



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

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Committee against Torture

Communication No. 571/2013

Decision adopted by the Committee at its fifty-fifth session (27 July-14 August 2015)

Submitted by:

M.S. (represented by counsel, Line Bøgsted,
Danish Refugee Council)

Alleged victim:

The complainant

State party:

Denmark

Date of communication:

22 November 2013 (initial submission)

Date of decision:

10 August 2015

Subject matter:

Risk of torture upon forcible return to
Afghanistan

Procedural issue:

Level of substantiation of claims

Substantive issue:

Forcible return to a State where there are
substantial grounds for believing that the person
would be in danger of being subjected to torture

Article of the Convention:

3



Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (fifty-fifth session)

concerning

Communication No. 571/2013*

Submitted by: M.S. (represented by counsel, Line Bøgsted,
Danish Refugee Council)

Alleged victim: The complainant

State party: Denmark

Date of communication: 22 November 2013 (initial submission)

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 10 August 2015,

Having concluded its consideration of communication No. 571/2013, submitted to it by M.S., under article 22 of the Convention,

Having taken into account all information made available to it by the complainant and the State party,

Adopts the following:

Decision under article 22(7) of the Convention

1.1 The complainant is M.S., an Afghan national born in 1981. His request for asylum in Denmark was rejected and at the time of submission of the complaint, he was in detention awaiting deportation to Afghanistan. He claims his deportation to Afghanistan would be contrary to article 3 of the Convention as he would be at risk of being subjected to torture. No date has been set for his deportation. The complainant is represented by Line Bøgsted of the Danish Refugee Council.

1.2 On 27 November 2013, acting under rule 114, paragraph 1, of its rules of procedure (CAT/C/3/Rev.5), the Committee granted the request for provisional interim measures and requested the State party to refrain from expelling the complainant to Afghanistan while his communication was under consideration by the Committee. That request may be reviewed at the request of the State party, in the light of information and observations received from the State party. The Committee also states that it may decide to lift the interim measures if the complainant continues to hide after the State party agrees to comply with the request for

* The following members of the Committee participated in the consideration of the present communication: Essadia Belmir, Alessio Bruni, Satyabhoosun Gupt Domah, Felice Gaer, Abdoulaye Gaye, Sapana Pradhan-Malla, George Tugushi, Claudio Grossman and Kening Zhang. Pursuant to rule 109 of the Committee's rules of procedure, Jens Modvig did not participate in the consideration of this communication.

interim measures. By letter of 3 December 2013, the Danish Refugee Appeals Board decided to postpone the complainant's deportation to Afghanistan.¹

The facts as presented by the complainant

2.1 The complainant was born in 1981 in Kandahar, Afghanistan. He arrived in Denmark on 21 May 2010, together with his wife. On the same day, they were interviewed by the Danish National Police. As the complainant is illiterate, his wife filled out the application for asylum on 25 May 2010, in which she explained that her husband had been abducted twice by a group of "criminals" in Kandahar and in Kabul, Afghanistan, and that he had been subjected to torture on both occasions.² She explained that the abductors demanded money for her husband's release.

2.2 The complainant was interviewed by the Danish Immigration Service on 11 May 2011. He explained that he was first abducted by the Taliban in Kandahar for 22 days and was tortured (no dates are provided).³ Most of the time, he was blindfolded so he was not sure whether there were two or more abductors. He was hit with cables and burned with hot metal. He claims that every second or third night, his hands and feet were tied up and that he was raped by two members of the Taliban. He said that the Taliban wanted him to act as a messenger and distribute flyers in Kandahar and that they asked him to sign up to carry out jihad, including by carrying a suicide bomb. He said that he accepted to carry out jihad on the second day of his detention. The Taliban also wanted 100,000 US dollars from the complainant's father in order to release him, as his family was well known and wealthy. His father gave the Taliban 20,000 US dollars and obtained his release.

2.3 The complainant and his wife went into hiding for 12 days in his father-in-law's house in Kandahar before going to Kabul. After about one month and 20 days, he was again abducted by the Taliban, this time for 28 days, and was continuously beaten (no dates are provided). He said that he was hit unconscious and did not know where they had taken him. The Taliban again tried to make him sign up to carry out jihad. The complainant's father paid the Taliban 15,000 US dollars for them to release him.

2.4 Following his release, the complainant and his wife went back to Kandahar to the complainant father's house. On or about 26 September 2009, the complainant and his wife left Afghanistan for the Islamic Republic of Iran by car with a human smuggler who his father had paid to transport them out of the country. The complainant stated that he had to leave Afghanistan because he was afraid that he would be killed if the Taliban found out that they had informed the authorities about the second abduction. On an unspecified date, the complainant's father complained to the police in Kabul about the second abduction.⁴

¹ See the information provided in the complainant's submission of 24 March 2014.

