



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. 960/2019*, **

<i>Communication submitted by:</i>	E.M.M.A. (represented by counsel, Bo Johansson; as of 18 February 2022, represented by the Swedish Refugee Law Centre)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	3 October 2019 (initial submission)
<i>Document references:</i>	Decisions taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on [11 October 2019] (not issued in document form)
<i>Date of adoption of decision:</i>	21 July 2022
<i>Subject matter:</i>	Deportation to Afghanistan
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issue:</i>	Risk of torture upon return to country of origin (non-refoulement)
<i>Article of the Convention:</i>	3

1.1 The complainant is E.M.M.A., a national of Afghanistan born in 1998.¹ He claims that the State party would violate his rights under article 3 of the Convention if it removed him to Afghanistan. The State party has made the declaration pursuant to article 22 (1) of the Convention, effective from 8 January 1986. The complainant is represented by counsel.

1.2 On 11 October 2019, 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 while his case was being considered.

* Adopted by the Committee at its seventy-fourth session (12–29 July 2022).

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

¹ The complainant's stated date of birth is one of the elements in his asylum account whose credibility has been questioned by the Swedish authorities. In his asylum interview on 11 October 2017, the complainant stated that he would be 28 years of age at his next birthday. However, he had already been registered in Sweden as having been born in 1998, and the German authorities had recorded that his year of birth was 1989. In the present communication, the complainant specifies that his date of birth is 10 November 1998, but he does not explain on what this is based. In his asylum procedure, the complainant has adhered to the details on his *Tazkara* (Afghan identity document).



Facts as submitted by the complainant

2.1 The complainant is ethnic Hazara and belongs to the Shi'a Muslim minority. He is from Baghlan Province of Afghanistan, where he was a farmer. There were two military trenches for the security of the local population in the village Surkh Kotal, near the city of Puli Khumri. The complainant and other villagers were obliged to bring food and water to the soldiers at the trenches. On an unspecified date, five soldiers were found beheaded near the trench. The complainant was perceived as the last person to have been seen at the location. Because of this, he was summoned to the local military commander and accused of collaborating with the Taliban and of killing the soldiers. The complainant denied the accusations, but the commander did not believe him.

2.2 The complainant was subsequently detained in the basement, where he was interrogated and tortured. He was beaten so severely that he lost consciousness. Several parts of his body were burned with a heated metal object. Later, a guard whom the complainant knew loosened the strips around his waist. He was later able to push open the cell door and escape.

2.3 The complainant contacted a smuggler, who helped him to flee to the Islamic Republic of Iran on an unspecified date, where he stayed for about two years. Afraid of possible deportation to Afghanistan, the complainant travelled to Pakistan to live with his uncle. The complainant married his uncle's daughter and after some time, with the help of a smuggler, was able to travel to the Islamic Republic of Iran.

2.4 The complainant then travelled to Sweden and applied for asylum on 1 January 2016, claiming that he would risk imprisonment or execution upon return to Afghanistan because of accusations that he was responsible for killing the five soldiers in Surkh Kotal. The complainant claimed to be vulnerable also because of his Hazara ethnicity and a member of the Shi'a Muslim community. The author presented medical certificates attesting that he had scars across his torso, arms and legs; that they were healed scars from burns that might have appeared as a result of torture; and that he needed rehabilitation.² The certificates further indicated that the complainant suffered from nightmares and had trouble sleeping.

2.5 On 21 December 2017, the Swedish Migration Agency rejected the complainant's asylum claim and concluded that he had not provided sufficient evidence of his identity. While admitting that the complainant could be at risk of persecution if returned to Baghlan Province, the Migration Agency was convinced that the complainant could settle in the area, namely in Mazar-e Sharif, where his sister resided. Although the complainant had claimed that people had been looking for him in Afghanistan and that they had visited his sister for that purpose, it was not clear who they were or why they were looking for him. His sister had not been subjected to any reprisals, and it did not appear that the Afghan authorities or anyone else had been looking for the complainant at his sister's residence. The Migration Agency concluded that the complainant was not in need of protection, considering that there was no armed conflict in Mazar-e Sharif, and that he was likely to be able to find employment and settle there. Moreover, in spite of the sequelae of torture, he did not suffer from a lethal disease, nor had he developed strong links with Sweden that warranted granting a residence permit.

