureau of Citizenship and Immigration, "India: information on relocation for Sikhs from Punjab to other parts of India".

<sup>23</sup> Immigration and Refugee Board of Canada, "India: situation of Sikhs outside the state of Punjab", para. 2.

<sup>24</sup> Ibid, para. 3.2.

<sup>25</sup> Ibid.

<sup>26</sup> Reference is made, inter alia, to the United Kingdom, Home Office, "Operational guidance note: India" (London, September 2005), para. 3.7.8.

continue to look for him in India. In its rejection of the complainant's application for refugee status, the Refugee Protection Division determined that he had an internal flight alternative in Bangalore or Mumbai. The Committee has previously expressed its view that persons with an internal flight alternative are not entitled to international protection.<sup>27</sup> There is thus nothing in the complaint to suggest that the Indian authorities would have any interest in the complainant outside of Jammu.

4.13 The State party concludes that the complainant's allegations of risk, in light of his personal situation and the current conditions in India, have not been substantiated. It requests the Committee to declare the complaint inadmissible because the complainant has not exhausted domestic remedies and because the complaint is manifestly ill-founded. Should it be declared admissible, the State party submits that the complaint is without merit for the same reasons.

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

5.1 In his submissions of 30 August 2014, the complainant reiterates his initial claims and argues that he established a prima facie case that he would be subjected to torture and a risk to his life if returned to India. Several Sikh and Punjabi torture victims are being returned from Canada to India, and subjected to cruel treatment there. At the time of submission of the complaint, the complainant had exhausted all domestic remedies with suspensive effect. Since then, he has submitted two applications for pre-removal risk assessments, neither of which have been entertained. As a result, he has never been offered a pre-removal risk assessment. As regards the State party's argument that he would be notified of his eligibility to apply for a pre-removal risk assessment once his removal becomes operationally possible, the complainant argues that "the decision on his application for such an assessment is imminent" and that such applications have a high rejection rate. There is no other effective recourse available once an application for a pre-removal risk assessment is dismissed.

5.2 The complainant submits that the Committee's interim measures request must be respected because he has satisfied the criteria of general comment No. 1 (1997) on the implementation of article 3 in the context of article 22 and because the Canadian authorities would not be likely to assess fairly an application for a pre-removal risk assessment.

5.3 Furthermore, applications for humanitarian and compassionate considerations have a processing time of almost four years and the mere fact of filing of such an application cannot stay the deportation unless the application is approved by Immigration, Refugees and Citizenship Canada, which may itself take years. The success rate for applications for humanitarian and compassionate considerations is extremely low.

5.4 The complainant is a victim of torture primarily because he tried to obtain justice against the police.<sup>28</sup> The police's allegations of his links to militants were fabricated to justify detention and torture. The complainant is a witness in the fight against the terrible impunity of police in Punjab with respect to this type of crime. The complainant's family is forced to suffer the same torture and harassment by the police in India. The documents submitted to the Committee confirm that he would run a risk of torture and that his life would be at risk in India.

5.5 The manner in which the State party considered the documentary evidence was arbitrary and amounted to a denial of justice, because the medical attestations, photographs and affidavits clearly showed that he had been tortured and that he would face a similar risk upon return. The Canadian authorities rejected this evidence for no reason. Contrary to the State party's submissions, the "Country reports on human rights practices for 2013" by the United States of America Department of State demonstrates that Sikhs suspected of being militants or families who have suffered human rights abuses still face a risk of torture. The complainant refers to *Kaur v. Canada (Minister of Citizenship and Immigration)*,<sup>29</sup> in which the Federal Court noted country information stating that human rights defenders in India continued to face threats, preventive arrest, detention and violence. Sikhs continue to suffer from torture and State brutality in various parts of India, including in August 2014 in

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<sup>27</sup> The State party cites, inter alia, *B.S.S. v. Canada* (CAT/C/32/D/183/2001), para. 11.5.

<sup>28</sup> No further details provided by the complainant.

<sup>29</sup> See Federal Court, *Kaur v. Canada (Minister of Citizenship and Immigration)* 2005 FC 1491.