² The complainant's wife alleged that neither her husband or his family told her the full story from the beginning, since it was not the custom in Afghanistan to involve women in such matters. She learned about the whole story little by little and could not give precise dates as to when she received the information or about details of the events. She said that she did not know whether to write the Taliban or criminals in the asylum application, because she was confused about how to refer to the abductors. She did not get the details on the abduction until after she had filled out the application. The complainant stated that he was not hospitalized after he had been subjected to torture; he was treated at his parents' home.

³ A copy of photographs of the complainant's bruises and burn marks from the torture is appended as Exhibit 3 to the initial communication.

⁴ No further information is provided by the complainant as to how the police reacted or if they were willing to protect the complainant. The Danish Immigration Service apparently did not question the complainant about that issue.

The complainant and his spouse were allegedly unable to return to Afghanistan out of fear that the complainant would be kidnapped again.

2.5 On 27 May 2011, the Danish Immigration Service rejected the complainant's application for asylum. On 13 January 2012, the Danish Appeals Board rejected the complainant's appeal on the ground that "the male applicant's abduction is an act of crime and the male applicant will not, on account of that, face a real risk of persecution, as defined in the Danish Aliens Act, article 7, paragraph 1, or be submitted to circumstances covered by the Danish Aliens Act, article 7, paragraph 2, upon return to his country of origin".

2.6 On 8 March 2012, the Danish Refugee Council, representing the complainant, applied to the Appeals Board to re-open the case. It argued that, *inter alia*, it was not clear whether the Board recognized that the male applicant had been abducted, but did not believe that the abductors were the Taliban. The Refugee Council also argued that, regardless of whether the abductors were the Taliban or a group of criminals, the Board had not assessed whether the complainant would obtain protection from the Afghan authorities if he again faced the risk of abduction upon return to Afghanistan. On 19 July 2013, the Appeals Board rejected the request and reiterated the same conclusions as those mentioned above.

2.7 The complainant claims that, according to UNHCR Eligibility Guidelines for assessing the international protection needs of asylum seekers from Afghanistan,⁵ the Afghan State is unable to fully protect its citizens against human rights violations.

2.8 Since, according to the Danish Aliens Act, decisions of the Danish Appeals Board cannot be appealed before the Danish courts, the complainant alleges that he has exhausted all available domestic remedies with the final decision by the Appeals Board.⁶ The present matter has not been submitted for examination to another procedure of international investigation or settlement.

2.9 In his submission dated 24 March 2014, the complainant added that the Danish Appeals Board rejected his application to re-open his case on 19 July 2013. He again requested the Appeals Board to re-open his case on 20 November 2013 and that application was rejected on 20 February 2014. Among the reasons given for the latter request to re-open his case was the fact that the doctor and psychologist in Denmark had confirmed that he had been subjected to torture in Afghanistan.

2.10 The Danish Appeals Board referred to its previous decisions rejecting the complainant's appeal, in which it did not find it likely that the male applicant had any conflict with the Taliban that would put him at risk of torture upon return to Afghanistan. The complainant stated that the Appeals Board did not consider that there was any significant new information or opinions in relation to the information available at the time of its original decision of 13 January 2012, nor at the time of its second refusal to re-open the case of 19 July 2013.

⁵ See United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for assessing the international protection needs of asylum seekers from Afghanistan*, 6 August 2013, pp. 23-25.

⁶ Denmark was asked about the absence of appeal before a domestic court in the context of the consideration of its periodic report under the Convention on the Elimination of All Forms of Racial Discrimination, in 2006. In its concluding observations, the Committee recommended that asylum seekers be granted the right to appeal the decisions of the Refugee Appeals Board before the Danish courts (see CERD/C/DEN/CO/17, para. 13). In its follow-up report, the Danish Government confirmed that the decisions of the Refugee Board were final (see CERD/C/DEN/CO/17/Add. 1, para. 12).

2.11 However, the Appeals Board relied on those decisions in relation to the complainant's third request to re-open his case, highlighting in particular that the new medical information that the male applicant was subjected to torture in Afghanistan could not lead to a change in the assessment of the case. The Appeals Board did not find that the complainant had provided any new evidence to prove that he and his spouse were at a real risk of persecution or abuse, as provided for under the Danish Aliens Act (art. 7). The complainant argues that the Appeals Board did not consider whether it was likely that the "male applicant" had been subjected to torture in Afghanistan, it just did not believe that it was the Taliban who had subjected him to torture. The Danish Appeals Board did not set a new deportation date since the original date was suspended on 3 December 2013 at the request of the Committee.

2.12 The complainant emphasizes that the Appeals Board has still not addressed whether he had been subjected to torture during his abductions in Afghanistan, whether he faced a real risk of being subjected to torture again upon return to Afghanistan, nor whether he would obtain protection from the Afghan authorities against being subjected to torture again upon return. The complainant emphasizes that they do not wish their identity disclosed in the Committee's final decision.

The complaint

3.1 The complainant claims that the Danish authorities did not adequately assess the risk that he would be subjected to torture if returned to Afghanistan. He claims that he would be at personal risk of being persecuted, abducted and tortured by the Taliban if returned to Afghanistan, therefore returning him to Afghanistan would violate article 3 of the Convention. His wife is afraid that he will be killed by the Taliban if they return to Afghanistan, and she does not think that they would be safe, even in another part of Afghanistan, since the Taliban was able to find her husband both in Kandahar and in Kabul.