2.6 Challenging the decision of the Swedish Migration Agency, the complainant submits that in his home country, he continues to be suspected of supporting or being connected to the Taliban by the Afghan authorities. He also submit that the authorities' interest in him is not localized to his native area, but applies to the whole territory of Afghanistan. The complainant notes that the Afghan police are presently able to issue nationwide arrest warrants, which further aggravates the risks to which the complainant would be exposed in Afghanistan. Given the gravity of what the complainant is accused of having inflicted on the Afghan army, it is likely that he is being sought across the country. The fact that the

² The author provided translations of medical reports, including from the Njurunda Health Centre in Kvissleby, Sweden, certifying that he suffered from post-traumatic stress disorder, and from a resource centre for trauma support, indicating that he needed further rehabilitation.

complainant still has a sister in Mazar-e Sharif is therefore irrelevant. Further, it is unlikely that the authorities would mistreat his sister for the sole purpose of finding him.

2.7 On 13 December 2018, the Swedish Migration Court rejected the complainant's appeal. Although the Migration Court accepted that he had been exposed to violence, it found that the written evidence, including medical certificates, did not support his claim that State authorities had accused him. While not disputing that the complainant's injuries had been caused by external violence, the Court found that the written evidence did not establish as probable that the representatives of the regime were responsible for the injuries.

2.8 As for his oral testimony, the Migration Court noted that he had claimed a different nationality in Germany. It did not find it credible that the complainant had been the last person to have seen the soldiers alive, nor that he would have been accused of cooperating with the Taliban, because the soldiers' location was well-known and because his family was respected in the village. In addition, it found the account of his captivity to be vague, lacking in detail and unlikely, particularly regarding his escape. The cell door had been locked with a chain and a padlock and so the complainant could not have opened it himself, especially considering his poor physical and mental condition; further, it was unlikely that the soldier who helped him escape had been the only one present at that moment and that no one else had noticed his escape. Additionally, the accusations against the complainant must have rendered it unlikely that a soldier would help him escape. The Migration Court concluded that he was not in need of international protection. It further found that his mental problems did not constitute a separate ground for granting a residence permit.

2.9 Commenting on the decision of the Migration Court, the complainant argues that, per the jurisprudence of the European Court of Human Rights,³ his medical records should have been considered as balancing any inadequacies in his asylum account, given that his claim was essentially consistent throughout the proceedings, including with regard to his duty to bring food to the military, the death of the soldiers, the accusations against him, his detention and arrest, and his subsequent escape. Further, the Migration Court did not point out any contradictions in the account of his imprisonment. The complainant finds the Migration Court's evaluation that the village's respect for his family would render it unlikely that the complainant would be accused of supporting the Taliban as speculative. The complainant emphasizes that he originates from a poor, undeveloped, rural background and has not received any education. The fact that he claimed another nationality before the German authorities can be explained by the turbulent refugee situation in Europe in 2015 and cannot affect the complainant's credibility.

2.10 On 15 March 2019, the Swedish Migration Court of Appeal decided not to grant leave to appeal the decision of the Migration Court.

Complaint

3.1 The complainant submits that, upon return to Afghanistan, he risks being exposed to treatment contrary to article 3 of the Convention, including imprisonment and torture.

3.2 The complainant underlines that he has suffered severe post-traumatic stress disorder as a result of being subjected to torture in his home country and that he has been psychologically traumatized. He refers to the Committee's decisions to support the claim that it is not expected of a torture victim to provide a coherent, consistent and non-contradictory asylum claim.⁴

3.3 The complainant claims that the Government of Afghanistan controls the main part of the country, whereas the national police and the military can operate on a national level and subsequently are capable of launching a nationwide search to get hold of the complainant.

³ European Court of Human Rights, *R.C. v. Sweden*, Application No. 41827/07, Judgment, 9 March 2010.

⁴ The complainant refers to *Tala v. Sweden* (CAT/C/17/D/43/1996); *Falakaflaki v. Sweden* (CAT/C/20/D/89/1997); *Karoui v. Sweden* (CAT/C/28/D/185/2001); *R.G. et al. v. Sweden* (CAT/C/56/D/586/2014); and *El Rgeig v. Switzerland* (CAT/C/37/D/280/2005), noting, in different wordings, that complete accuracy is seldom to be expected from victims of torture.

3.4 The complainant claims that if returned to Afghanistan, he will be identified and detained upon arrival and accused of collaborating with the Taliban. He underlines that the national police and the military are known for their systemic use of torture and that the risk of him being subjected to torture is very high. In this context, the complainant refers to a report issued by the United States of America about torture methods used, including severe beatings, electric shocks, prolonged suspension of arms and sleep deprivation.⁵

State party's observations on admissibility and the merits

4.1 In a note verbale dated 18 September 2020, the State party submitted its observations on admissibility and the merits. It stated that the complainant's assertion that he was at risk of being treated in a manner that would amount to a breach of article 3 of the Convention if returned to Afghanistan failed to rise to the minimum level of substantiation required for the purposes of admissibility. It therefore submits that the communication is manifestly unfounded and thus inadmissible pursuant to article 22 (2) of the Convention and rule 113 (b) of the Committee's rules of procedure.

