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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 681/2015*, **

Communication submitted by:	M.K.M. (represented by counsel, Michaela Byers)
Alleged victim:	The complainant
State party:	Australia
Date of complaint:	18 May 2015 (initial submission)
Date of present decision:	10 May 2017
Subject matter:	Risk of deportation of complainant to Afghanistan
Procedural issues:	Admissibility — manifestly ill-founded
Substantive issues:	Risk of torture in the event of deportation to country of origin (non-refoulement)
Articles of the Convention:	3

1.1 The complainant is M.K.M., an Afghan national born on 18 June 1985. He sought asylum in Australia, his application was rejected and he risks forcible removal to Afghanistan.[1] He claims that his deportation from Australia to Afghanistan would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia made the declaration under article 22 of the Convention on 28 January 1993. The complainant is represented by counsel, Michaela Byers.

1.2 On 22 May 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from returning the complainant to Afghanistan while his complaint was being considered by the Committee. On 31 March 2016, the State party requested that the Committee lift its request for interim measures. On 12 May 2016, the Committee, acting through its Rapporteur on new complaints and interim measures, decided not to accede to the State party's request for lifting interim measures.

The facts as submitted by the complainant

2.1 The complainant is Tajik by ethnicity and Sunni Muslim by religion. He arrived in Australia by boat on 13 March 2010 without a valid visa and was placed in immigration

* Adopted by the Committee at its sixtieth session (18 April-12 May 2017).

** The following members of the Committee took part in the consideration of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sébastien Touzé and Kening Zhang.

[1] No date of deportation has been indicated. The complainant has been in Australia since his arrival.

detention.[2] On 12 April 2010, he underwent an entry interview conducted by an official of the Department of Immigration and Border Protection. On 23 May 2010, the complainant made a request for a refugee status assessment.

2.2 On 14 September 2010, an official of the Ministry found that the complainant was not a refugee and was therefore not a person to whom Australia owed protection. In accordance with the applicable appeals process, the complainant applied on 22 September 2010 for an independent merits review.[3] On 30 November 2011, an independent merits reviewer conducted an assessment of the complainant's claims. On 6 December 2011, the reviewer confirmed the primary decision of the Ministry official, finding that the complainant was not entitled to protection.

2.3 The complainant appealed the decision of the reviewer before the Federal Magistrates Court of Australia (renamed the Federal Circuit Court in April 2013). On 1 June 2012, the Court found that the reviewer had failed to afford the complainant procedural fairness in not seeking his views on the file and thus the complainant was entitled to a new review of his application.

2.4 On 13 August 2012, the complainant was notified by an official of the Department of Immigration and Border Protection that amendments to the migration legislation of 24 March 2012 allowed the complainant to claim "complementary protection".[4] The complainant was advised that as the independent review of his case was finalized before 24 March 2012, the reviewer had not considered his claims against the new "complementary protection" criteria. The official advised the complainant that he did not satisfy the criteria in the Minister's guidelines for the consideration of post-review protection claims and that he was therefore not being referred to the Minister for a new assessment as to whether it was in the public interest to allow the complainant to apply for a protection visa.

2.5 On 22 October 2012, an independent merits reviewer conducted a second review of the complainant's protection claims. On 25 October 2012, the reviewer found that the complainant was not entitled to protection under either the Convention relating to the Status of Refugees or under the complementary protection obligations.

2.6 On 23 January 2013, the complainant again appealed the decision of the independent merits reviewer before the Federal Magistrates Court. On 13 February 2013, the complainant submitted a ministerial intervention request that the Minister exercise his discretion to grant him a protection visa. It was found that the complainant had not met the conditions of the Minister's guidelines and his request was rejected. On 27 June 2013, the Federal Circuit Court dismissed the complainant's appeal of 23 January 2013. No further appeal was available.

2.7 The complainant submits that he fears the Taliban due to his ethnicity and religion. He also submits that the Taliban accused him of working for a foreign Government and suspected him of being implicated in the preparation of a suicide bombing, which was revealed on 19 July 2008, when two alleged suicide bombers were arrested in front of the complainant's shop in Sayed Kaka Market near Radio Dekkaka. The complainant claims that 10 days after the incident, he received a telephone call from the Taliban. Five days later, another person telephoned the complainant and requested him to go to the mosque in the Andar district in Ghazni Province, but he refused. A few days after the threatening phone call, he and his father were stopped at Maidan-e-hairdar Abad by four armed men who attacked and kidnapped them. They were put in a small cellar about 4m x 4m with three

[2] On Christmas Island.