3.2 The complainant submits that, regardless of whether his abductors were the Taliban or a group of criminals, the Danish Appeals Board should have assessed whether he could obtain protection from the Afghan authorities if returned to Afghanistan. Given that he was abducted more than once, and that the Taliban were able to find him both in Kandahar and in Kabul, there is a risk that he would be abducted again upon his return. The complainant maintains that the State party should have addressed that risk and considered that he had been subjected to torture during his abductions and for that reason he would be at risk of being abducted again upon return to Afghanistan. In that regard, the complainant underscores that the Appeals Board did not contest the fact that he had been abducted twice before fleeing to Denmark.

3.3 In support of his claims, the complainant refers to the UNHCR Eligibility Guidelines regarding asylum seekers from Afghanistan (see para. 2.7 above), according to which the Afghan State is unable to fully protect its citizens against human rights violations. It is reported that "even where the legal framework provides for the protection of human rights, the implementation of Afghanistan's commitments under national and international law to promote and protect these rights in practice frequently remains a challenge".⁷ According to the Guidelines, there are "high levels of corruption, ineffective governance and a climate of impunity" and "in most areas the police are not linked to a functioning justice system, while there is no effective governance backing up the police in many areas".⁸

⁷ See *UNHCR Eligibility Guidelines*, (see note 5), p. 23.

⁸ Ibid.

State party's observations on admissibility and merits

4.1 On 27 May 2014, the State party submitted that the complainant and his spouse entered Denmark on 21 May 2010 without any valid travel documents. On the same day, they applied for asylum. On 27 May 2011, the Danish Immigration Service rejected their asylum applications. On 13 January 2012, the Danish Appeals Board upheld the refusal of the Danish Immigration Service. By letter of 8 March 2012, the complainant and his spouse requested the Danish Appeals Board to re-open their asylum proceedings. On 19 July 2013, the Appeals Board refused to re-open the asylum proceedings. By letter of 20 November 2013, the complainant and his spouse again requested the Appeals Board to re-open their asylum proceedings. In its decision of 20 February 2014, the Appeals Board again refused to re-open the complainant's asylum proceedings.

4.2 On 22 November 2013, the complainant submitted his communication to the Committee, claiming that it would constitute a violation of article 3 of the Convention if the State party were to return him to Afghanistan. On 27 November 2013, the Committee forwarded the communication to the State party and requested it to provide its observations on the admissibility and merits of the communication. The Committee also requested the State party to refrain from deporting the complainant to Afghanistan while his case was being considered by the Committee. On 3 December 2013, the Danish Appeals Board suspended the date for the complainant and his spouse's departure from Denmark until further notice, in accordance with the Committee's request.

4.3 The State party submits that according to the report of 11 May 2011 of the Danish Immigration Service, the complainant stated that, inter alia, he had lived in Kandahar, Afghanistan, for seven or eight years. Then he went with his parents to the Islamic Republic of Iran and lived there for 18 or 19 years due to the war in Afghanistan and the Taliban. In 2005, the family moved back to Kandahar. According to the asylum registration report of 21 May 2010, the complainant stated that he was kidnapped by a gang of robbers who demanded ransom from his family. He was detained for 21 or 22 days. According to the report of 11 May 2011 on the interview with the Danish Immigration Service, the complainant stated that, inter alia, he was kidnapped by the Taliban both in Kandahar and in Kabul. There was an interval of about one month and 20 days between the two kidnappings. As the Taliban had not achieved their goal of forcibly recruiting him during the first kidnapping, they were still interested in him. The complainant stated that his father reported the kidnappings to the police after the second kidnapping. Out of fear for the complainant's life, his father had not dared to tell the police who had kidnapped him.

4.4 The State party submits that, in the context of the Appeals Board's decision of 13 January 2012, as grounds for seeking asylum, the complainant stated that he feared being killed by the Taliban and forced to participate in jihad or be killed because his family could not keep on paying ransoms. The complainant stated that he had been detained on 29 May 2009 and subjected to physical abuse by the Taliban, including abuse of a sexual nature, and that the Taliban had wanted him to participate in jihad. The majority of the members of the Appeals Board found that the complainant's statement about the abductions were inconsistent and elaborative; the Board also took into account that in the asylum registration reports, the complainant and his spouse had only mentioned kidnapping committed by a gang of robbers or criminals. The majority of the members of the Board could not accept as a fact that the complainant had been kidnapped by the Taliban; they also considered it unlikely that the Taliban would have subjected him to torture and sexual abuse during the entire detention of 22 days if the complainant had accepted to participate in jihad almost from the beginning and that, despite that, the Taliban had released him against payment of ransom.

