



# 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. 529/2012\*\*, \*\*\*

<i>Submitted by:</i>	J.B. (represented by counsel, Bashir Khan)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Canada
<i>Date of complaint:</i>	16 November 2012 (initial submission)
<i>Date of present decision:</i>	6 May 2016
<i>Subject matter:</i>	Deportation to Pakistan
<i>Substantive issues:</i>	Non-refoulement
<i>Procedural issues:</i>	Admissibility – exhaustion of domestic remedies
<i>Articles of the Convention:</i>	3 and 22

1.1 The complainant is J.B., a national of Pakistan, born on 1 January 1963. She claimed that her deportation to Pakistan would constitute a violation by Canada of her rights guaranteed by the Convention. The complainant does not explicitly indicate any article of the Convention, but the facts, as presented, raise issues under article 3 of the Convention. The complainant is represented by counsel, Bashir Khan.

1.2 On 22 November 2012, in application of rule 114 (1) of its rules of procedure, the Committee requested the State party not to deport the complainant to Pakistan while her complaint was being considered by the Committee.

1.3 On 16 September 2014, the Committee decided to lift the interim measures in the light of information received from the parties. On the same date the complainant was deported to Pakistan.

\* Reissued for technical reasons on 7 December 2016.

\*\* Adopted by the Committee at its fifty-seventh session (18 April-13 May 2016)

\*\*\* The following members of the Committee participated in the examination of the present communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Claude Heller Rouassant, Sébastien Touzé and Kening Zhang.



**Factual background**

2.1 The complainant alleged that if deported to Pakistan, she would be at risk of torture or execution by her ex-husband, B.A., his family or the national authorities because she had been accused of committing adultery.

2.2 The complainant maintained that she had been abused and harassed by her ex-husband's family, in particular by a relative, B., following a land ownership conflict that started in the 1990s and still continues.

2.3 The complainant and her then husband had bought land from B. but the latter refused to hand the land over after receiving the money. The complainant and her husband filed a law suit and a court decided in their favour on 27 July 1992. After the court decision, B. and his sons beat B.A. with sticks. On an unspecified date, B. set fire to the local document registry office, destroying the files that contained the court decree and the relevant land documents. B. and his sons "teased, assaulted, harassed and physically abused" the complainant. Her husband was working in Saudi Arabia and she was raising their children alone. In his absence, the complainant filed reports with the police, which took no action. On 17 May 1997, the complainant and her servant were set upon by a group of people, including B. One of them hit the servant on the head with a brick. The complainant complained to the police. On the evening of 31 March 1999, the complainant was at home with her children when a group of men and women broke into the house, beat the complainant and her 15 year old daughter, F., with sticks and threw bricks and stones inside the house. Neighbours rescued the complainant and her children; the complainant and her daughter were injured. On 14 December 1999, several of B.'s sons assaulted the complainant with iron rods. Some village residents intervened and called the police and the complainant was taken to hospital. A complaint was filed with the police. The complainant's husband returned to Pakistan in September 2001 and accompanied her to the police station to file a complaint regarding the attacks against her by B. and his sons, but the police refused. On the way home, they were approached by B. and his sons, who demanded to marry their daughters and be given the land as dowry. B.A. refused; B. and two of his sons shot B.A. He was taken to hospital and complained to the police. The police filed a first information report.

2.4 The complainant's husband again left to work in Saudi Arabia. She tried to obtain clarification of the status of the land that was the subject of the original dispute with B. She was informed that securing ownership of the land would require that she return to court and obtain another judgment in her favour. She filed a new law suit on 25 May 2004, which was resolved in her favour on 7 September 2005. Sometime in 2006, a group of people broke into the complainant's home, intending to force the *nikah* (Islamic marriage contract) on her daughters. When they realized that the daughters were not present, they dragged her by her hair and tore her clothes. She was taken to the police and false accusations of adultery and prostitution were filed against her. The complainant submitted that while in police custody, she was harassed, molested and tortured; B. and his sons were present while she was in police custody; they repeatedly demanded to marry her daughters and threatened to kidnap her daughters and kill her, her husband and their sons, in order to gain ownership of the land. She spent two nights in police custody and was released when village elders intervened and promised B. that his sons could marry the complainant's daughters.

2.5 Fearing for her well-being, the complainant fled Pakistan alone. She arrived in Canada on 11 January 2007 and filed a refugee claim with the Canadian Refugee Board, which was rejected on 15 January 2010. She could not afford a lawyer to appeal the decision.

2.6 On 9 February 2010, the complainant's husband divorced her, having believed B.'s adultery allegations. The entire village believed that the complainant had committed

adultery and a criminal case was initiated against her. On 3 January 2011, the complainant's ex-husband attacked one of their daughters because she had refused to tell him where the complainant was and to call the complainant to urge her to return to Pakistan.

2.7 On 6 April 2010, the complainant submitted an application for a pre-removal risk assessment with the Canadian authorities, which was rejected on 26 May 2011. On 26 July 2011, she appealed the rejection before the Federal Court of Canada, which dismissed her appeal on 21 October 2011. The complainant submitted that she had exhausted all available domestic remedies and that she could be deported to Pakistan at any moment.

### **The complaint**

3. The complainant submits that her Convention rights would be violated if she were to be deported to Pakistan. She claims that, if returned, she would be at a serious risk of imprisonment, torture, honour killing or disappearance. The complainant also submits that there is a consistent pattern of human rights violations and honour killing in Pakistan and that the situation of women in Pakistan should be taken into account before deciding on her deportation.

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

4.1 On 28 May 2013, the State party referred to the complainant's claims that if removed, she would be at risk of being tortured — either by State authorities or by private citizens in Pakistan with the acquiescence of the State. The State party notes that the complainant also mentioned a risk of disappearance in her communication and submits that it would discuss the alleged risk of disappearance only insofar as torture may be a component aspect of this form of serious harm. The State party also submits that the other risks mentioned by the complainant — to her life, arrest, detention and/or imprisonment — did not fall within the competence of the Committee under article 3 of the Convention. The complainant claimed that the risk of torture arises from a false accusation of adultery made in 2006 by her husband's uncle. She claimed that, if she returned to Pakistan, she would be sought by the police in relation to this accusation and she would also face potential risks of harm from her ex-husband, her sons, her ex-husband's uncle and other private individuals.