4.2 The State party notes that it does not wish to underestimate the concerns that may legitimately be expressed with respect to the general human rights situation in Afghanistan;⁶ however, the situation there has not been deemed such that there is a general need to protect all asylum-seekers from the country. The State party submits that the Committee must focus on the foreseeable consequences of the complainant's expulsion to Afghanistan in the light of his personal circumstances, such as the Swedish migration authorities' assessments in the present case.

4.3 The State party recalls the Committee's views and observes that the burden of proof in cases such as the present one rests with the complainant, who must present an arguable case establishing that he or she runs a foreseeable, present, personal and real risk of being subjected to torture. In addition, 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.⁷

4.4 Regarding the general legal framework of the asylum procedure, the State party informs the Committee that several provisions in its Aliens Act reflect the same principles as those laid down in article 3 of the Convention, and it observes that national migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee applies when examining a subsequent complaint under the Convention. In this context, the State party notes that under the Aliens Act, the expulsion of an alien may never be enforced to a country where there is reasonable cause to assume that the alien would risk being subjected to the death penalty or to corporal punishment, torture or other inhuman or degrading treatment or punishment, or to a country where the alien is not protected from being sent on to another country in which the alien would run such a risk.

4.5 The State party observes that the national authorities are in a very good position to assess the information submitted by an asylum-seeker and to appraise the credibility of his or her statements and claims, and subsequently underlines that in the present case, both the

⁵ The complainant refers to the United States Department of State, "2018 country reports on human rights practices: Afghanistan".

⁶ Reference is made to reports on the human rights situation in Afghanistan, including [A/76/667-S/2022/64](#); United Nations High Commissioner for Refugees, "Afghanistan: compilation of country of origin information (COI) – Relevant for assessing the availability of an internal flight, relocation or protection alternative (IFA/IRA/IPA) to Kabul", December 2019; Austrian Centre for Country of Origin and Asylum Research and Documentation, "Brief compilation on the security situation in Afghanistan", 27 November 2019, and "Security and socio-economic situation in Herat-City and Mazar-e Sharif", 26 November 2019; Special Inspector General for Afghanistan Reconstruction, *Quarterly Report to the United States Congress*, 30 October 2019; and United Nations Assistance Mission in Afghanistan, "Quarterly report on the protection of civilians in armed conflict: 1 January to 30 September 2019", 17 October 2019.

⁷ The State party refers to Committee against Torture, *H.O. v. Sweden*, communication No. 178/2001, para. 13; *A.R. v. Netherlands* ([CAT/C/31/D/203/2002](#)), para. 7.3; *Kalonzo v. Canada* ([CAT/C/48/D/343/2008](#)), para. 9.3; and *X v. Denmark* ([CAT/C/53/D/458/2011](#)), para. 9.3.

Swedish Migration Agency and the Migration Court have conducted thorough examinations of the complainant's case.

4.6 Regarding the asylum procedure, the State party notes that the Swedish Migration Agency held an introductory interview and an extensive asylum investigation with the complainant, on 15 February 2016 and on 11 October 2017, respectively. Furthermore, upon appeal, the Migration Court held an oral hearing with the complainant. The investigations and the hearing were all conducted in the presence of a public counsel and with the assistance of interpreter, whom the complainant confirmed he understood well. The complainant was invited to scrutinize and submit written observations on the minutes of the investigations conducted, and to make written submissions and appeals. It follows from this background that the complainant has had ample opportunities to explain the relevant facts and circumstances in support of his claim and to argue his case, both orally and in writing, before the Swedish Migration Agency and the Migration Court.

4.7 The State party recalls the Committee's views whereby it was confirmed that the Committee is not an appellate, quasi-judicial or administrative body and that considerable weight will be given to findings of facts made by organs of the State party concerned. The State party holds that there is no reason to conclude that the national rulings were inadequate or that the outcome of the domestic proceedings was in any way arbitrary or amounted to a denial of justice. Accordingly, considerable weight must be attached to the opinions of the Swedish migration authorities, as expressed in their rulings ordering the expulsion of the complainant to Afghanistan, which would not entail a violation of article 3 of the Convention.