4.5 The State party informs the Committee that the majority of the members of the Board found that the complainant had failed to substantiate how the Taliban would have

found him in Kabul; they also found it unlikely that the Taliban would have kidnapped him a second time for the purpose of making him participate in jihad, after having released him shortly before. The majority of the Board members also considered that the complainant had been unable to describe any specific circumstances or details about the events that gave rise to his release, including about his father's negotiations. Consequently, they concluded that the complainant's kidnapping was a criminal act and that the complainant would not be at a real risk of persecution under sections 7 (1) and (2) of the Danish Aliens Act if returned to his country of origin. The Board thus upheld the decision of 27 May 2011 of the Danish Immigration Service, refusing asylum to the complainant and his spouse. At the same time, the complainant and his spouse were ordered to depart from Denmark within seven days of the date of the decision, as prescribed by section 33(1) and the second sentence of section 33(2) of the Aliens Act.

4.6 As regards the Appeals Board's decision of 19 July 2013, refusing the complainant's request to re-open the asylum proceedings, the State party informs the Committee that the complainant raised, *inter alia*, the issue of principle in relation to what information the Board should take into account in connection with refusals based on a negative credibility assessment. In particular, the complainant did not consider it reasonable that information on the grounds for requesting asylum, given during an asylum registration interview, should be taken into account in a credibility assessment. The complainant also contested the fact that the Board took into account that the complainant had failed to substantiate how the Taliban would have located him in Kabul. The complainant stated that it seemed as if he and his spouse were met with distrust no matter what they said to the Danish Immigration Service and that parts of the statements that they had made during the proceedings had been incorrectly translated, which had apparently cast doubts on their statements. The complainant also stated that it was unclear whether or not the Board had found it a fact that the complainant had been kidnapped, but just did not believe that he was kidnapped by the Taliban. The complainant stated that it was of no significance to the issue of protection against kidnapping that would be available to him upon return to Afghanistan whether it was the Taliban or another criminal group that had kidnapped him.

4.7 In its decision of 19 July 2013, the Danish Appeals Board found no basis for re-opening the asylum proceedings in favour of the complainant, nor did it find any basis for extending the time limit for his departure, as no substantial new information had been provided compared with the information provided at the original appeal hearing. Therefore, the Board could not accept the complainant's statements about conflicts with the Taliban as facts and relied on its findings in its decision of 13 January 2012. Concerning the statements made by the complainant about the information provided in the asylum registration report, the Board observed that the asylum registration report had been included as part of the cause of the claim for asylum, as was usual in all asylum cases. In that connection, the Board observed that it had based its decision of 13 January 2012 on an overall assessment of all the documents in the case, including the statements made by the complainant and his spouse and all background material available to it on the situation in Afghanistan. Concerning the complainant's submission that parts of the statements had been incorrectly translated, the Board observed that errors had been corrected by the interpreter who had attended the interview with the Danish Immigration Service. The Board further observed that the parts of the statements that had been incorrectly or inaccurately translated were not taken into account by either the Danish Immigration Service or the Danish Appeals Board in their decisions to refuse asylum. The State party adds that during the hearing, the Board was able to clear up any misunderstandings that may have arisen in connection with the interpretation and translation during previous proceedings by asking additional questions and carrying out an independent assessment of the applicant's credibility based on his statement given at the hearing.

4.8 The State party referred to the Appeals Board's decision of 20 February 2014 in response to the complainant's request of 20 November 2013 to reopen the asylum proceedings. It submits that the complainant explained that the inconsistencies between the statements made by him and his spouse were due to the interpretation problems at the asylum interviews because they were assigned an Iranian interpreter, who spoke Farsi, and not an Afghan interpreter, who would have understood Dari. The complainant alleged that the interpreter had not understood ordinary everyday words and that the interpreter had told them that it would harm their asylum case to bring up that issue. The police dismissed the complainant's reservations about the inconsistencies in the interpretation. At the Appeals Board hearing, the complainant and his spouse had therefore not been able to account for the misunderstandings. According to the State party, the complainant stated that both he and his spouse were uneducated people and that their inability to explain about various circumstances actually showed that they had not invented and coordinated a mendacious story, but that they were traumatized refugees who were made nervous by the intense interrogation that they had been subjected to. The complainant added that it was well established that the Taliban often kidnapped the sons of wealthy families and demanded a ransom;⁹ he considered the Board's examination of the case inadequate and said that his and his spouse's honesty had been unfairly impugned. In his letter dated 26 November 2013, the complainant included additional information that he had been examined by a doctor and a psychologist, who had confirmed that he had been subjected to torture in Afghanistan.

4.9 The State party submits that, with his letter of 27 November 2013, the complainant forwarded a transcript of his medical records, from which it appeared that he had told the doctor that he had been subjected to torture, having twice been detained by the Taliban, and that, during his detention, he had been burnt with cigarettes, beaten with electric cables, burnt with metal and raped. The complainant had shown the doctor the scars on his body, and the doctor considered it likely that the pain experienced by the complainant was due to torture and previous lashings on his back and that he suffered from post-traumatic stress disorder. The Board still found no basis for re-opening the asylum proceedings. It emphasized that no substantial new information had been added to the complainant's case, compared with the information that was made available at the original Board hearing on 13 January 2012 or at the time of the Board's refusal of 19 July 2013 to re-open the proceedings.

