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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 912/2019*, **

Communication submitted by:	S.B., represented by Stewart Istvanffy and Anne Castagner
Alleged victim:	The complainant
State party:	Canada
Date of complaint:	10 February 2019 (initial submission)
Document references:	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 11 February 2019 (not issued in document form)
Date of adoption of decision:	22 April 2022
Subject matter:	Deportation of the complainant from Canada to India
Procedural issue:	None
Substantive issues:	Risk of torture in the event of deportation to country of origin (non-refoulement); prevention of torture
Article of the Convention:	3

1.1 The complainant is S.B., a national of India born in 1986. His asylum claim in Canada was rejected and he risks deportation to India. He asserts that if it proceeds with his deportation, the State party would violate its obligations under article 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 11 February 2019, 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 to refrain from expelling the complainant to India while it considered his complaint.

Facts as submitted by the complainant

2.1 The complainant was born in Rampur, India, but settled in Punjab with his wife and their two children. Between 2002 and 2009, he was a rituals singer and a religious preacher

* Adopted by the Committee at its seventy-third session (19 April–13 May 2022).

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

in Sikh temples and used to travel to Canada to perform in religious ceremonies. During this period, he resided in Dugri, Punjab, an area allotted for the victims of the 1984 riots.

2.2 The police regularly harassed youngsters in Dugri, and the complainant was also targeted due to his occupation. However, the complainant's problems started escalating when he became friends with J.S., who was a family member of one of the victims of the 1984 riots and also a relative of the complainant's in-laws. When J.S. was arrested by the police on the suspicion of collaborating with militants and tortured, which occurred on numerous occasions, the complainant helped his family to have him released, and even facilitated his escape to Mumbai. J.S. was eventually apprehended by the authorities and has never been released from detention.

2.3 During 2011, the complainant was detained by the police and subjected to torture on several occasions. He decided to flee to Haryana; however, even there he did not feel safe. He suffered from depression and was unable to work as he was afraid to reveal his identity. In July 2011, he received a Canadian visa and, in October 2011, he travelled to Canada. Once in Canada, the complainant was able to again freely and safely perform in religious rituals, which helped him to improve his physical and mental condition. However, back in India the police continued to harass his family, demanding that they reveal his whereabouts. His family had to move from one place to another to escape the harassment. Meanwhile, as the harassment did not stop, the complainant was urged by his family to request asylum in Canada, which he did in February 2012.

2.4 On 21 February 2012, the complainant filed a refugee claim, which was rejected by the Immigration and Refugee Board of Canada on 15 December 2014. On 23 March 2015, the Federal Court dismissed the application for leave and for judicial review of the Board's decision. On 8 August 2016, the complainant filed an application for permanent residence based on humanitarian and compassionate considerations and, on 23 November 2017, an application for a pre-removal risk assessment. On 23 May 2018, both of these applications were refused. On 21 August 2018, he filed an application for leave and for judicial review by the Federal Court against the negative decision on his application for permanent residence on humanitarian and compassionate grounds, which was refused on 21 November 2018. The complainant did not challenge the pre-removal risk assessment decision because recent developments at the Federal Court showed that it did not intervene in negative pre-removal risk assessment decisions, except on very rare occasions. His lawyers therefore advised him to challenge the decision to reject his application for permanent residence on humanitarian and compassionate grounds instead, because the authorities would have to consider the same issues of risk and new evidence of danger as they would in a review of the pre-removal risk assessment decision. The complainant believes that had he appealed the pre-removal risk assessment decision, the outcome would have been the same.

2.5 On 21 October 2016, the police came to the complainant's family house in India and abused and harassed his father, demanding that he reveal the complainant's whereabouts. One of the policemen hit his father on the head. Two days later, the complainant's father died due to a stroke.[1]

Complaint

3.1 The complainant submits that there has not been a fair assessment of his claims in the course of domestic procedures. He asserts that the domestic authorities gave no weight to the solid evidence presented about him being a victim of persecution and discrimination in India on the sole ground that he would have an internal flight alternative. In this regard, the complainant submits that the internal flight alternative fails to consider the fact that he has no social or protection network outside of Punjab and that he suffers from depression and post-traumatic stress disorder.