4.8 Referring the complainant's cited vulnerability as a Shi'a Muslim of Hazara ethnicity in Afghanistan, the State party highlights that according to the Swedish Migration Agency, the country of origin information does not demonstrate that these groups were generally exposed to systematic persecution of the intensity referred to in the Aliens Act. The complainant was hence not considered to have plausibly demonstrated that he had such a well-founded fear of persecution under the Aliens Act on account of his ethnicity or religion. The State party notes that the complainant has not submitted information on any further circumstances that give rise to a different conclusion in this regard.

4.9 The State party notes that the Swedish Migration Agency assessed the complainant's claims, namely that in his home village, he had been accused of cooperating with the Taliban, resulting in the death of five government soldiers; that he had been detained for three days and later arrested, where he was tortured and was threatened with death if he did not admit to having been connected to the Taliban; and that he had managed to escape from his captivity with the help of a well-intended soldier. The Swedish Migration Agency found in its initial review that the cited threat to the complainant had to be regarded as local and that the complainant had not plausibly demonstrated that he would be exposed to it if he settled in Mazar-e Sharif, where his sister and her family resided. The complainant was hence considered to be able to establish himself and find work in Mazar-e Sharif. However, the State party notes that the Swedish Migration Agency in its further review changed its previous opinion about the credibility of the complainant's account and concluded that the veracity thereof could be questioned.

4.10 The State party notes that neither the Swedish Migration Agency nor the Migration Court have questioned the complainant's exposure to physical violence in Afghanistan. The complainant submitted two certificates during the national asylum proceedings: one certifying that he had been referred to the clinic on account of post-traumatic stress disorder due to severe traumatic experiences in the form of torture, and the other stating that he had exhibited scarring on his body which, according to the certifying doctor, might very well have arisen through torture. The State party notes in this regard that the Migration Court in its judgment emphasized that the submitted medical certificates, which provide evidence that sustained injuries might have been caused by torture, called for an increased investigative responsibility. In this context, the State party notes that the present case is clearly distinguishable from the one decided by the European Court of Human Rights, to which the complainant referred in his complaint, and notes that the Migration Court in its judgment referred to relevant indicative judgments of the Migration Court of Appeal and concluded that an extended investigative responsibility did not apply if the underlying asylum account completely lacked credibility.

4.11 In this context, the State party notes that in the present case, the Migration Court found multiple reasons to question the credibility of the complainant's account and reiterates some findings of particular importance: the written evidence submitted by the complainant could not be considered to provide support for the notion that the complainant was accused by the Afghan regime or its representatives in the way he had asserted; the complainant had provided varying accounts of his identity and he was also known to German authorities with a different nationality; the complainant's account of his captivity and what he then claimed to have endured was vague and lacked detail; the complainant's escape through a door locked with a chain and a padlock without being noticed, and the conduct of the soldier who allegedly helped the complainant to escape are improbable; and the complainant's claims about the background to his cited need for protection were so improbable that they could not form the basis of the assessment. In line with this, the Migration Court concluded that these circumstances had a negative effect on his general credibility and found that the torture claim did not need to be investigated more closely.

4.12 The State party refers to the Migration Court's conclusion, in which it stated that the complainant was not in need of international protection despite the fact that he had been subjected to violence in his country of origin. Consequently, the Migration Court had no reason to assess whether the complainant could settle in Mazar-e Sharif.

4.13 Referring to the complainant's claims that he suffers from post-traumatic stress disorder and that these psychological effects often cause memory problems and affect the possibility of presenting a coherent and consistent story free of contradictions, the State party underlines that it is not mentioned in the medical certificates or any other submitted documentation that the complainant suffers from memory loss.

4.14 The State party holds that the complainant has been given ample opportunities to explain the relevant facts and circumstances in support of his claimed need for protection and to argue his case, both orally and in writing, and that the domestic authorities have thoroughly examined all the facts and evidence submitted by the complainant during the domestic asylum process. The State party concludes that the application of domestic law in the complainant's case was neither arbitrary, nor did it amount to a denial of justice, and it reiterates that the Committee is not a court of fourth instance that should re-evaluate facts and evidence *de novo*.

4.15 The State party observes that the complainant's claims and presented facts are insufficient to conclude that the alleged risk of ill-treatment upon his return to Afghanistan meets the requirements of being foreseeable, present, real and personal. It therefore concludes that an enforcement of the expulsion order would not, under the present circumstances, constitute a violation of the State party's obligation under article 3 of the Convention.