4.2 The State party submits that its refugee status decision makers had determined that the complainant would not be at a real risk of torture upon return to Pakistan. It considers the communication inadmissible for three reasons: (a) the complainant did not exhaust all available domestic remedies, thus her communication is inadmissible under article 22 (5) (b) of the Convention; (b) she did not substantiate, even on a prima facie basis, her allegation that she faced a real and personal risk of torture upon return to Pakistan, therefore the communication is inadmissible as an abuse of the right of submission under article 22 (2); and (c) her remaining allegations are incompatible with the provisions of the Convention, therefore the communication is inadmissible under article 22 (2).

4.3 However, should the Committee declare the communication admissible, the State party submits that, on the basis of the same considerations, the complaint is entirely without merit.

4.4 The State party maintains that the complainant did not exhaust two available domestic remedies: (a) she did not apply for leave to seek judicial review of the decision of the Refugee Protection Division nor did she provide any evidence that she could not afford legal representation in order to avail herself of this remedy; and (b) she did not apply for permanent residence on the basis of humanitarian and compassionate grounds, nor did she explain why she did not pursue this remedy.

4.5 The State party submits that after the complainant had received the negative decision from the Refugee Protection Division, she could have applied to the Federal Court for leave to seek judicial review of that decision, but she did not. A successful application for judicial review would result in the flawed decision being set aside and the applicant's claim being resubmitted to the Refugee Protection Division for a fresh determination by a different decision maker. Judicial review has consistently been recognized by the Committee as a procedure that must be exhausted for the purposes of admissibility of a communication.<sup>1</sup> The decision of the Refugee Protection Division is a critical step in the State party's system for assessing a claimant's allegations of risk upon return to their country of origin. By not seeking a judicial review of that decision, the complainant did not provide the decision makers with the opportunity to review and correct any errors that may have been made in the initial assessment. The complainant stated that she did not exhaust this domestic remedy because she could not afford a lawyer. The State party maintains that the complainant failed to prove that this remedy was factually unavailable. Complainants are required to provide case-specific evidence to substantiate that financial considerations prevented them from pursuing a particular remedy.<sup>2</sup> In her communication, the complainant provided no evidence to substantiate her assertion that she could not afford a lawyer. Such evidence is particularly important in the current communication where the factual record is inconsistent with the notion that the complainant was unable to find legal counsel. The complainant was represented by the same legal counsel for her Refugee Protection Division hearing, her pre-removal risk assessment application, and her application to the Federal Court for leave to seek judicial review of the pre-removal risk assessment decision. She even had the assistance of an immigration consultant to prepare her initial personal information form and personal narrative. In the light of the complainant's apparent ability to secure qualified representation for all other domestic proceedings, she has a clear evidentiary burden to substantiate that she was unable to find a lawyer for that one stage of the process. Furthermore, the complainant did not need to be represented by a lawyer to pursue that remedy. The Federal Courts Rules permit applicants such as the complainant to represent themselves.<sup>3</sup> The State party notes that it costs Can\$ 50 to file a leave application of this nature before the Federal Court.

4.6 The State party also maintains that the complainant did not provide sufficient evidence to substantiate any incidents of torture suffered before she left Pakistan — either at the hands of State authorities or private individuals with the acquiescence of the State. She did not substantiate that a local dispute between family members, centred around an allegation of adultery over six years ago, could give rise to such a risk of harm that would cause her return to anywhere in Pakistan in 2013 to be a violation of article 3 of the Convention. The State party further maintains that the complainant did not provide

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<sup>1</sup> See for example communications No. 307/2006, *E.Y. v. Canada*, decision adopted on 4 November 2009, paras. 9.3-9.4; No. 304/2006, *L.Z.B. v. Canada*, decision adopted on 8 November 2007, para. 6.6; No. 273/2005, *Aung v. Canada*, decision adopted on 15 May 2006, para. 6.3; No. 66/1997, *P.S.S. v. Canada*, decision adopted on 13 November 1998, para. 6.2; No. 86/1997, *P.S. v. Canada*, decision adopted on 18 November 1999, para. 6.2; No. 42/1996, *R.K. v. Canada*, decision adopted on 20 November 1997, para. 7.2; No. 95/1997, *L.O. v. Canada*, decision adopted on 19 May 2000, para. 6.5; No. 22/1995, *M.A. v. Canada*, decision adopted on 3 May 1995, para. 3; 183/2001, *B.S.S. v. Canada*, decision adopted on 12 May 2004, para. 11.6.

<sup>2</sup> See communications No. 24/1995, *A.E. v. Switzerland*, decision adopted on 2 May 1995, para. 4; No. 121/1998, *S.H. v. Norway*, decision adopted on 19 November 1999, para. 7.3; No. 127/1999, *Z.T. v. Norway*, decision adopted on 19 November 1999, para. 7.3; No. 284/2006, *R.S.A.N. v. Canada*, decision adopted on 17 November 2006, para. 6.4.

<sup>3</sup> See Canada, *Federal Court Rules* (SOR/98-106), rule 119. Available at <http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/FullText.html>.

evidence to indicate that she would be sought by either the police or private individuals seeking to harm her if she returned to an area of Pakistan outside of her home region.

4.7 The complainant had also alleged that she faced the risk of arrest, detention and imprisonment by State actors in Pakistan and that she faced a risk to her life by private citizens in Pakistan. The State party maintains that these allegations are inadmissible because they are incompatible with article 3 of the Convention.