[1] The complainant submits his father's death certificate, which does not specify the cause of death, and a medical report of the magnetic resonance imaging (MRI) of his father's brain conducted on the day of his death which indicates "a large acute infarct in his right [middle cerebral artery], causing mild mass effect".

3.2 For the aforementioned reasons the complainant requests not to be returned to India, as he fears that he would be in danger of being subjected to torture upon his return.

State party's observations on admissibility and the merits

4.1 On 11 November 2019, the State party submitted its observations on admissibility and the merits. It asserts that the complaint is inadmissible for non-exhaustion of domestic remedies and lack of substantiation.

4.2 With regard to the exhaustion of domestic remedies, the State party submits that the complainant has failed to apply for a judicial review of the negative decision on his pre-removal risk assessment application. It notes that, in some of its past views, the Committee has found that judicial review of negative decisions of the Immigration and Refugee Board or on pre-removal risk assessment applications does not provide an effective remedy. However, in its recent decisions, the Committee held that applications for leave and judicial review of negative decisions are not mere formalities. The State party argues that its domestic system of judicial review, and in particular its Federal Court, does provide an effective remedy against removal where there are substantial grounds for believing that a complainant faces a risk of torture, and that it provides for judicial review on the merits. The grounds for review listed in subsection 18.1 (4) of the Federal Courts Act cover all of the substantive ways in which a decision could potentially be reviewed in any context, covering potential errors of the decision maker with regard to issues of jurisdiction, procedural fairness, fact and the law. Had the complainant applied for leave and for judicial review of the pre-removal risk assessment decision, and if the Federal Court were to have found an error of law or an unreasonable finding of fact with respect to that decision, it would have granted relief in accordance with the powers set out in subsection 18.1 (3) of the Federal Courts Act.

4.3 The State party also notes that the Committee has consistently expressed the view that the overall rate of success for individual applicants in a particular remedial avenue does not affect the determination of whether that remedy is an effective one that must be exhausted for the purposes of admissibility.[2] Moreover, the Committee has observed that mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such a remedy.[3]

4.4 The State party further notes that the complainant could have also applied for an administrative deferral of removal from the Canada Border Services Agency, which is another domestic remedy that could result in a reasonable prospect of redress. It also notes that the Federal Court of Appeal has repeatedly held that an enforcement officer must defer removal where an individual establishes a risk of death, extreme sanction or inhumane treatment that has arisen since the last assessment of risk.

4.5 The State party further argues that the complainant has failed to substantiate for the purposes of admissibility his allegations that he faces a foreseeable, personal and real risk of torture in India. It notes that it is not the role of the Committee to weigh evidence or reassess findings of fact made by domestic courts or tribunals. The Immigration and Refugee Board reviewed the complainant's evidence and allegations of risk, concluding that he had not substantiated his claim of being either a refugee within the meaning of the Convention relating to the Status of Refugees or a person in need of protection. The Federal Court refused to grant leave for the judicial review of that decision. The State party asserts that these findings were appropriate and well founded, and should be respected by the Committee. The complainant also had his allegations of prospective risk considered by a pre-removal risk assessment officer in 2018, who concluded that the complainant's allegations of both past and future risk in India were not substantiated by evidence and that there was no reasonable possibility he would be at risk if he returned to India.

4.6 According to the State party, the complainant's allegations of being detained, harassed and tortured by the police have not been established. The Immigration and Refugee Board could not ascertain that the complainant had been tortured by the Indian authorities as alleged,

[2] For example, *P.S. v. Canada* (CAT/C/23/D/86/1997), para. 6.3; and *Z.T. v. Norway* (CAT/C/23/D/127/1999), para. 7.5.