Complainants' comments on the State party's observations

5.1 On 1 December 2020, the complainant submitted his comments on the State party's observations. He maintains that the communication should be considered admissible and reiterates his claim that the risk of torture, were he to be returned to Afghanistan, is foreseeable, personal and real. He submits that he provided enough proof that he had been subjected to torture in his home country. He notes that Afghanistan is one of the most insecure countries in the world and that violations of basic human rights are extensive. His conflict is closely related to the Afghan military; therefore, the risk is highly foreseeable and, in particular, personal and real.

5.2 The complainant strongly emphasizes that he is not an ordinary Afghan citizen and that his background differs considerably from others, and that the Government of Afghanistan has a special interest in him.

5.3 The complainant argues that the migration authorities erred in concluding that his asylum account completely lacked credibility. He notes that to describe a complicated sequence of events within two hours is difficult, especially considering that everything was communicated through an interpreter. Proper consideration should be rendered to his personal circumstances. He is a young person with almost no education, and he lived in a rural area. His linguistic and narrative skills are therefore limited.

5.4 While agreeing that the Committee is not an appellate or quasi-judicial body, the complainant notes that it must seriously evaluate the judgment and assessments made by the national instances and not take their conclusions for granted.

5.5 The complainant argues that the situation of the Hazara ethnic group is difficult in Afghanistan and that they are exposed not only to social discrimination but also subjected to regular persecution, particularly because they belong to a minority religious group. The complainant adds that there are individual circumstances that constitute a foreseeable risk of abuse and a well-founded fear of persecution in Afghanistan.

5.6 Referring to his earlier statements to the German authorities, the complainant argues that an asylum-seeker is in a very fragile position and that his or her actions are often based upon rumours provided by the migration community. That was the situation for the complainant in Germany and the reason why he acted in that manner. In this context, the complainant argues that his credibility must be evaluated separately from the information he provided to the German authorities.

5.7 The complainant disagrees with the findings of the migration authorities concerning the credibility of his account of detention and escape from the Taliban, noting that they failed to look into all the facts surrounding his escape, taking into account that he was assisted by a soldier whom he knew and that the prison where he was detained was in fact a very primitive construction, with a door that was relatively easy to force open.

5.8 The complainant emphasizes that one cannot expect a cohesive and consistent story, free from contradiction from a person who suffers from post-traumatic stress disorder, which was why his story might have been affected by his memory, even if his statement in its fundamental elements was coherent and consistent.

5.9 The complainant notes that since it was proven that he has been subjected to torture and that the main wording of his statement remained the same throughout the entire process, the burden of proof must have shifted to the State party. He concludes that he would face a personal, foreseeable and real risk of torture if deported to Afghanistan, which would constitute a violation of his rights under article 3 of the Convention.

State party's additional observations

6.1 On 27 January 2022, the State party submitted its additional observations on admissibility and the merits of the complaint and reported that on 16 July 2021, the Swedish Migration Agency decided to suspend all enforcements of deportation orders to Afghanistan until further notice. On 23 July 2021, the Migration Agency also imposed a decision to halt all cases concerning Afghanistan. The decisions were taken in order to enable the Migration Agency to re-evaluate the security and human rights situations in Afghanistan.

6.2 On 30 November 2021, the Swedish Migration Agency issued a new legal position paper on Afghanistan, thereby revoking the above-mentioned general suspension of enforcement of expulsion orders to Afghanistan as well as the previous decision to halt cases.⁸ According to the legal position paper, the guidance by the European Asylum Support Office,⁹ which was issued on 11 November 2021,¹⁰ largely formed the basis for the Migration Agency's assessment. The paper further refers to the guidance concerning certain vulnerable groups that might be at risk of persecution in Afghanistan, as well as risk profiles for such persecution. It also concludes that there is no effective protection to be obtained from the Afghan authorities and that an internal protection alternative is only available in exceptional cases.

⁸ The State party provided a copy of the legal position papers, which constitutes the Swedish Migration Agency's general recommendations regarding the application of laws and ordinances within the Agency.

⁹ The European Asylum Support Office is an agency of the European Union set up by Regulation (EU) 439/10 of the European Parliament and of the Council of 19 May 2010.

¹⁰ European Asylum Support Office, *Country Guidance: Afghanistan – Common Analysis and Guidance Note* (Luxembourg: Publication Office of the European Union, 2021).