4.8 The State party submits that the complainant comes from a rural region of Lahore District in the Punjab province of Pakistan; she married B.A. in March 1977 and between 1978 and 1994 they had three daughters and three sons. She was issued a visitor's visa for Canada on 28 August 2006 at Islamabad and arrived in Canada, without her husband or other family members, on 11 January 2007. Five days later, she applied for protection as a refugee under the Immigration and Refugee Protection Act, alleging "a well-founded fear of persecution based on race". She also claimed protection as a "person in need of protection" under the Act, alleging that if returned to Pakistan she would face a danger of torture, a risk to her life and/or a risk of cruel and unusual treatment or punishment. According to the materials submitted by the complainant, B.A. divorced her in 2010 and he and their children continue to reside in Pakistan. In the personal information form that she submitted to the Immigration and Refugee Board of Canada, the complainant gave her account of an escalating land dispute with her husband's uncle and his sons. The dispute, which allegedly occurred over at least 15 years, led to legal action initiated by the complainant and to acts of harassment and physical violence against her. The dispute culminated in a false accusation of adultery and ultimately led her to leave Pakistan. The State party notes that the narrative does not include many key dates.

4.9 The complainant's claim for protection under the Immigration and Refugee Protection Act was heard by the Refugee Protection Division of the Immigration and Refugee Board on 24 November 2009. The Division is an independent, quasi-judicial, specialized tribunal that considers applications by non-nationals seeking protection, based on a fear of persecution, torture or other serious violations of their human rights if they were to be removed to their countries of origin. The Division not only determines whether a claimant is a "Convention refugee"<sup>4</sup> within the meaning of the Convention relating to the Status of Refugees, but also whether the claimant is a "person in need of protection"<sup>5</sup> for

<sup>4</sup> See section 96 of the Immigration and Refugee Protection Act of Canada:

"A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,  
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or  
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country."

<sup>5</sup> See section 97 (1) of the Immigration and Refugee Protection Act of Canada:

"A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally  
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or  
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if  
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,  
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,  
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

the purpose of section 97 of the Immigration and Refugee Protection Act. Section 97 mandates the protection of persons who, on removal to their countries of origin, would face a risk to their life, a risk of cruel and unusual treatment or punishment or a real risk of torture within the meaning of article 1 of the Convention against Torture. Generally speaking, a “protected person” has the statutory right, under section 115 of the Act, not to be removed from Canada. This statutory principle of non-refoulement is in addition to the protection of life, liberty and security of all persons in the State party that is guaranteed by the Canadian Charter of Rights and Freedoms.

4.10 The Refugee Protection Division conducts an oral hearing that is usually held privately in an informal and non-adversarial manner. Officials from the United Nations High Commissioner for Refugees may observe the proceedings. Individuals seeking protection as a Convention refugee or a person in need of protection are usually assisted by legal counsel and an interpreter and are provided with every opportunity to establish, through oral testimony and supporting documentary evidence, that he or she is a Convention refugee or a person in need of protection. The officers of the Division receive comprehensive, ongoing training on the Refugee Convention and other aspects of the State party’s international legal obligations. They are well-informed and develop expertise in relation to conditions and events in countries of alleged persecution or other human rights violations and have access to the Immigration and Refugee Board’s internationally recognized research programme. A Refugee Protection Officer assists the officers of the Division by ensuring that they have all the relevant documentation. The Division draws its conclusions based on the evidence adduced during the oral hearing and all available relevant documentation provided to it. All of its decisions are communicated in writing and the reasons for negative decisions are also provided in writing.

4.11 The complainant was represented by legal counsel at the Refugee Protection Division hearing. She provided an oral testimony and had the opportunity to explain any ambiguities or inconsistencies and to respond to questions that the Board may have had with regard to her claims. In support of her claim, she submitted an extensive package of written documentation, including court documents relating to the land dispute between the complainant and her husband’s relative, B.; two first information reports filed by or on behalf of her and/or her husband with the police in Pakistan after alleged assaults by B. (dated 14 December 1999 and 25 September 2001); one first information report filed by or on behalf of B., accusing the complainant of adultery (dated 25 November 2006); two hospital reports, one for the complainant (dated 30 October 2002) and the other for her husband (dated 25 September 2001); and a package of general documentary information on the situation of women and the phenomenon of honour killing in Pakistan.

4.12 By decision rendered orally on the day of the hearing (24 November 2009), the Refugee Protection Division determined that the complainant was not a Convention refugee within the meaning of section 96 of the Immigration and Refugee Protection Act and article 1 of the Refugee Convention. It also determined that the complainant was not a person in need of protection within the meaning of section 97 of the Act, that is, *inter alia*, that she was not a person whose removal to her country of nationality would subject her personally to “a danger, believed on substantial grounds to exist, of torture within the meaning of article 1 of the Convention against Torture”.<sup>6</sup> The Refugee Protection Division issued its written decision on 15 January 2010. It identified three separate risks that the complainant had claimed she would face upon return to Pakistan: (a) a risk from the police as a result of

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(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.”

<sup>6</sup> See Canada, Immigration and Refugee Protection Act, sect. 97 (1) (a).

the adultery allegations made by B.; (b) a risk of persecution from the residents of her village as a result of the adultery allegations; and (c) a risk to her life from B.

4.13 The Refugee Protection Division concluded that the complainant had been a credible witness in relation to the facts of her account. However, it concluded that her specific claims of the risk she would face were not supported by the evidence provided and that, ultimately, she had a clear internal flight or relocation alternative in Pakistan. First of all, the Division concluded that there was not sufficient credible evidence that the police would seek out the complainant if she returned to Pakistan, because she had been released after only two days in custody and had testified that the matter had never reached the courts because a local politician had come to get her out of the police station. Furthermore, she was able to leave Pakistan legally and using her own passport, without any difficulties. Secondly, the Division concluded that the complainant had not provided sufficient credible evidence that she would face persecution from the residents of her village if returned. Her personal narrative and testimony consistently indicated that her husband and her family and the rest of the village had supported her and not B., after the allegations of adultery were made. Thirdly, and taking into account the conclusions on the points above, the Division concluded that there was not sufficient credible evidence that B. would be able to harm the complainant if she returned to Pakistan. The legal action concerning the land had already been decided in the complainant's favour and there was no evidence to indicate that the accusation of adultery would proceed further. Ultimately, the Division concluded that if the complainant returned to Pakistan, she would have an internal flight or relocation alternative with respect to any risk posed by B. The complainant did not provide sufficient credible evidence that B. would be able to learn of her return if she relocated to a major urban centre, or that B. would be able to persuade the State authorities to seek her out. Furthermore, even if B. learned of her location, it was not clear that he would seek her out because her daughters live in a place that is known to B. and he has not harmed them. The Division took into account all serious problems, including societal discrimination faced by women in Pakistan in general, but concluded that the complainant would not face undue hardship if she availed herself of an internal flight or relocation alternative.