[3] Persons arriving through excised offshore places in Australia undergo a non-statutory status determination process known as a refugee status assessment, but do not have access to the Refugee Review Tribunal and only very limited access to the Australian courts. Apparently, asylum seekers arriving in excised zones still cannot submit an application for a protection visa, except at the Minister's discretion, and lack access to the refugee status determination process that applies on the mainland.

[4] Complementary protection is the term used to describe a category of protection for people who are not refugees, as defined in the Convention relating to the Status of Refugees, but who also cannot be returned to their home country, because there is a real risk that they would suffer certain types of irreparable harm that would engage the country's international non-refoulement obligations.

other detainees: a television cameraman, a translator and a driver from a foreign organization. The complainant and his father were reportedly interrogated and tortured for about five months. About a month after the initial detention, Mullah Gul Jan allegedly gave an order for the complainant's father and the cameraman to be killed.[5] The complainant witnessed the perpetrators decapitate the cameraman and then his own father.[6] After several more weeks of detention, the complainant was taken to the Taliban headquarters in Paktika Province. He managed to escape while he was being sent on a mission to Kabul by the Taliban.[7]

2.8 Following the significant physical and mental abuse and torture that he suffered when he was captured and detained by the Taliban in 2008, and when he witnessed the decapitation of his father and another detainee, the complainant feared for his life and safety. He submits that he could not get any protection from the Afghan authorities because they are infiltrated at all levels by the Taliban. He therefore decided to leave Afghanistan for Australia and did so in March 2010. The complainant submits that if he returned, he would not be able, as a failed asylum seeker, to get effective protection against the threats to life by non-State actors. In that regard, the complainant refers to a report by Amnesty International, dated 2011, which points to the deteriorating conditions in Afghanistan and the real security risks faced by returnees.[8] The complainant further refers to accounts by the Office of the United Nations High Commissioner for Refugees (UNHCR) of insecurity, political instability and economic and social problems, which are likely to continue and may increase following the departure of international security forces and transfer of responsibilities to Afghan counterparts.[9] Moreover, he points to the assessments by the Edmund Rice Centre of frequently fatal consequences, including threats and attacks against returned asylum seekers, which have been confirmed by the United Nations Assistance Mission in Afghanistan.[10] The complainant argues that in the absence of adequate protection and reintegration support or assistance, the failed Afghan asylum seekers who are deported are at risk of facing serious negative consequences, including deterioration of their mental health and potentially severe mental health problems.[11]

2.9 The complainant claims that he has exhausted all available effective domestic remedies, and that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

The complaint

3.1 The complainant claims that should he be forcibly returned to Afghanistan, he will be identified, persecuted and possibly killed upon return as an escapee from the Taliban, since he witnessed many of their activities and saw the faces of many of its members while he was detained by them. He alleges that such threats amount to torture.

3.2 In that regard, he claims that the Afghan authorities are unwilling or unable to protect him from persecution and torture, which he admits is essentially inflicted by non-State actors. He fears that he will face a substantial risk of torture and ill-treatment, similar to the beating and persecution he faced following his witnessing of the arrest of two suicide bombers outside his shop in July 2008 and the torture he suffered during his detention by the Taliban for several months, together with his father. The complainant also recalls that he witnessed the decapitation of his father and of another detainee. Owing to the serious

[5] No further information has been provided on the identity of Mullah Gul Jan, although images of him are available from www.bing.com/images/search?q=Mullah+Gul+Jan&qpvt=Mullah+Gul+Jan&qpvt=Mullah+Gul+Jan&qpvt=Mullah+Gul+Jan&FORM=IGRE.

[6] No further information has been provided on the identity of the alleged perpetrators.

[7] No further information has been provided as to the purpose of the mission.

[8] The report is annexed to the initial complaint.

[9] See UNHCR eligibility guidelines for assessing the international protection needs of asylum seekers in Afghanistan (17 December 2010), annexed to the initial complaint.

[10] See, for example, www.erc.org.au/grave_dangers_faced_by_deportees_from_australia.

[11] The complainant refers to a letter, dated 9 March 2013, from members of the Afghan parliament to the Minister for Foreign Affairs and Trade addressing those issues and the report of the Refugee Council of Australia, dated November 2012, in which concerns over the return of failed asylum seekers to Afghanistan were raised.

and significant physical and mental abuse he underwent during his detention by the Taliban, the complainant suffers from mental consequences including post-traumatic stress disorder (see paras. 4.8, 4.11 and 6.4 below).

3.3 The complainant adds that he fears harassment, persecution and torture also by the Afghan authorities, for his status as a failed asylum seeker who has resided since 2010 in a western country. In that regard, the complainant argues that returning Afghans have nothing to return to: there are no schools, no access to medical aid and no water in Afghanistan. The complainant does not have any close family connections left in Afghanistan.[12] He fears that without the crucial support of his family and relatives, he may be at greater risk of being detected and persecuted by the Taliban or other parties.