Saharanpur in the state of Uttar Pradesh. The authorities have conducted large-scale arrests, including of Sikhs, who live under a constant threat of torture throughout India. Contrary to the State party's argument that Sikhs can live freely in Delhi as an alternative to Punjab,<sup>30</sup> New Delhi is where the 1984 massacre of Sikhs took place. Extensive literature and reports on human rights violations in India submitted by the complainant in his initial submission remain valid, as no human rights organization in India would suggest that everything has been resolved and that there is no longer any risk of torture. Therefore, there is a real and genuine threat to the complainant's life in India. He would also be at risk because his family sought justice in his case.<sup>31</sup> Furthermore, given the circumstances, it was legitimate for the complainant not to file a complaint with the police.<sup>32</sup>

5.6 As regards the State party's argument concerning an internal flight alternative, the complainant refers to the position of Office of the United Nations High Commissioner for Refugees whereby an internal flight alternative is normally unavailable when the persecutor is the State itself. Generally, it does not make sense to claim that an internal flight alternative exists for those who are hiding from their persecutors. There is a systematic pattern of surveillance and control over new arrivals in other parts of India, particularly of Punjabi speakers or those who are culturally Sikhs of Punjab. Furthermore, due to a surge in terrorism in India in the last two years, much attention is being paid to individuals such as the complainant. It is thus extremely difficult, if not impossible, for the complainant and his family to live safely elsewhere in India.<sup>33</sup>

5.7 The State party is ignoring its international human rights obligations and has no respect for international human rights bodies, such as the Committee. The State party removes individuals to countries where they might be tortured or killed in spite of interim measures by the Committee, including in the case of Francis Mbaioirem. The State party only accepts 33 per cent of asylum applications. The Prime Minister of India, Narendra Modi, has been accused of involvement in killing thousands of Muslims in Gujarat in 2002. In mid-2006, the Committee found that the State party had violated the Convention in the case of Bachan Singh Sogi.<sup>34</sup> While the complainant acknowledges that it is not for the Committee to evaluate the credibility of the State party's findings, he underlines that the rejection of his compelling documentation showing a personal risk of torture is arbitrary and unfair.

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

6.1 In its further observations dated 2 December 2014, the State party reiterates that the complaint is inadmissible for non-exhaustion of domestic remedies and because of a manifest lack of substantiation owing to an internal flight alternative elsewhere in India, and that it is without merit for the same reasons.

6.2 As for the complainant's non-exhaustion of remedies, the State party points out that he would not be removed to India without having had the opportunity to apply for a pre-removal risk assessment, which is an available, effective and timely remedy. He has failed to identify alleged injustices in the pre-removal risk assessment process other than to suggest that an application would likely be rejected. His non-exhaustion of the pre-removal risk assessment process renders the complaint inadmissible. Furthermore, while the Committee should not countenance the complainant's allegations concerning the Canadian asylum system in general, the Federal Court recently concluded that the 12-month ineligibility period to apply for a pre-removal risk assessment was consistent with the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the Canadian Charter of Rights and Freedoms, when considered in light of the broader removals process.<sup>35</sup> That process allows for the consideration of changes in risks following a negative refugee determination even during the 12-month period of

<sup>30</sup> The Refugee Protection Division determined that the complainant had an internal flight alternative in Bangalore or Mumbai.

<sup>31</sup> No further details provided by the complainant.

<sup>32</sup> No further details provided by the complainant.

<sup>33</sup> No further details provided by the complainant.

<sup>34</sup> See *Singh Sogi v. Canada* (CAT/C/39/D/297/2006).

<sup>35</sup> See Federal Court, *Peter v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1073.

ineligibility for a pre-removal risk assessment. Claimants have additional remedies during this period, including judicial review of a decision by the Refugee Protection Division and the possibility to request a deferral of removal.

6.3 In relation to the complainant's claim that applications for humanitarian and compassionate considerations are ineffective because they take a long time to process and given that a stay of removal is unavailable pending its evaluation, the State party notes that, if the complainant demonstrates compelling humanitarian and compassionate grounds, he will benefit from a stay of his removal until a final decision has been made. If the application is rejected, he may apply for a judicial stay pending any application for leave and for judicial review of the negative decision. He may also request a deferral of removal.

6.4 The complainant refers to current conditions in India without reference to any sources except for one excerpt from the "Country reports on human rights practices for 2013" from the United States Department of State, indicating that there were reports of arbitrary and unlawful killings, including extrajudicial killings of suspected criminals and insurgents, especially in regions of conflict, such as Jammu. However, the complainant does not have the profile of a suspected criminal or insurgent. Moreover, even if it were accepted that he has faced difficulties with the police in Jammu, he has not established that he cannot safely relocate within India.