4.14 Judicial review of a Refugee Protection Division decision is available with leave from the Federal Court. The Federal Court's test for granting leave to apply for judicial review of such decisions is the applicant's demonstration that there is a fairly arguable case or a serious question to be determined. The Federal Court hears and decides legal disputes arising in the federal domain, including challenges to the decisions of federal tribunals like the Refugee Protection Division. The complainant did not apply to the Federal Court for leave to seek judicial review of the Division's decision.

4.15 The complainant also did not apply for permanent residence on the basis of humanitarian and compassionate grounds. When an application on humanitarian and compassionate grounds is made by a foreign national, it must be considered by the Minister of Citizenship and Immigration or his representative. The assessment of such an application consists of a broad, discretionary review by the decision maker to determine whether the person should be granted permanent residence for humanitarian and compassionate reasons. The test is whether the applicant would suffer unusual and undeserved or disproportionate hardship if he or she had to apply for a permanent resident visa from outside of Canada. The decision maker considers and weighs all the relevant evidence and information, including the applicant's written submissions. Some examples of hardship that may be considered in an application on humanitarian and compassionate grounds include lack of critical medical or health care; discrimination that does not amount to persecution; and adverse country conditions that may have a direct, negative impact on the applicant. In her communication to the Committee, the complainant did not explain why she had not submitted an application for residence on humanitarian and compassionate grounds to the Canadian authorities.

4.16 On 6 April 2010, the complainant applied for a pre-removal risk assessment, as provided for under the Immigration and Refugee Protection Act. She was represented by the same legal counsel who had represented her during most of the refugee proceedings, including the Refugee Protection Division hearing.

4.17 A foreign national who is awaiting removal and who alleges a risk of harm in his or her country of origin may apply for protection prior to removal. An applicant who is eligible for a pre-removal risk assessment will not be removed prior to the conduct of the risk assessment. As in the case of a determination of risk by the Refugee Protection Division, the pre-removal risk assessment mechanism is founded on the State party's domestic and international commitments regarding the principle of non-refoulement, in accordance with which a person should not be removed to a country where he or she would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment. For persons who have already received a decision by the Division, a pre-removal risk assessment is largely based on new facts or evidence demonstrating that the person is now at risk of persecution, torture, risk to life or risk of cruel or unusual treatment or punishment. Its purpose is to assess whether there have been any new developments since the Division's determination that could affect or change the risk assessment. For this reason, section 113 (a) of the Immigration and Refugee Protection Act establishes that evidence submitted for the purpose of a pre-removal risk assessment must be "new evidence that arose after the rejection [by the Division] or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection".

4.18 Applications for pre-removal risk assessment are considered by officers who are specifically trained to assess risk and to take into consideration the Canadian Charter of Rights and Freedoms and international human rights obligations relating to refugee and other protection. The officers would have also received training on administrative law and jurisprudence. They keep up to date with new developments in these areas and have access to the most recent and authoritative information on human rights developments around the world.

4.19 In her pre-removal risk assessment application, the complainant submitted the same claims that she had submitted in support of her initial protection claim. The only new evidence submitted were legal documents from Pakistan relating to her divorce from B.A., including the certificate of divorce effective 2 February 2010. On 26 May 2011 the complainant's pre-removal risk assessment application was rejected. The officer had reassessed the three risks identified by the Refugee Protection Division (see para. 4.12 above) in the light of the new evidence submitted by the complainant and evidence relating to general country conditions in Pakistan. He concluded that the complainant had clearly not submitted adequate new evidence, as defined in section 113 (a) of the Immigration and Refugee Protection Act, that she would be likely to face a risk of torture, risk to her life or risk of cruel and unusual treatment or punishment in Pakistan. The officer also concluded that the documentary evidence supported the finding that, despite its acknowledged human rights problems, country conditions in Pakistan were relatively stable and showed minor improvement on some fronts. The pre-removal risk assessment decision was delivered to the complainant on 21 June 2011.

4.20 With the assistance of legal counsel, the complainant applied to the Federal Court for leave to commence judicial review of the negative pre-removal risk assessment decision. The materials submitted to the Court by the complainant's legal counsel included a memorandum of legal argument and an affidavit by the complainant. The complainant's application was dismissed by court order on 21 October 2011, without any reasons. Although the court did not provide reasons, the State party observed that the materials that



were submitted to the Court did not call into question the fundamental reason for the decision taken by the pre-removal risk assessment officer.

4.21 On 12 October 2012, Canada Border Services Agency sent the complainant a written notice to present herself to the local office for a pre-removal interview on 25 October 2012. The complainant did not present herself for the interview. The Agency called the complainant at her last known telephone number and left a message. That day, the Agency also sent her a written notice to present herself for a second interview on 6 November 2012 and faxed a copy of the notice to the lawyer who had represented her in the proceedings thus far. The lawyer responded that she was no longer representing the complainant. The complainant did not present herself for the second interview scheduled by the Agency. The Agency concluded that the complainant was non-compliant and was avoiding their attempts to initiate contact in order to thwart her removal. A warrant was issued on 8 November 2012 for the complainant's removal. Following the Committee's interim measures request of 22 November 2012, the State party temporarily refrained from removing the complainant.