6.3 The State party observes that the assessment of impediments to enforcement of expulsion orders in the legal position paper is of particular importance to the present communication. In this regard, the Swedish Migration Agency notes that the changes in the human rights situation and the limited availability of an internal protection alternative following the Taliban takeover in Afghanistan can, in the individual case, justify an examination in accordance with the Aliens Act.¹¹ Under the relevant provision, the Swedish Migration Agency may grant a residence permit in a case concerning enforcement of an expulsion order that has become final and non-appealable if new circumstances come to light that mean that there is an impediment to enforcement.¹²

6.4 The State party further observes that the prevailing general situation in the country following the Taliban takeover and the application of Sharia law is considered to be such a new circumstance under the Aliens Act, one which an applicant could not be presumed to have been able to invoke previously. A new examination should thus be granted since it can be assumed that the changed situation constitutes such a permanent impediment to enforcement of an expulsion order. In this context, the State party notes that the Swedish Migration Agency's legal position paper and the European Asylum Support Office guidance, inter alia, indicate a significant change in the general situation and the human rights situation in Afghanistan. The State party also notes the limited availability of an internal protection alternative.

6.5 The State party observes that under these circumstances, an application for a residence permit under chapter 12, section 18, or a new examination under chapter 12, section 19, of the Aliens Act must be considered to be an available and effective domestic remedy for the complainant and that therefore, the present communication should now be declared inadmissible for non-exhaustion of domestic remedies. To support this argument, the State party states that it is a generally recognized principle of international law to allow national authorities to address Convention violations first within their domestic systems. Any assessment on the issue of domestic remedies should strike a fair balance between the legitimate interest of States that applicants make use of reasonable remedies they offer; and arguments of complainants that effective remedies (a) were not available at all, (b) would unreasonably prolong the proceedings or (c) would be unlikely to bring effective relief.

6.6 The State party further notes that a complainant must use remedies that are directly related to the risk of torture in the country to which the complainant would be sent, not those that might allow the complainant to remain in the sending State for other reasons. Since new domestic proceedings in the present case would concern the complainant's need for protection, with due regard taken to the drastically changed situation in Afghanistan, the State party is of the opinion that such proceedings must be considered to go to the substance of the claim before the Committee.¹³

6.7 The State party further notes that a potential new examination of the issue of residence permit may bring effective relief to the complainant within the meaning of article 22 (5) (b) of the Convention. Both proceedings concern a claimed need for international protection and the issue of non-refoulement. In this regard, the State party further notes that according to the Committee, mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such a remedy.¹⁴

6.8 Referring to the suspensive effect of the expulsion order, the State party explains that if, in a case concerning enforcement of an expulsion order that has become final and non-appealable, the applicant cites new circumstances referred to in chapter 12, section 19, paragraph 1, of the Aliens Act, the expulsion order must not be enforced before the Swedish Migration Agency has determined whether a new examination shall take place. Should the applicant be granted a new examination of the issue of the residence permit, the expulsion

¹¹ Aliens Act, chap. 12, sect. 18.

¹² Ibid., chap. 12, sects. 1–3.

¹³ *A.H.A. v. Sweden* (CAT/C/56/D/564/2013); *R.U. and others v. Sweden* (CAT/C/56/D/587/2014); and *Osivand v. Netherlands* (CCPR/C/86/D/1289/2004), para. 8.

¹⁴ *S.K. and R.K. v. Sweden* (CAT/C/47/D/365/2008), para. 11.3.

order may not be enforced until the issue of the residence permit has been determined through a final and non-appealable decision.

6.9 The State party refers to decisions of the Human Rights Committee in which it has been established that where a complainant has lodged renewed proceedings with the authorities that go to the substance of the claim before the Committee, the complainant must be held to have failed to exhaust domestic remedies as required by article 5 (2) (b) of the Optional Protocol.¹⁵ While recognizing that the complainant in the present case has not lodged renewed proceedings with the authorities after the Taliban takeover, the State party holds that in a case where it must be undisputed that there are relevant new circumstances not previously assessed, e.g. the profound changes in the general situation in the country, it would be illogical and contrary to the principle of subsidiarity if the complainant did not first have to exhaust national remedies linked to those circumstances.

6.10 The State party furthermore takes note of the fact that, according to rule 116 (2) of the Committee's rules of procedure, a decision to declare a complaint inadmissible for non-exhaustion of domestic remedies may be reviewed upon a written request by or on behalf of the complainant containing evidence to the effect that the reasons for inadmissibility no longer apply. It will hence be possible for the complainant to have his case examined by the Committee if his application for a residence permit or a new examination is rejected by the Swedish migration authorities.

6.11 The State party further explains that there is no support for any assertion that the relevant domestic remedy would not be available for the complainant, that it would unreasonably prolong the proceedings or that it would be unlikely to bring effective relief. It considers that there is a national remedy that must be exhausted in the present case and that the complaint should be declared inadmissible in accordance with article 22 (5) (b) of the Convention and rule 113 (e) of the Committee's rules of procedure.