4.10 Concerning the complainant's allegations of interpretation problems during the asylum interviews, the State party submits that the Appeals Board had observed that it appeared from the reports on the asylum interviews with the Danish Immigration Service on 10 and 11 May 2011, respectively, signed by both the complainant and his spouse, that they had been interviewed in Dari, their mother tongue. According to the reports, the complainant and his spouse had reviewed the reports with the interpreter and had the opportunity to make additions and comments. It also appeared that both the complainant and his spouse had stated that there were no problems with the interpretation. The State party points out that the Board observed that the fact that the complainant had allegedly told the police on a later occasion that there had been interpretation problems during the asylum interviews could not lead to a different result. The Board also observed that, at the hearing, the complainant and his spouse did not draw the Board's attention to the alleged interpretation problems during the previous proceedings.¹⁰

⁹ The complainant refers to the findings of the Danish Afghanistan Committee in that regard.

¹⁰ According to the State party, the Appeals Board used a different interpreter from the ones used for the interviews with the Danish Immigration Service.

4.11 Concerning the statements by the complainant that it was generally known that sons of wealthy families were kidnapped by the Taliban, the State party submits that the Danish Appeals Board had observed that such information was of a general nature and deemed to have no bearing on the complainant's specific conflict. The Board also observed that, according to its background material, including the Danish Immigration Service report of 29 May 2012, "Country of Origin Information for Use in the Asylum Determination Process", the Taliban mainly recruit ethnic Pashtuns, and the complainant is an ethnic Tajik. The medical records forwarded by the complainant with his letter of 27 November 2013 could not lead to a different assessment of the case and the Board still found that the complainant and his spouse had failed to substantiate that they would be at a real risk of persecution or abuse under section 7 of the Aliens Act if they were to return to Afghanistan. The Board therefore relied entirely on its decisions of 13 January 2012 and 19 July 2013. On 3 December 2013, further to the Committee's request, the Board suspended the date for the complainant and his spouse's departure from the State party.

4.12 The State party submits that the complainant has failed to establish a *prima facie* case for the purpose of admissibility under article 22 of the Convention. He has not provided sufficient information to enable the Danish Appeals Board to establish that there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Afghanistan. The State party is of the view that this part of the communication should be considered manifestly ill-founded and inadmissible. The State party considers that the complainant is trying to use the Committee as an appellate body in order to have the factual circumstances in support of his asylum claim re-assessed.

4.13 In that connection, the State party refers to the case law of the Committee, which states that due weight must be accorded to findings of fact made by domestic, judicial or competent government authorities unless it can be demonstrated that such findings are arbitrary or unreasonable.¹¹ The Committee has stated in its case law that it is for the courts of the States parties to the Convention, and not the Committee, to evaluate facts and evidence in a particular case and it is for the appellate courts of States parties to the Convention to examine the conduct of a case, unless it can be ascertained that the manner in which the evidence was evaluated was clearly arbitrary or amounted to a denial of justice, or that the officers had clearly violated their obligations of impartiality.¹²

4.14 The State party submits that in the present case, the decision to uphold the refusal of the Danish Immigration Service to grant asylum to the complainant and his spouse was made by the Danish Appeals Board — a collegial, independent and quasi-judicial body. The decision was made on the basis of a hearing procedure, during which the complainant had the opportunity to present his views to the Board with the assistance of legal counsel. The Board has thus conducted a comprehensive and thorough examination of the evidence in the case. Moreover, on two occasions — in its decisions of 19 July 2013 and of 20 February 2014 — the Board found that there was no basis for re-opening the asylum proceedings.

4.15 With regard to the merits, the State party argues that, should the Committee consider the communication admissible, the complainant has not sufficiently established that his return to Afghanistan would constitute a violation of article 3 of the Convention. It maintains that the complainant must establish that he would be in danger of being tortured

¹¹ See, *inter alia*, communication No. 148/1999, *A.K. v. Australia*, decision adopted on 5 May 2004, para. 6.4.

¹² See communication No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006, para. 7.6.

if returned to Afghanistan and that such danger is personal and present.¹³ The State party submits that the complainant has not substantiated that he will face a foreseeable, real and personal risk of being tortured in the country to which he is returned.¹⁴ As the Committee has stated on numerous occasions, the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country, as additional grounds must exist to show that the individual concerned would be personally at risk.¹⁵

4.16 The State party also observes that in its decision of 13 January 2012, the majority of the members of the Appeals Board had found that the complainant had failed to substantiate his grounds for seeking asylum. The majority found that the complainant's statements about the detentions had been inconsistent and elaborative. It took into account that, *inter alia*, in the asylum registration reports, the complainant and his spouse had only mentioned a kidnapping committed by a gang of robbers or criminals. Accordingly, the majority of the members of the Board could not accept as a fact that it was the Taliban who had kidnapped the complainant. Therefore, the Board found as a fact, in an overall view, that the complainant's kidnapping was a criminal act and that the complainant would not be at a real risk of persecution as set out in section 7 (1) of the Aliens Act or of abuse under section 7 (2) of the Aliens Act, if he were returned to his country of origin. Consequently, the Board dismissed the complainant's statement about his grounds for asylum as lacking in credibility.