4.22 The State party maintains that the communication is also inadmissible because the complainant failed to substantiate, even on a prima facie basis, the allegation that she would face a real risk of torture in Pakistan to the extent that her removal would be a violation of article 3 of the Convention. The State party notes that the complainant's communication does not explicitly identify any provision under the Convention that would be infringed by her removal to Pakistan. Rather, she has alleged that upon her return to Pakistan, the accusations of adultery made against her by B. and his sons would lead to a number of different risks, including a risk of torture, disappearance, arrest and imprisonment by Pakistani State actors and a risk of death by honour killing and/or torture with police acquiescence by private individuals, such as her ex-husband, her sons, B. and his sons.

4.23 The State party maintains that incidents of past torture are not, in and of themselves, evidence that can substantiate a future risk of torture and that in any event the complainant did not substantiate that she had been a victim of torture in the past.<sup>7</sup> She did not provide sufficient evidence to substantiate her core factual allegation that she had been tortured in 2006 while in police detention on a false accusation of adultery. The complainant's allegations with respect to this incident before the State party's decision makers were inconsistent and often vague. In her initial narrative, she indicated that she had been detained by the police from 26 to 27 November 2006. In subsequent submissions to decision makers, she alleged that the detention occurred in the summer of 2006. In some instances, she said that she was detained for two nights. Although she claims that she was in police detention, the complainant's account suggests that her alleged mistreatment while in custody was committed by B. and his sons.

4.24 The only evidence submitted by the complainant in relation to the allegation of past torture is a first information report filed with the Pakistani police on 25 November 2006 in response to B.'s accusation of adultery. The report supports the complainant's allegation that B. filed an official accusation, but the report does not support the complainant's allegation that she was detained in relation to that accusation. The complainant has not provided any additional evidence to substantiate the allegation that she was detained by the Pakistani police; she has not provided copies of any police records indicating that she had ever been detained; nor has she submitted any affidavits from family members or village residents attesting to her alleged detention. The complainant stated during the Refugee Protection Division hearing that a prominent local politician had secured her bail, but she

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<sup>7</sup> See communications No. 182/2001, *A.I. v. Switzerland*, decision adopted on 12 May 2004, para. 6.5; and No. 245/2004, *S.S.S. v. Canada*, decision adopted on 16 November 2005, para. 8.4.

did not provide and documentation relating to her release, nor an affidavit from the politician.

4.25 The State party observes that the complainant alleged that she had suffered significant mistreatment while in custody, but she did not submit any medical records, affidavits or letters from any doctor or other medical staff to attest to her alleged injuries. Although the complainant alleges that the experience continues to cause her emotional upset, she has not submitted documents of any kind from doctors or other health-care providers in the State party to attest to any ongoing physical or psychological harm. Therefore the core factual allegation of relevance to her claim in respect of article 3 of the Convention is entirely unsubstantiated.

4.26 The complainant had submitted two first information reports filed with the Pakistani police — the first with respect to her allegation that she was assaulted on 14 December 1999, and the second with respect to her allegation that her then husband, B.A., was shot by B. and his sons on 25 September 2001 —, a hospital report for B.A. dated 25 September 2001 and a hospital report for herself, dated 30 October 2002. The date of this latter report does not correspond to any violent incident alleged by the complainant and she did not explained its relevance to the communication. The complainant did not provide the State party's decision makers with any evidence of either State actions or State acquiescence that caused or contributed to "severe pain or suffering, whether physical or mental", consistent with the definition of torture under article 1 of the Convention.

4.27 The State party submits that, although the complainant alleged that she faced a future risk of torture upon return because of the false accusation of adultery made by B., she did not provide any evidence to demonstrate that the police or other State authorities in Pakistan had any interest in responding to B.'s accusation of adultery. The accusation was made in November 2006, that is over six years ago; the complainant never alleged that the police had initiated an investigation or brought formal charges or ever took any action after she had filed the initial report concerning B.'s accusation. The complainant testified at the Refugee Protection Division hearing that she left Pakistan in January 2007 using her own passport, which is consistent with the notion that B.'s accusation was not being pursued at that time.

4.28 The State party notes that a risk of arrest does not, in itself, establish that returning the complainant would be a violation of the Convention.<sup>8</sup> The complainant's assertions that she is of continued interest to the local police and that she is at risk of arrest and imprisonment in Pakistan would not, in and of themselves, support a finding of a violation of article 3 if the complainant were returned to Pakistan — even if such assertions were supported by documentary evidence.

4.29 The State party also submits that the complainant did not substantiate her allegation that she faced a real risk of torture from private individuals, such as her ex-husband, B.A., or B. and his sons, with the acquiescence of State authorities. With respect to the risk allegedly presented by B.A., the complainant had alleged that, although her former husband initially defended her in relation to B.'s false accusations, over time, B. had managed to convince him that she did indeed commit adultery. B.A. divorced the complainant in February 2010. The complainant alleged that, if she were to return to Pakistan, he would seek to harm her, either by killing her or attempting to have the State authorities punish her. The complainant did not provide sufficient evidence to substantiate that B.A. currently poses a real risk of causing her severe mental or physical harm. The complainant

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<sup>8</sup> See communications No. 355/2008, *C.M. v. Switzerland*, decision adopted on 14 May 2008, para. 10.9; No. 57/1996, *P.Q.L. v. Canada*, decision adopted on 17 November 1997, para. 10.5; and No. 65/1997, *I.A.O. v. Sweden*, decision adopted on 6 May 1998, para. 14.5.

demonstrated that she was divorced from B.A. in February 2010 by submitting official documents from Pakistan and a first information report filed with the Pakistani police on 3 February 2011 by one of her daughters, who complained that B.A. and two of his sons had broken into her home and demanded that she call the complainant to urge her to return to Pakistan. According to the daughter, they wanted to kill the complainant. When the daughter refused to call the complainant, B.A. shot her in the foot. The complainant submitted affidavits from her daughter's lawyer, indicating that the daughter's complaint was being pursued through court proceedings.