6.12 Finally, the State party invites the Committee to request information from the complainant on whether or not he maintains his communication and discontinue the case if he does not. However, should the complainant maintain his communication, the State party invites the Committee to declare it inadmissible due to non-exhaustion of domestic remedies. Should the Committee for some reason conclude that the complaint should not be declared inadmissible for non-exhaustion of domestic remedies, the Government maintains what has been stated in its previous observations on the admissibility and the merits. Should the complainant maintain his communication, the State party sees no reason to request the Committee to halt its consideration of this matter.

Complainants' comments on the State party's additional observations

7.1 On 17 March 2022, the complainant¹⁶ submitted his comments and indicated that he maintains his communication, which should not be discontinued or declared inadmissible. He claims that he has exhausted all available domestic remedies within the meaning of the Convention and that the exhaustion of domestic remedies is not a prerequisite where the application of the remedies is unlikely to bring effective relief to the person who is the victim of a violation of the Convention.¹⁷

7.2 The complainant notes that former asylum-seekers do enjoy the right to submit subsequent applications according to national and European Union laws; however, when it has to do with asylum reasons that have already been claimed, the migration authorities very often refer to the previous assessments. In practice, these applications therefore rarely lead to a residence permit being granted to the applicant. The complainant is convinced that the domestic authorities will not re-examine the case in full since the processing of subsequent applications is focused on new reasons or grounds for protection.

7.3 The complainant's asylum application was rejected on the basis of the Court's credibility assessment and had less to do with the general security situation in Afghanistan.

¹⁵ *Osivand v. Netherlands*, para. 8; and *Benali v. Netherlands* (CCPR/C/81/D/1272/2004), para. 6.3.

¹⁶ The complainant provided a signed power of attorney by the Swedish Refugee Law Centre, dated 18 February 2022.

¹⁷ Reference is made to article 22 (4) (b) of the Convention.

It is therefore unlikely that the suggested domestic remedy would bring effective relief to the complainant.

7.4 The complainant argues that the State party did not specify any new circumstances regarding his individual circumstances, credibility or protection needs, which is what the expulsion decision is based on. The State party failed to clarify what, if any, difference the Swedish Migration Agency's new legal position paper on Afghanistan would make for the complainant in a new domestic process. Furthermore, there is no guarantee that such a procedure will lead to a complainant being granted protection status and a residence permit in the State party, and there is thus a substantial risk of refoulement.

7.5 The complainant also notes that the Swedish Migration Agency may grant a residence permit when a rejected asylum-seeker is found to have protection needs due to new circumstances,¹⁸ a process that does not require a subsequent application by the applicant, which means that a residence permit may be granted ex officio by the Swedish Migration Agency. The legal position paper does not present a new option for a domestic remedy; rather, it confirms that the situation in Afghanistan is extremely insecure and entails a high risk for several vulnerable groups. The complainant has already presented his asylum claim to the national remedies available, but the migration authorities have thus far failed to grant him protection from refoulement.

7.6 Lastly, the complainant refers to the Committee's recent decision and notes that the case was adopted after the Taliban takeover and the issuance of the guidance of the European Asylum Support Office and the European Union Agency for Asylum, upon which the new legal position paper is largely based. The complainant notes that the Committee considered the case on its merits, stating that it rests in the assurance that once the removal ban is lifted, previously refused Afghan asylum cases will be subjected to fresh review in the context of the human rights situation in Afghanistan as it stands at that time.¹⁹

Additional submission by the State party

8.1 On 11 April 2022, the State party submitted its additional observations and noted that the complainant's further observations did not include any new submissions in substance. The State party emphasizes that it fully maintains its position regarding the admissibility and merits of the present complaint as expressed in its previous observations. It further clarifies that even if there might be aspects of the complainant's submissions that the State party has not addressed, this should not be interpreted as an acceptance of those assertions.

8.2 Regarding the decision cited by the complainant, which concerned an Afghan national, the State party notes that a crucial difference in comparison with the present communication is that the Committee's earlier decision in question was adopted before the Swedish Migration Agency's new legal position paper on Afghanistan had been issued. The State party reiterates that according to the position paper, the changed security situation in Afghanistan affects the assessment of impediments to enforcement of an expulsion order and that the complainant in the present case has an available and effective domestic remedy and that for that reason, he has failed to exhaust domestic remedies, which differ in the present case from the Committee's case of *A.A. v. Sweden*.