4.17 The State party also refers to the fact that the complainant gave inconsistent statements about the purpose of his kidnappings. He and his spouse have given inconsistent statements about when and how his spouse learned about the kidnapping and that it was carried out by the Taliban and about the scope of his injuries as a consequence of the abuse. The State party adds that the complainant gave an incoherent statement about his release after the second kidnapping, including as to how the person who helped him to escape from his kidnappers was able to freely enter the place where he was being held. Concerning the complainant's statement that he does not know how the Taliban found him in Kabul, the State party observes that, according to the background information available, Kabul is a rapidly growing city with more than three million inhabitants and with no central registration of inhabitants. It was therefore deemed unlikely that the Taliban would have been able to find the complainant there, in particular since, as the complainant stated, nobody knew where they were. The Appeals Board could not find as a fact that it was the Taliban who had kidnapped the complainant or that it was the Taliban who had subjected him to abuse during his detention, in particular as the Taliban mainly recruits ethnic Pashtuns and the complainant is an ethnic Tajik.

4.18 The State party submits that the Appeals Board did not find it a fact that the complainant had been kidnapped by the Taliban; it considered the kidnapping an isolated criminal act and therefore did not consider it necessary to request a medical examination of

¹³ See the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22, para. 7.

¹⁴ See, for example, communications Nos. 270 & 271/2005, *E.R.K. and Y.K. v. Sweden*, decision adopted on 30 April 2007, paras. 7.2 and 7.3; No. 282/2005, *S.P.A. v. Canada* (see note 12), para. 7.1 and 7.2; No. 180/2001, *Mr. F.F.Z. v. Denmark*, decision adopted on 30 April 2002, paras. 9 and 10; and No. 143/1999, *S.C. v. Denmark*, decision adopted on 10 May 2000, paras. 6.4 and 6.6.

¹⁵ See, for example, communications No. 220/2002, *David v. Sweden*, decision adopted on 2 May 2005, para. 8.2; No. 245/2004, *S.S.S. v. Canada*, decision adopted on 16 November 2005, para. 8.3; Nos. 270 & 271/2005, *E.R.K. and Y.K. v. Sweden* (see note X), para. 7.2; and No. 286/2006, *M.R.A. v. Sweden*, decision adopted on 17 November 2006, para. 7.3.

the complainant because, whatever its outcome, the examination could not serve to prove that the complainant had been subjected to abuse by the Taliban. Furthermore, the complainant has not demonstrated that he would be unable to obtain the protection of the Afghan authorities. Consequently, the State party finds that the complainant will not be at real risk of persecution as set out in section 7 (1) of the Aliens Act or of abuse under section 7 (2) of the Aliens Act if he were returned to his country of origin.

4.19 The State party maintains that the Appeals Board took into account all relevant information in its decisions and that the submission of the communication to the Committee has not brought to light any information to substantiate that the complainant would risk being subjected to torture if returned to Afghanistan. It therefore relies on the findings of the Appeals Board and refers to the lack of a satisfactory explanation for the inconsistent statements made by the complainant and his spouse. The State party concludes that it will not constitute a breach of article 3 of the Convention to return the complainant to Afghanistan.

4.20 Finally, the State party requests the Committee to review its request for interim measures as the complainant has failed to substantiate that he would be at risk of suffering irreparable harm if returned to Afghanistan.

Complainant's comments on the State party's observations

5.1 On 20 August 2014, the complainant reiterated his claim that the State party will breach its obligations under article 3 of the Convention if he is forcibly removed from the State party.

5.2 The complainant emphasizes the importance of the credibility assessment in the asylum procedure, especially in the light of the paucity of documentary and other evidence confirming or supporting the applicant's statements. The complexity of the credibility assessment is partly linked to the multilingual and cross-cultural communication which could exacerbate the scope for misunderstandings and errors and refers to a United Nations High Commissioner for Refugees report¹⁶, which states that "factors such as the working of the human memory, the psychology of the applicant, and his or her experience of traumatic events also have an impact and need to be understood," and that "the repetitive nature of the task and the routine exposure to accounts of trauma and ill-treatment [...] may lead to case-hardening and credibility fatigue". He also refers to other studies on the complexity of credibility assessment in the asylum procedure. In the complainant's view, the Danish asylum process, notwithstanding the thorough personal interview and adequate legal safeguards, is not exempt from the above-mentioned challenges, therefore the statements made by the complainant and his spouse as well as the credibility assessment made by the Danish authorities should be considered in the light of those challenges.