[3] For example, *Jensen v. Denmark* (CAT/C/32/D/202/2002), para. 6.3.

and concluded that he was most likely the target of bribes by the local police. Before the Immigration and Refugee Board, for example, the complainant could not provide any evidence that J.S., who was reportedly responsible for the complainant's alleged mistreatment by the Indian authorities, was missing or sought after by the police. He also could not provide an explanation as to why he was released from police custody and was able to leave Punjab for Haryana to stay with a friend prior to his departure for Canada in 2011. With regard to the complainant's allegations of past torture by the police, the State party submits that he has not provided reliable medical evidence to substantiate his allegations. It notes that the letter from the "Sanjivani Natural Healing & Wellness Centre" only indicates that he was treated twice in 2011 for injuries; it does not stipulate that the injuries were consistent with torture or the complainant's claims of having been tortured. Similarly, the two letters provided by "Clinique des demandeurs d'asile et des réfugiés (CDAR)" were drafted in 2015 and 2017, respectively, four to six years after the last alleged incidents of torture. These letters only indicate that the complainant has attributed the pain he suffered to alleged violence sustained in India.

4.7 The State party further notes that, even if the complainant were given the benefit of the doubt with respect to his past experience, which has not been demonstrated, he still has failed to establish that he faces a foreseeable, real and personal risk of torture if returned to India. His claims of prospective risk were considered in his pre-removal risk assessment application in which the officer considered the same affidavits by his family regarding continued police harassment as those attached to the present complaint. The officer, however, concluded that the complainant had failed to present sufficient evidence to substantiate his claim that he was currently being sought by the police in India or that he was currently perceived by the police as a sympathizer with militants.

4.8 With respect to the complainant's allegation that his father was killed by the police in 2016, the State party notes that neither the medical report nor the death certificate provided by the complainant show that the injuries allegedly sustained by his father were consistent with his claim.

4.9 The State party further notes that the general human rights situation in India does not corroborate the complainant's allegation that he would face a real risk of torture. According to the State party, the complainant alleges that there are massive, systematic and flagrant human rights abuses in India. To substantiate these allegations, he relies on two articles from 2002 and 2005,[4] purportedly describing the general human rights situation in Punjab, without explaining to the Committee how this general information has any relevance to his own circumstances. In addition, many of the statements upon which the complainant relies appear to address the detention, torture or killing of suspected criminals and insurgents, none of which are relevant to his circumstances. The State party notes that, based on the complainant's own testimony, he was not involved in militant or insurgent activities.

4.10 Finally, the State party submits that even if the complainant has demonstrated, on a prima facie basis, that he faces a personal risk of torture if returned to India, he has not established that he would be unable to live free of personal risk in a part of India other than Punjab. The State party notes that Sikhs are free to move to any state in India and do not face legal or procedural difficulties in relocating. It also notes that reports concerning country conditions in India demonstrate a marked improvement in the human rights situation for Sikhs to the extent that it can no longer be said that there is a general risk of ill-treatment on return solely on the basis of one's real or perceived political opinion.[5] According to the State party, only those high-profile militants actively engaged in or who are perceived to be engaged in or supporting militant activity are likely to be of interest to the central authorities on return to India. Also, Sikh minorities living in states outside of Punjab have the freedom to practice their religion and have access to education, employment, health care and housing. Moreover, Sikhs who move from Punjab to other parts of India are not normally viewed with

[4] Jaskaran Kaur, "A Judicial Blackout: Judicial Impunity for Disappearances in Punjab, India", *Harvard Human Rights Journal*, vol. 15, 2002; and Ensaaf, "Punjab Police: Fabricating Terrorism through Illegal Detention and Torture – June 2005 to August 2005", October 2005.

[5] United Kingdom of Great Britain and Northern Ireland, Home Office, "Operational Guidance Note: India", May 2013, available at http://www.refworld.org/docid/51a890674.html

heightened suspicion, nor harassed by local police simply because of their religion or the region from which they have come. Based on the foregoing, the State party submits that the complainant has a viable internal flight alternative.