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

7.1 In his further comments dated 29 November 2015, the complainant largely reiterates the arguments in his submission dated 30 August 2014, claiming that applications for pre-removal risk assessments and humanitarian and compassionate considerations would take a long time to process, would not be assessed fairly and would likely be rejected. Judicial review of dismissals of applications for pre-removal risk assessments, humanitarian and compassionate considerations and deferral of removal are expensive and ineffective processes. The complainant should therefore be exempted from the requirement to exhaust all available domestic remedies.

7.2 The complainant repeats his position on the conditions in India and refers to several incidents and reports,<sup>36</sup> including the 2013 and 2014 United States Department of State "Country reports on human rights practices", documenting extrajudicial killings by the Indian police in Jammu and Kashmir, Uttar Pradesh and Punjab. In case of return to India, he will likely be arrested on fabricated charges under the Prevention of Terrorism Act or section 121 of the Penal Code, which provides for heavy punishments, including the death penalty and life imprisonment.

7.3 The complainant has no internal flight alternative because the Indian security forces are actively looking for him due to his perceived links with the Khalistan Zindabad Force and because, in India, everyone needs to be registered with local police upon relocating.

7.4 As regards the current risk to his life in India, the complainant adds that the Indian army and police detained and tortured his parents on 4 June 2015, falsely alleging that the complainant and his associates had, from Canada, made financial contributions to a Sikh protest at Gadigarh, near Jammu. His parents were released on 7 June 2015, following the intervention of Sikh leaders and the payment of a bribe, and on the condition that they would surrender the complainant to the police in India.

#### **State party's further observations**

8.1 By note verbale dated 24 March 2017, the State party confirms that a pre-removal risk assessment has been initiated following the complainant's application to that effect on 29 February 2016. No decision has yet been made, but the complainant continues to benefit from a regulatory stay of removal pending a final determination.

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<sup>36</sup> See United States, Department of State, "Country reports on human rights practices", 2013 and 2014, "International religious freedom report for 2012: India"; Immigration and Refugee Board of Canada, "1994 Punjab human rights update" (Ottawa, 1 January 1994); International People's Tribunal on Human Rights and Justice in Indian-Administered Kashmir, *Buried Evidence: Unknown, Unmarked, and Mass Graves in Indian-Administered Kashmir – A Preliminary Report* (Srinagar, 2009). The complainant also refers to additional, unspecified reports.

8.2 The State party next clarifies that an interim measures request never suspends a removal order because such requests are not binding. However, the State party's general practice is to defer removal in accordance with the terms of the interim measures request, because it takes its human rights obligations seriously and considers the Committee's requests and views in good faith.

8.3 The State party notes that a notification that an individual can introduce an application for a pre-removal risk assessment can only be given after several steps have been taken. These include determinations of whether removal is operationally possible and whether it can be executed pending acquisition of travel documents, visas and final itinerary arrangements, and whether the individual concerned is eligible to apply for a pre-removal risk assessment. Further considerations are whether the individual concerned has a valid travel document and modalities influencing when the in-person meeting can be arranged to notify the individual.

8.4 The State party clarifies that people eligible for a pre-removal risk assessment will not be removed until they have been notified of their eligibility, given an opportunity to submit their application, notified that a decision has been made and provided with a copy of that decision.<sup>37</sup>

8.5 In its further observations dated 11 May 2018, the State party confirms that there have been no changes in the complainant's domestic proceedings. It notes that neither it nor the complainant have requested the suspension. A suspension can affect the State party's efforts to streamline its immigration and protection system. Its authorities thoroughly assess allegations of risk in countries of origin. New evidence of personal risk may be presented in a request to defer removal. There is generally no need for multiple subsequent risk assessments during the Committee's consideration of a complaint. The Committee should not permit the complainant to subvert the State party's immigration and protection system by delaying removal so as to trigger eligibility for multiple domestic remedies. The State party reiterates its request to the Committee to move the complaint forward for consideration.<sup>38</sup>