5.3 The complainant describes the nature of the four procedural steps of the Danish asylum process: registration, application, asylum interview and appeal hearing. Regarding the finding by the majority of the members of the Appeals Board of the lack of credibility and the inconsistency of the complainant and his spouse's statements, the complainant emphasizes that he is illiterate and his spouse received three years of tuition by her uncle. He highlights that illiteracy and lack of formal education can affect asylum seekers' ability to articulate the reasons for their asylum applications and to respond to questions posed by the authorities and that inconsistency in statements is not necessarily indicative of lack of

¹⁶ See UNHCR, *Beyond proof: credibility assessment in EU asylum systems*, May 2013, p. 11.

credibility.¹⁷ The complainant adds that discrepancies in statements are common especially, although not exclusively, when the person is suffering from post-traumatic stress disorder.

5.4 The complainant reiterates that he was subjected to inhuman and degrading treatment during the kidnappings in Afghanistan, the fact of which does not seem to be disputed by the State party, unlike the identity of the agents of the persecution. The fact that he was subjected to such treatment repeatedly during the kidnappings should be reflected in the credibility assessment, as such treatment is likely to affect cognitive functions of the victims, including memory malfunction and inability to concentrate. The complainant refers to the Committee's case law, in which it states that complete accuracy is seldom to be expected by victims of torture or those who suffer from post-traumatic stress disorder.¹⁸ Even if the inconsistencies relate to a material fact, the evidence may still be accepted as credible.¹⁹ The complainant argues that the alleged lack of credibility and inconsistencies in his and his spouse's statements, for example, the details regarding his release after the second kidnapping or when and how his spouse was informed of the kidnappings, made during the asylum process over a period of more than 19 months, does not necessarily indicate that they lack credibility. Those discrepancies might be normal or explainable traits in the asylum seeker's account of the reasons why he fled Afghanistan and ill-treatment to which he was subjected there. The errors in the interpretation from Dari to Danish should also be considered as normal and distorting factors in the communication during the asylum proceedings between the asylum seekers and State officials.

5.5 As an explanation of the pivotal point of the communication, that is, whether the kidnappers were the Taliban or a criminal gang without affiliation to the Taliban, the complainant states that when he said "criminals" during the registration with the Danish police, he meant the Taliban. The same explanation was given to the Appeals Board. The complainant also stated that he became aware that the kidnappers were from the Taliban, partly due to how they were dressed and how they talked, and partly because, when he was first kidnapped, they told him directly that they were from the Taliban. The complainant also contests the assertions in the report of the Danish Immigration Service of 29 May 2012 that the Taliban mainly recruit ethnic Pashtuns, pointing out that the report is limited in scope and based on interviews carried out in Kabul, whereas Kandahar is a traditional Taliban stronghold as that is the original area of the Taliban movement. He submits in addition that, at the time of his kidnapping, Kandahar province was largely inaccessible for the United Nations and reports of abduction and assassination of Afghan citizens also increased during that period. Therefore, his statements that he was kidnapped by the Taliban in Kandahar are not inconsistent with background information on the security situation in Kandahar and of the known power bases of the Taliban at that time. The complainant also contests the State party's allegations that it was possible to hide from the Taliban in Kabul and gives examples of security incidents to the contrary.

5.6 The complainant submits that in the light of international research on credibility assessments and relevant background information from Afghanistan, his and his spouse's statements should be regarded as credible as they describe the personal and real risk that he could be subjected to ill-treatment and torture by the Taliban if returned to Afghanistan, given that he had already been kidnapped twice by the Taliban and subjected to various acts of torture.

¹⁷ Ibid., pp. 68 and 152.

¹⁸ See communications No. 21/1995, *Alan v. Switzerland*, views adopted on 8 May 1996; No. 41/1996, *Kisoki v. Sweden*, views adopted on 8 May 1996; and No. 279/2005, *C.T. & K.M. v. Sweden*, decision adopted on 17 November 2006.

¹⁹ See communication No. 101/1997, *Haydin v. Sweden*, views adopted on 20 November 1998.

5.7 The complainant also maintains that he did establish a *prima facie* case for the admissibility of his communication. He recalls that his statement — considered in the light of his individual circumstances as a victim of kidnapping and serious ill-treatment and the fact that he is illiterate — together with relevant background information about the situation in Afghanistan provide substantial grounds that go beyond mere theory or suspicion for determining that he would be in danger of being subjected to torture in Afghanistan. In particular, the complainant notes that no medical evidence was sought to support his claim that he had been subjected to torture, as the Danish Appeals Board denied him access to relevant medical examinations.²⁰

5.8 The complainant requests that the Committee find the communication admissible for consideration by the Committee in order to assess the Danish Immigration Authorities' interpretation of the principle of "benefit of the doubt" and to assess the extent to which necessary consideration is given to, for example, people who are illiterate and victims of torture.

5.9 The complainant contends that the Danish Appeals Board did not adequately take into account his particular situation, including the fact that he is illiterate and a victim of torture, who cannot always be expected to relate the facts in the same way as individuals who have not been subjected to torture. The complainant also contends that the Appeals Board did not adequately consider the cultural differences with regard to the role of women in Afghan society and the information that his spouse was expected to know about him, and that the frequency and character of the somewhat sceptical questions put to him throughout the asylum proceedings did not take into consideration the fact that he had been subjected to serious and repeated ill-treatment.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party has not challenged the admissibility of the communication on the ground of non-exhaustion of domestic remedies. It therefore concludes that it is not precluded from considering the communication under article 22 (5) (b) of the Convention.