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

5.1 On 21 February 2020, the complainant submitted his comments on the State party's observations. He contests that torture victims have any kind of access to an internal flight alternative in India. Given the wide number of activities that leave behind an electronic footprint, and the fact that India has a very strong surveillance system, anyone can be easily tracked down in the country. The complainant argues that he has many characteristics of someone who would be most at risk if returned to India. Namely, he is an Amritdhari Sikh; he has family members who have previously been targeted for political activism and who have suffered torture and forced disappearance; and he and his family have problems both with the political establishment and with the corrupt and lawless police in Punjab. Therefore, there is very little in his case that suggests that it is not a high-profile case. The complainant refers to the Committee's decision in *Singh v. Canada*[6] and submits that the Committee findings in that case regarding the shortcomings of the pre-removal risk assessment procedure and judicial review are relevant to his own.

5.2 The complainant notes that no human rights organization or refugee support groups have any confidence in the pre-removal risk assessment as an effective recourse to protect victims of human rights violations due to its lack of credibility. He reiterates that he considers the domestic remedies to be exhausted since the judicial review of the rejection of his application for permanent residence on humanitarian and compassionate grounds is essentially based on the same facts as the pre-removal risk assessment. He submits that during the pre-removal risk assessment procedure much of the evidence was rejected only because those who had provided testimony in support of the complainant personally knew him. He argues that this is not a fair criterion, and that real evidence can only be obtained from medical experts or those who personally know torture victims.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any complaint submitted in a communication, the Committee must decide whether the communication 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 In accordance with article 22 (5) (b) of the Convention, the Committee shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. In this regard, the Committee notes the State party's argument that the complainant may file an application for leave and judicial review of the decision denying his application for a pre-removal risk assessment, as well as an application for an administrative deferral of removal from the Canada Border Services Agency. The Committee also notes the complainant's contention that a judicial review of a pre-removal risk assessment decision does not provide an effective recourse to protect victims of human rights violations because the jurisprudence of the Federal Court shows that it does not intervene in negative pre-removal risk assessment decisions, except on some very rare occasions, and that his appeal for a judicial review of the negative decision on his application for permanent residence on humanitarian and compassionate grounds was based on the same facts as the pre-removal risk assessment.

6.3 From the information available on file, the Committee observes that under section 18.1 (4) of the Federal Courts Act, a judicial review of a pre-removal risk assessment decision by the Federal Court is not limited to errors of law and mere procedural flaws, but the court

[6] CAT/C/46/D/319/2007.

may look at the substance of a case. The Committee also observes that the complainant has not put forward relevant arguments in support of his assertion that a judicial review of the pre-removal risk assessment decision is not an effective remedy. He merely asserts that, since he applied for a judicial review of the refusal of his application for permanent residence on humanitarian and compassionate grounds, all effective domestic remedies were exhausted since that application was essentially based on the same facts as the pre-removal risk assessment and had he appealed the pre-removal risk assessment decision, the outcome would have been the same.

6.4 In this connection, the Committee recalls that the mere fact of doubting the effectiveness of a remedy does not absolve a complainant from the obligation to exhaust it and that the Federal Court may, in appropriate cases, examine the merits of a case.[7] Accordingly, the Committee considers that, in the circumstances of the present case, the complainant has failed to exhaust all available domestic remedies since he has not applied to the Federal Court for judicial review of the pre-removal risk assessment decision.

6.5 Accordingly, and in the light of all the information before it, the Committee considers that, in the present case, the complainant had an available and effective remedy that he failed to exhaust. It therefore finds the communication inadmissible under article 22 (5) (b) of the Convention.

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

7. Accordingly, the Committee decides:

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

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

[7] See *Aung v. Canada* (CAT/C/36/D/273/2005/Rev.1), para. 6.3; *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.5; and *S.S. v. Canada* (CAT/C/62/D/715/2015), para. 6.4.