4.30 The State party submits that these documents do not substantiate that, if returned to Pakistan in 2013, the complainant would face a real and personal risk of severe harm from B.A. The complainant's divorce was granted in 2010 and the assault on her daughter occurred in 2011. As of 16 April 2012, B.A. was facing legal action for assaulting his daughter, who was represented by legal counsel in the proceedings relating to her complaint.

4.31 With respect to B., his sons and other residents of the village, the complainant did not submitted any evidence to indicate that they would pose a threat to her upon her return to Pakistan. The underlying basis of past violence by former family members, as alleged by the complainant, was a dispute over land ownership, yet the question of who now owned the land, particularly after her divorce, did not form a part of the complainant's allegations of future risk. It has been several years since B. accused her of adultery and the complainant has not provided evidence that either B. or the Pakistani authorities have pursued the accusations further. There is no evidence of an ongoing legal battle over the land that would continue to place the complainant at risk of harm.

4.32 The State party contends that it would not be removing the complainant to Lahore District specifically, but to Pakistan, where she could avail herself of an internal flight or relocation alternative. The complainant did not provide evidence to substantiate the allegation that she would be unable to reside free of personal risk of torture in another part of Pakistan. The complainant would not be sought by Pakistani State authorities as a result of the accusation of adultery made in 2006. Although local police in Lahore District, where the complainant lived, had a first information report on file concerning the accusation made in November 2006, there was no evidence that the local police had taken any steps to follow up the complaint. Several months after the report had been filed, the complainant left Pakistan using her own passport. Given the foregoing, there is no reason to believe that the complainant would be sought by State authorities upon return to Pakistan, particularly if she lived somewhere outside of Lahore District.

4.33 In the event that the Committee should deem it necessary to consider the general human rights situation in Pakistan, the State party maintains that the situation does not establish that the complainant would face a real and personal risk of torture upon her return to Pakistan. A number of reports on conditions in Pakistan attest to the complainant's general submission that honour killings and other forms of violence against women continue to be a serious problem in certain areas of Pakistan, especially rural areas.<sup>9</sup> However, with respect to women who are in a position similar to the one the complainant

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<sup>9</sup> See Amnesty International, *Amnesty International Annual Report 2012* (Pakistan), 24 May 2012, available at [www.amnesty.org/en/region/pakistan/report-2012](http://www.amnesty.org/en/region/pakistan/report-2012); United States of America, Department of State, *Country Reports on Human Rights Practices for 2012* (Pakistan), available at [www.state.gov/documents/organization/204621.pdf](http://www.state.gov/documents/organization/204621.pdf); Human Rights Watch, *World Report 2013* (Pakistan), available at [www.hrw.org/world-report/2013/country-chapters/pakistan](http://www.hrw.org/world-report/2013/country-chapters/pakistan); and Maliha Zia Lari, *A Pilot Study on: 'Honour Killings' in Pakistan and Compliance of Law* (Islamabad, Aurat Foundation, November 2011), available at [www.af.org.pk/pub\\_files/1366345831.pdf](http://www.af.org.pk/pub_files/1366345831.pdf).

would be in upon her return to Pakistan, those reports do not support the notion that they face a real risk of torture as defined by the Convention.

4.34 The State party notes that the communication includes allegations of risks of harm in Pakistan which are incompatible with article 3 of the Convention, namely the risk of arrest and imprisonment in relation to the accusation of adultery and the risk to her life (honour killing) by private individuals. Returning a person to a State where there are claims of risk of arrest, detention or imprisonment does not, in and of itself, mean that the person would face the risk of torture as defined in article 1 of the Convention. Even if the treatment that the complainant may be subjected to upon hypothetical arrest, detention or imprisonment could constitute cruel, inhuman or degrading treatment or punishment contrary to Pakistan's obligations under article 16 of the Convention, the obligation of non-refoulement under article 3 applies only to a real risk of being subjected to torture.

### **Complainant's comments**

5.1 On 18 August 2013, the complainant maintained that a judicial review of the Refugee Protection Division decision was ineffective because applicants must first be granted leave to have a full judicial review hearing and 80 to 85 per cent of the requests for leave to the Federal Court were not granted as the cases that go to the Federal Court were not effectively reviewed or even heard by a judge. She submitted an academic article entitled "A refugee from justice? Disparate treatment in the Federal Court of Canada"<sup>10</sup> in support of her argument and referred to the Committee's decision in *Nirmal Singh v. Canada*.<sup>11</sup>

5.2 The complainant submitted that application for permanent residence on humanitarian and compassionate grounds would not have been an effective remedy in her case and referred to the Committee's decisions in *Kalonzo v. Canada* and *T.I. v. Canada*.<sup>12</sup> She also submitted that she was told by a lawyer that such applications could take up to 28 months to be decided and that she would be deported in the interim. The complainant also submitted that she did not have money to pay the lawyer's fees and the fee for such an application. She further submitted that a stay of removal motion was not granted in the majority of cases and that the judiciary in Canada is not independent.

5.3 In her submission, the complainant enclosed a police report of the accusation of adultery against her and an arrest warrant issued by the Magistrates' Court in Pakistan, which she did not submit with her initial communication.

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

6.1 On 6 November 2013, the State party noted that the complainant's submission contained two additional pieces of evidence dating from 2006: a copy of the police report regarding B.'s first information report to the police, alleging that the complainant and her daughters "are bad characters" and indicating that the complaint was received on 16 November 2006; and a judicial arrest warrant against the complainant, originating from a local court in Lahore District, indicating that it was issued in response to the 16 November 2006 complaint. However, in the English translation provided by the

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<sup>10</sup> See J. B. Gould, C. Sheppard and J. Wheeldon, "A refugee from justice? Disparate treatment in the Federal Court of Canada", *Law & Policy*, vol. 32, No. 4 (October 2010), p. 454. Available from [www.researchgate.net/publication/227642031\\_A\\_Refugee\\_from\\_Justice\\_Disparate\\_Treatment\\_in\\_the\\_Federal\\_Court\\_of\\_Canada](http://www.researchgate.net/publication/227642031_A_Refugee_from_Justice_Disparate_Treatment_in_the_Federal_Court_of_Canada).