6.3 The Committee notes the State party's submission that the communication is inadmissible as the complainant's claims are manifestly ill-founded. The Committee, however, considers that the communication has been adequately substantiated for the purposes of admissibility and declares the communication admissible and proceeds with its consideration of the merits.

²⁰ See the Committee's general comment No. 1, para. 8 (c).

Consideration of the merits

7.1 The Committee has considered the present communication in the light of all the information made available to it by the parties concerned, in accordance with article 22 (4) of the Convention.

7.2 The issue before the Committee is whether the forcible removal of the complainant to Afghanistan would constitute a violation of the State party's obligation under article 3 (1) of the Convention not to expel or to return ("refouler") a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

7.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Afghanistan. In assessing that risk, the Committee must take into account all relevant considerations, including the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be "personally" at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

7.4 The Committee recalls its general comment No. 1 (1997) on the implementation of article 3 of the Convention, in which it states that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to meet the test of being highly probable, the Committee recalls that the burden of proof normally falls upon the complainant, who must present an arguable case establishing that he or she runs a "foreseeable, real and personal" risk.²¹ The Committee also recalls that, under the terms of its general comment No. 1, it gives considerable weight to findings of fact made by the organs of the State party concerned, while at the same time, it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, to freely assess the facts based on the full set of circumstances in every case.

7.5 The Committee notes that the complainant claims that he had been kidnapped twice by the Taliban in the past, subjected to physical abuse, including of a sexual nature, and that the Taliban had asked him to participate in jihad. He also claimed that he would face a personal and real risk of being subjected to torture or other inhuman or degrading treatment by the Taliban if returned to Afghanistan. The Committee also notes the State party's submission that the Danish Appeals Board found that complainant had failed to substantiate his grounds for seeking asylum as his statements regarding the kidnappings had been inconsistent and elaborate, that it considered it unlikely that the Taliban would have subjected the complainant to torture and sexual abuse during the entire detention of 22 days if, as he had stated, he had accepted to participate in jihad from the beginning and that the Taliban had nevertheless released the complainant against payment of ransom.

7.6 The Committee notes the complainant's claims that the State party failed to carry out an independent medical assessment of his allegations of abuse and torture. It also notes the

²¹ See, for example, communications No. 414/2010, *N.T.W. v. Switzerland*, decision adopted on 16 May 2012, para. 7.3; and No. 343/2008, *Kalonzo v. Canada*, decision adopted on 18 May 2012, para. 9.3.

State party's response that such an examination was not relevant because, whatever its outcome, it could not serve to prove that the complainant had been subjected to abuse specifically by the Taliban. In particular, the Committee takes into account the State party's allegations of inconsistency in the complainant and his spouse's statements about the scope of the injuries suffered by the complainant as a consequence of the abuse, and the State party's overall lack of credibility of the complainant's story, in particular as regards the purpose of kidnapping and whether it was the Taliban who had kidnapped the complainant and subjected him to abuse in connection with that purpose.

7.7 The Committee observes that, even assuming that the complainant had been tortured, the alleged instances of torture did not occur in the recent past²² and the question is whether he currently runs a risk of torture if returned to Afghanistan. It does not necessarily follow that, several years after the alleged events occurred, he would still be at risk of being subjected to torture if returned to his country of origin. The Committee also observes that the complainant has not adduced any evidence that the Afghan authorities or his alleged torturers had been looking for him in the recent past.

7.8 The Committee notes the complainant's claim that he would risk being subjected to torture if deported to Afghanistan, because the Taliban would again attempt to recruit him for their cause. The Committee also notes the State party's submission that it cannot be found as a fact that the complainant had been kidnapped by the Taliban and that it perceives the kidnapping as an isolated criminal act. The Committee observes that no material in the file allows it to establish that the complainant had been subjected to torture by State authorities or that the complainant would be unable to obtain the protection of the Afghan authorities against the risk of torture, over six years after the alleged abuse and torture occurred.

7.9 The Committee recalls its general comment No. 1, according to which the burden of presenting an arguable case lies with the author of a communication.²³ In the Committee's opinion, the complainant has not discharged that burden of proof.²⁴ Further, the complainant has not demonstrated that the authorities of the State party, in this case, Denmark, failed to conduct a proper investigation into his allegations.

8. The Committee therefore concludes that the complainant has not adduced sufficient grounds to enable it to believe that he would run a real, foreseeable, personal and present risk of being subjected to torture upon return to Afghanistan.

9. The Committee against Torture, acting under article 22 (7) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's removal to Afghanistan by the State party would not constitute a breach of article 3 of the Convention.

²² See the Committee's general comment No. 1, para. 8 (b).

²³ Ibid., para. 5.

²⁴ See communication 429/2010, *M.S. v. Denmark*, decision adopted on 11 November 2013, paras. 10.5 and 10.6.