8.6 On 28 September 2018, the State party informed the Committee that it had, regrettably, erroneously removed the complainant to India on 1 August 2018. It appears that, following the rejection of the complainant's application for a pre-removal risk assessment on 9 July 2018, officials of the Canada Border Services Agency were unaware of the existence of the interim measures request and that Agency officials with knowledge of the request only learned about the removal on 29 August 2018. The State party states that the facts surrounding the removal were still being ascertained and that it would provide the Committee with further details as soon as possible.<sup>39</sup>

8.7 In its further comments dated 19 February 2019, the State party specifies that an internal review of the facts surrounding the complainant's removal had revealed that officers of the Canada Border Services Agency had incompletely reviewed two electronic databases, resulting in oversight of the interim measure. Other factors contributing to the erroneous removal were a lack of visual identification of an interim measure on the outside of the complainant's physical file and the failure by the complainant and his counsel to mention the present complaint and the interim measures request during a hearing to review his detention on 30 July 2018. The State party has since taken corrective measures to ensure a similar situation would not reoccur, including centralization of responsibility for inputting the existence of interim measures requests in the databases as well as for tracking and reviewing them and increased visual identification of interim measures requests.

8.8 Given the content of the complainant's affidavit dated 25 July 2018, particularly his statements that his claim for refugee status was false, and that he "decants from" his earlier

<sup>37</sup> On 12 May 2017, the complainant was requested to submit comments on the State party's submission by 12 June 2017. He did not do so, despite reminders sent on 6 September 2017 and 19 June 2019.

<sup>38</sup> On 25 May 2017, the complainant was requested to submit comments on the State party's submission by 25 July 2017. He did not do so, despite reminders sent on 3 October 2017 and 1 April and 19 June 2019.

<sup>39</sup> On 3 October 2018, the complainant was requested to submit comments on the State party's submission by 3 December 2018. He did not do so, despite a reminder sent on 1 April and 19 June 2019.

position, wants to return as soon as possible to India and makes no mention of being at risk there, the State party would not be seeking to return the complainant to Canada.

8.9 As for the admissibility of the complaint, the State party maintains that the complainant did not exhaust domestic remedies because he could have, but did not, apply to the Federal Court for leave and for judicial review of the decision on the pre-removal risk assessment, the decision on humanitarian and compassionate considerations, and the decision not to process his request for an administrative deferral of removal. Because the function of judicial review in Canada is to ensure the legality, reasonableness and fairness of the decision-making process and its outcomes, such a review constitutes an effective remedy, which was available to the complainant. Judicial review does not require a hearing to constitute an effective remedy because the reviewing court shows no deference to the administrative decision maker. The State party's approach is consistent with the approach accepted by the European Court of Human Rights in a number of cases.<sup>40</sup>

8.10 Additionally, the State party reiterates that the complaint is inadmissible because it is manifestly ill-founded. The alleged facts submitted by the complainant are essentially the same as those of his claim for refugee protection, which the complainant has admitted are false. Furthermore, the complainant's claim and evidence have already been considered by several competent, impartial domestic decision makers, who have consistently determined that the evidence relied on by the complainant does not support a finding that he faces a foreseeable, real and personal risk in India. The complaint is without merit for the same reasons.

8.11 Furthermore, the State party believes that the communication is also inadmissible because it constitutes an abuse of the right to file a submission, given that, in the affidavit of 25 July 2018, the complainant admits that his claim was false.<sup>41</sup>

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

#### *The State party's failure to cooperate and to respect the Committee's request for interim measures pursuant to rule 114 of its rules of procedures*

9.1 The Committee notes that the adoption of interim measures pursuant to rule 114 of its rules of procedure, in accordance with article 22 of the Convention, is vital to the role entrusted to the Committee under that article. Failure to respect the interim measures requested by the Committee, in particular through such irreparable action as extraditing an alleged victim, undermines the protection of the rights enshrined in the Convention.

9.2 The Committee takes note of the State party's submission that it removed the complainant erroneously due to oversight of the interim measure. It also takes note of the State party's observation that its authorities have since taken corrective measures to ensure a similar situation will not reoccur.