<sup>11</sup> Communication No 319/2007, *Singh v. Canada*, decision adopted on 30 May 2011.

<sup>12</sup> Communications No 343/2008, *Kalonzo v. Canada*, decision adopted on 18 May 2012; and No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010.

complainant, the date, seal and signature fields of the document have all been left blank. The Urdu version does not appear to have a date of issuance or to be marked by a judicial stamp that would indicate that it was issued. The State party submitted that the importance of the second piece of evidence is extremely limited.

6.2 The State party maintained that the new evidence provided with the complainant's comments did not support her contention that her removal to Pakistan in 2013 would violate article 3 of the Convention. At best, the newly provided documents slightly enhanced substantiation of her assertion that, in 2006, B. had sought to have the Pakistani authorities pursue criminal charges against her in relation to his accusation of adultery. The documents do not provide substantiation as to whether the Pakistani authorities had taken any steps, beyond the filing of the first information report accusing her of adultery, in 2006; whether the complainant had ever been detained and mistreated by Pakistani State authorities; whether the first information report and/or its accompanying arrest warrant that she submitted in 2013 are valid or enforceable documents; whether, in 2013, the Pakistani State authorities had any interest in pursuing the allegation made by B. in 2006; and whether, in 2013, B. or other private individuals had any interest in pursuing the allegations made in 2006. The State party reiterated that the complainant had not substantiated the core factual allegation that she had been tortured in Pakistan in 2006, while being in police detention on a false accusation of adultery. Although the evidence submitted by the complainant supports the allegation that she was involved in a long-running and occasionally violent dispute with her former husband's relatives, there is no evidence to substantiate that the police or any other State actors acquiesced in any of the violent acts allegedly committed by these private actors. There is also no evidence to suggest that any violence by these private actors escalated to such a level that it could be considered "torture", as defined in article 1 of the Convention.

6.3 The State party reiterated its previous submission regarding the substantiation of the claims. It noted that the complainant's additional comments did not address the question of an internal flight or relocation alternative and reiterated its arguments in that regard.

6.4 The State party also noted that, with respect to the remedial avenue of applying for leave to seek judicial review of the Refugee Protection Division decision, the complainant did not raise any issues with the effectiveness of the remedy in her initial communication to the Committee. It maintained that judicial review of Refugee Protection Division decisions in the Federal Court was an effective remedy and a key element of its system that has been consistently recognized by the Committee as a procedure that must be exhausted for the purposes of admissibility of a communication.<sup>13</sup> It referred to several communications in which the Committee had noted that applications for leave and judicial review were not mere formalities, but that the Federal Court may, in appropriate cases, look at the substance of a case.<sup>14</sup> It maintained that the current system of judicial review by the Federal Court does provide for judicial review of the merits of a case, in the sense that it allows for review of both the legal procedure and the facts. The Federal Court reviews Immigration and Refugee Board decisions for factual errors or errors involving both facts and law, generally based on a reasonableness standard, in deference to the expertise of the tribunal. However, the Court may review, based on a correctness standard, any aspect of the decision of the

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<sup>13</sup> See for example communications No. 307/2006, *E.Y. v. Canada*, decision adopted on 4 November 2009, paras. 9.3-9.4; *L.Z.B. v. Canada*, para. 6.6; *P.S.S. v. Canada*, para. 6.2; *P.S. v. Canada*, para. 6.2; *R.K. v. Canada*, para. 7.2; *L.O. v. Canada*, para. 6.5; *M.A. v. Canada*, para. 3; *B.S.S. v. Canada*, para. 11.6; and *Aung. v. Canada*, para. 6.3.

<sup>14</sup> See *Aung. v. Canada*, para. 6.3; and *L.Z.B. v. Canada*, para. 6.6.

tribunal that involves issues of law that are of central importance to the legal system as a whole and outside the Board's expertise.<sup>15</sup>

6.5 The State party specified that judicial review of a Refugee Protection Division decision is available with leave from the Federal Court. The Federal Court's test for granting leave to apply for judicial review of Division decisions is whether there is a "fairly arguable case" or a "serious question to be determined".<sup>16</sup> Leave applications are thoroughly reviewed by a judge of the Federal Court on the basis of written submissions from the applicant and the Government. Decisions are communicated to applicants through a signed judicial order, typically without reasons. The fact that leave applications are often decided on the basis of written submissions does not mean that the review process is unfair. Judges of the Federal Court consider each leave application on the basis of the tribunal record and the written submissions made by the parties. A hearing does not have to be an oral hearing in order to be fair and to comply with the rules of natural justice. If the written submissions disclose a fairly arguable case for judicial review, leave is granted and the case is assigned to a different justice for an oral hearing on the merits of the judicial review application. The existence of the leave requirement in no way undermines the effectiveness of judicial review as a remedial avenue.

6.6 The State party referred to the statistics compiled by the Federal Court for the 2012 calendar year<sup>17</sup> — out of 6,396 applications for leave to appeal refugee decisions that were handed down in that period, 911 were granted, which constituted a grant rate of 14.2 per cent. These statistics are not indicative of a lack of vigilance by the Federal Court but rather of a focus of its resources to the decisions that satisfy the established test for leave. This triage of cases is made necessary by the high volume of leave applications filed each year. The acceptance rate for leave applications is not unduly low, given the quality of the decision-making at first instance within the Canadian system.