8.3 Responding to the complainant's claims that the migration authorities most often refer to their previous assessments regarding the applicant's protection needs when assessing subsequent applications and that it is therefore unlikely that the suggested domestic remedy would bring effective relief, the State party stresses the fact that the Swedish Migration Agency, in its legal position paper, has clarified various aspects when it comes to the examination of impediments to enforcement regarding individuals from Afghanistan, which is of importance to the present communication. The State party further notes that an application for impediments to enforcement of an expulsion order means that applicants have the possibility to cite all individual circumstances that they wish to put forward, and the Swedish Migration Agency will conduct a thorough assessment of all the claims cited. It is also pertinent to clarify that a re-examination granted under chapter 12, section 19, of the

¹⁸ Aliens Act, chap. 12, sect. 18.

¹⁹ *A.A. v. Sweden* (CAT/C/72/D/918/2019), para. 8.7.

Aliens Act will take into account both the new circumstances that prompted the granting of a re-examination, as well as the reasons for protection invoked by the alien previously in the proceedings. The Migration Court of Appeal has clarified that only such a comprehensive examination allows for an assessment of whether the circumstances invoked constitute a lasting impediment to enforcement under chapter 12, sections 1 to 3, of the Aliens Act and may lead to the granting of a residence permit.

Issues and proceedings before the Committee

Consideration of admissibility

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

9.2 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. The Committee notes that, in the present case, the State party has contested admissibility stating that on 30 November 2021, the Swedish Migration Agency issued a new legal position paper on Afghanistan, which concerns certain vulnerable groups that may be at risk of persecution in Afghanistan, as well as risk profiles for such persecution. According to the legal position paper, there is no effective protection to be obtained from the Afghan authorities and an internal protection alternative is only available in exceptional cases. The Committee notes the State party's observation that: the assessment of impediments to enforcement of expulsion orders in the legal position paper is of particular importance to the present communication; according to the Swedish Migration Agency, the changes in the human rights situation and the limited availability of an internal protection alternative following the Taliban takeover in Afghanistan can, in the individual case, justify an examination in accordance with the Aliens Act; and under the relevant provision, the Swedish Migration Agency may grant a residence permit in a case concerning enforcement of an expulsion order that has become final and non-appealable if new circumstances come to light that mean that there is an impediment to enforcement.

9.3 The Committee notes that State party's further observation that the prevailing general situation in the country following the Taliban takeover and the application of Sharia law is considered to be such a new circumstance under the Aliens Act, and that a new examination in the complainant's case should be granted since it can be assumed that the changed situation constitutes such a permanent impediment to enforcement of an expulsion order. As a result, an application for a residence permit or a new examination must be considered to be an available and effective domestic remedy for the complainant, and therefore, the present communication should now be declared inadmissible for non-exhaustion of domestic remedies. The Committee also notes that the present communication is different from *A.A. v. Sweden*, which was considered by the Committee on 24 November 2021, since the latter was adopted before the new legal position paper was issued on 30 November 2021 and could not apply to that case.

9.4 The Committee observes, however, that the complainant has not initiated new asylum proceedings – an option available to him following the adoption of the new legal position paper on Afghanistan – while arguing that domestic authorities will not re-examine the case in full since the processing of subsequent applications is focused on new reasons or grounds for protection. He further states that the State party failed to specify any new circumstances regarding his individual circumstances, credibility or protection needs. He also doubts that the new position paper on Afghanistan would make any difference for the complainant in a new domestic process. In this respect, the Committee recalls its jurisprudence, according to which mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such a remedy.²⁰ The Committee is of the view that there is nothing to indicate that this new procedure, concerning asylum-seeking nationals of Afghanistan,

²⁰ *Jensen v. Denmark* (CAT/C/32/D/202/2002), para. 6.3.

cannot bring effective relief to the complainant, thus offering him a new remedy to be exhausted. In this regard, the Committee notes the State party's claim that the complainant has the possibility to cite all individual circumstances that he wishes to put forward and the Swedish Migration Agency will conduct a new assessment of all the claims in light of the fundamental change of human rights situation in Afghanistan. In addition, if the complainant is granted a new examination of the issue of a residence permit, the expulsion order may not be enforced until the issue of a residence permit has been determined by a final and non-appealable decision. When taking this decision, the Committee wishes to underscore that the complainant would be able to submit a new communication to the Committee against the State party, should he face the risk of forcible removal to Afghanistan in the future.

10. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention due to the introduction by the State party of novel administrative procedures that offer to the applicant remedies that did not exist at the time of submission of the complaint, and hence could not be exhausted, and which constitute new circumstances;

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