9.3 The Committee recalls that the non-refoulement principle codified in article 3 of the Convention is absolute. It observes that any State party that has made a declaration under article 22 (1) of the Convention recognizes the competence of the Committee to receive and consider complaints from individuals who claim to be victims of violations of the provisions of the Convention. By making such a declaration, States parties implicitly undertake to cooperate with the Committee in good faith by providing it with the means to examine the complaints submitted to it and, after such examination, to communicate its comments to the State party and the complainant. By failing to respect the request for an interim measure transmitted to the State party on 19 November 2013 and reiterated on two occasions since, the State party seriously failed in its obligations under article 22 of the Convention.

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<sup>40</sup> See European Court of Human Rights, *Soering v. United Kingdom* (application No. 14038/88), judgment of 7 July 1989; and *Vilvarajah and others v. United Kingdom* (application Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87), judgment of 30 October 1991, para. 126.

<sup>41</sup> On 1 April 2019, the complainant was requested to submit comments on the State party's submission by 3 June 2019. He did not do so, despite a reminder sent on 19 June 2019.

### *Consideration of admissibility*

10.1 Before considering any 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.

10.2 The Committee notes the State party's argument that the complaint should be declared inadmissible under article 22 (5) (b) of the Convention, because the complainant did not make an application to the Federal Court for leave and for judicial review of the decisions on the pre-removal risk assessment and humanitarian and compassionate considerations, and the decision not to process his request for an administrative deferral of the removal. The Committee also notes the complainant's contention that the aforementioned remedies do not provide any relief against a threat of torture, because they are designed to assess the degree of his establishment in Canada and hardship in the country of origin upon return.

10.3 With regard to the possibility to apply for leave and for judicial review of the decision on humanitarian and compassionate considerations, the Committee recalls its jurisprudence according to which, although the right to assistance on humanitarian grounds may be a remedy under the law, such assistance is granted by a minister on purely humanitarian grounds, rather than on a legal basis, and is thus *ex gratia* in nature.<sup>42</sup> Furthermore, this remedy does not shield applicants from deportation. The Committee concludes that the fact that the complainant did not apply for leave and for judicial review of the decision on humanitarian and compassionate considerations does not constitute an obstacle to the admissibility of the complaint.

10.4 As for complainant's failure to apply for leave to seek judicial review of the pre-removal risk assessment decision of 23 May 2018, the Committee notes the State party's argument that, with leave, the Federal Court may review decisions on pre-removal risk assessments. It also notes that a judicial stay of removal pending the adoption of a final court decision may be available. With reference to its previous jurisprudence on the matter, the Committee observes that under section 18.1 (4) of the Federal Courts Act, judicial review of a decision on a pre-removal risk assessment is not limited to errors of law and mere procedural flaws and that the Court may, in appropriate cases, look at the substance of a case.<sup>43</sup> The Committee also observes that the complainant has not put forward arguments substantiating his allegation that judicial review of the decision on pre-removal risk assessment is an ineffective remedy. Instead, he merely argues that this procedure is very expensive, would not be assessed fairly and would likely lead to a rejection. The Committee recalls that mere doubts about the effectiveness of a remedy do not dispense a complainant from the obligation to exhaust it.<sup>44</sup> Accordingly, the Committee considers that the complainant has failed to exhaust the available domestic remedies since he did not file an application for judicial review of the decision on the pre-removal risk assessment before the Federal Court.

10.5 Accordingly, the Committee is of the view that domestic remedies have not been exhausted in accordance with article 22 (5) (b) of the Convention. In light of this finding, the Committee does not deem it necessary to examine any of the other grounds invoked by the State party for considering the communication inadmissible.

11. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention;

<sup>42</sup> See, for example, *X v. Canada* (CAT/C/67/D/791/2016), para. 6.3; *W.G.D. v. Canada* (CAT/C/53/D/520/2012), para. 7.4; and *Falcon Ríos v. Canada* (CAT/C/33/D/133/1999), para. 7.3.

<sup>43</sup> See, for example, *Shodeinde v. Canada* (CAT/C/63/D/621/2014), para. 6.7; *S.S. v. Canada* (CAT/C/62/D/715/2015), para. 6.4; *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.5; *L.Z.B. and J.F.Z. v. Canada*, para. 6.6; and *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.5.

<sup>44</sup> See, for example, *S.S. v. Canada*, para. 6.4; *Aung v. Canada*, para. 6.3; and *S.S. and P.S. v. Canada*, para. 6.5.

(b) That the present decision shall be communicated to the complainant and to the State party.

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