6.7 The State party reiterated that it was not the role of the Committee to consider its immigration and refugee protection system, including the Federal Court review, in the abstract, but to consider only whether the system has, in some specific way, failed to protect the Convention rights of the complainant.<sup>18</sup> Insofar as any of the complainant's allegations about the deficiencies in the judicial review system may have had a direct bearing on the assessment of the complainant's claim for protection, which has been denied, they could and should have been raised first before the Federal Court itself and, on appeal with leave, to the Supreme Court. The basic admissibility requirement of exhaustion of domestic remedies exists to ensure that the substance of any allegation submitted to the Committee is first raised before the domestic courts. Complainants cannot raise issues for the first time before the Committee; if they do so, such allegations are inadmissible.<sup>19</sup>

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<sup>15</sup> The jurisprudence of the Supreme Court of Canada on this point provided guidance for judicial review by all Canadian courts. See its explanation of "reasonableness" and "correctness" standards of review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 49, available at [www.canlii.org/en/ca/scc/doc/2008/2008scc9/2008scc9.html](http://www.canlii.org/en/ca/scc/doc/2008/2008scc9/2008scc9.html).

<sup>16</sup> See *Bains v. Minister of Employment and Immigration* (1990), 109 N.R. 239 (Fed. C.A.); and *Wu v. Minister of Employment and Immigration*, [1989] 2 F.C. 175 (T.D.).

<sup>17</sup> See Federal Court of Canada, "Statistics", Archived Content, Activity Summary – January 1 to December 31, 2012, available at [http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc\\_cf\\_en/Statistics/Statistics\\_dec12](http://cas-cdc-www02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Statistics/Statistics_dec12).

<sup>18</sup> See for example communication No. 15/1994, *Khan v. Canada*, decision adopted on 15 November 1994, para. 12.1.

<sup>19</sup> See Human Rights Committee, communication No. 1494/2006, *Chadzjian v. Netherlands*, decision adopted on 22 July 2008, para. 8.3.

6.8 On 3 October 2014, the State party submitted that on 10 September 2014, the complainant received written notice that her removal to Pakistan was scheduled for 16 September 2014. Upon receipt of the removal order, the complainant could have requested that her removal be deferred, but she did not take any steps to pursue this available domestic remedy. Claimants who allege new evidence of personal risk may request the enforcement officer to defer their removal. Although enforcement officers have limited discretion as to the timing of a removal, the Federal Court of Appeal has repeatedly held that an enforcement officer must defer removal if there is compelling evidence that the removal would expose the person to “a risk of death, extreme sanction or inhumane treatment”.<sup>20</sup>

6.9 On 15 September 2014, the complainant applied to the Federal Court for leave to apply for a judicial review of the decision to enforce her removal order. The complainant also sought a judicial stay of her removal pending consideration of this application. That afternoon, the Court heard arguments pertaining to the stay of removal application. The complainant was represented by legal counsel at the hearing. The Court rejected the complainant’s stay of removal application on the grounds that she had not met the legal test for a stay of removal because she had not demonstrated that she would suffer irreparable harm if removed to Pakistan. The State party therefore enforced the removal order against the complainant on 16 September 2014.

#### **Complainant’s further comments**

7.1 On 1 October 2014, the complainant’s counsel submitted that she had been deported on 16 September 2014 and that the Canadian media had reported that she had arrived in Pakistan and was in hiding. He provided a summary of the proceedings that took place on 15 September 2014 before the Federal Court and reiterated that, according to the Committee’s jurisprudence, judicial review of a negative finding in a pre-removal risk assessment and application for residence on humanitarian and compassionate grounds did not constitute effective remedies.

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

##### *Consideration of admissibility*

8.1 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.

8.2 In accordance with article 22 (5) (b) of the Convention, the Committee shall not consider any communication, unless it has ascertained that the complainant has exhausted all available domestic remedies. This rule does not apply where it is established that the application of those remedies has been or would be unreasonably prolonged or would be unlikely, after a fair trial, to bring effective relief.

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<sup>20</sup> See *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, paras. 41-45 and 52, available at [www.canlii.org/en/ca/fca/doc/2011/2011fca286/2011fca286.html](http://www.canlii.org/en/ca/fca/doc/2011/2011fca286/2011fca286.html); and *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, para. 51, available at [www.canlii.org/en/ca/fca/doc/2009/2009fca81/2009fca81.html](http://www.canlii.org/en/ca/fca/doc/2009/2009fca81/2009fca81.html). Aside from these circumstances, “other personal exigencies have been held to warrant a deferral because removal at that time would not be reasonably practicable” in *Canada (Public Safety and Emergency Preparedness) v. Shpati*, para. 44.

8.3 The Committee notes the State party's argument that, inter alia, the complaint should be declared inadmissible under article 22 (5) (b), of the Convention, as the complainant failed to apply for leave to seek judicial review of the 15 January 2010 decision of the Refugee Protection Division. The Committee notes the complainant's submission that she could not afford a lawyer to appeal the decision. In this regard, the Committee observes that the complainant did not provided any information about the cost of legal representation or court fees nor about the possibilities or any efforts on her part to obtain legal aid for the purpose of initiating proceedings before the Federal Court.<sup>21</sup> The Committee also observes that she was represented by legal counsel for her Refugee Protection Division hearing, her pre-removal risk assessment application and her application to the Federal Court for leave to seek judicial review of the negative pre-removal risk assessment decision. The Committee further notes that the complainant did challenge the effectiveness of the remedy of judicial review of the decision, by stating that 80 to 85 per cent of such applications were rejected, but it notes that the complainant did not address the State party's arguments about the effectiveness or availability of the above remedy nor did she furnish any evidence that it would be unreasonably prolonged or unlikely to bring effective relief in her particular case. In the light of this information, the Committee is satisfied with the arguments of the State party that, in this particular case, there was an available and effective remedy that the complainant has not exhausted. In the present case, the Committee considers that an application for leave to apply for a judicial review of the decision would have been an effective remedy in the complainant's case.<sup>22</sup>

8.4 The Committee is therefore of the view that, in this case, all domestic remedies have not been exhausted in accordance with article 22 (5) (b) of the Convention.

9. Accordingly, the Committee decides:

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

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

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<sup>21</sup> See for example, *R.S.A.N. v. Canada*, para. 6.4.

<sup>22</sup> See for example, *Aung. v. Canada*, para. 6.3; and communication No. 604/2014, *Z.H. v. Canada*, decision adopted on 20 November 2015, para. 7.3.