State party's observations on the admissibility and the merits

4.1 On 10 December 2015, the State party submitted observations on the admissibility and merits of the complaint.

4.2 The State party submits that the complainant's allegations are inadmissible because his claims are manifestly unfounded. It holds that it is the responsibility of the complainant to establish a prima facie case for the purpose of admissibility of his complaint, which he has failed to do. Should the Committee find that the allegations are admissible, the State party submits that the claims are without merit as they have not been supported by evidence demonstrating that the complainant would face a "foreseeable, real and personal risk of being subjected to torture".[13]

4.3 The State party asserts that the complainant's claims have been thoroughly considered through a series of domestic processes, including by way of a refugee status assessment, an independent merits review and the Federal Circuit Court[14] and have been subject to judicial review by the Federal Circuit Court and the Federal Court of Australia. Robust domestic processes have considered and determined that the complainant's claims were not credible and did not engage the State party's non-refoulement obligations. In particular, the complainant's claims have been assessed under the complementary protection provisions contained in section 36 (2) (aa) of the Migration Act 1958, which reflect non-refoulement obligations, as enshrined in article 3 of the Convention.

4.4 It further claims that the complainant has not provided any new and credible claims to the Committee that have not already been considered through robust and comprehensive domestic administrative and judicial processes. The State party refers to the Committee's jurisprudence to the effect that, as it is not an appellate or judicial body, it gives considerable weight to findings to fact that are made by organs of a State party.[15] It requests the Committee to accept that the complainant's claims have been thoroughly assessed through its domestic proceedings, following which it concluded that it does not owe the author protection obligations under the Convention. The State party asserts that it takes its obligations under the Convention seriously and has implemented them in good faith through its domestic migration procedures.

4.5 The State party also submits that it has reviewed the material provided by the author and that this material does not provide additional grounds to show that the author is at a foreseeable, real and personal risk of torture if returned to Afghanistan. The issues raised by the author relating to the human rights violations and risk of torture he would face in case of return to Afghanistan as a failed asylum seeker have been specifically and carefully considered by all domestic authorities. They concluded that there were no substantial

[12] Two of the complainant's siblings reside in Pakistan.

[13] The State party submits that the obligation of non-refoulement under article 3 of the Convention is confined to torture and does not extend to cruel, inhuman or degrading treatment or punishment, referring to the Committee's general comment No. 1 (1997) on the implementation of article 3, para. 1.

[14] The Federal Circuit Court quashed the recommendation of the first independent merits review by consent.

[15] See Committee against Torture, general comment No. 1, para. 9 (a).

grounds to believe that the complainant would face a personal and real risk of torture if returned to Afghanistan.

4.6 It transpires from the documents on file that in the context of the refugee status assessment, the Department of Immigration and Border Protection accepted, despite some credibility concerns, that "the Taliban believed that the author was responsible for a failed attack by two suicide bombers near his shop, that the author and his father were kidnapped and tortured by the Taliban over several months, that the author witnessed his father's beheading, that he escaped from the Taliban and consequently had a subjective fear of returning to Afghanistan after having escaped". However, the Department concluded that the author would not be persecuted because of his Tajik ethnicity and that he could reasonably relocate to another area within Afghanistan, including Kabul, and that accordingly, the author did not have a genuine fear of harm. The Department found that the author's fear of persecution, as defined under the Convention relating to the Status of Refugees, was not well founded.

4.7 The complainant's claims were assessed under the complementary protection provisions of the Migration Act during the independent merits review and subsequent domestic procedures. The reviewer had several concerns about the credibility of the author's claims. He concluded that the author did not face a real risk of persecution from the Taliban in Afghanistan and rejected the author's claims concerning the suicide bomber attack and the author's subsequent capture by the Taliban.

4.8 Following the decision of the Federal Magistrates' Court, the first independent merits review was quashed for procedural error in not affording the complainant procedural fairness.[16] In the second independent merits review, the reviewer considered the author's ability to give evidence and considered also the evidence from the New South Wales Service for the Treatment and Rehabilitation of Torture and Trauma Survivors that the author was suffering from post-traumatic stress disorder. Although the reviewer determined that the author was able to give meaningful evidence, he stated that inconsistent evidence or the late introduction of significant new claims might reflect on the credibility of the complainant's statements. The reviewer found that the complainant would not face a real risk of persecution or ill-treatment if removed to Afghanistan. He did not accept that the author was targeted by the Taliban as a collaborator with the authorities or foreign forces, and considered that the author was not of ongoing interest to the Taliban. Nor did he accept that the author would be targeted upon his return to Afghanistan for being a former asylum seeker in Australia.

4.9 On 27 March 2014, the Federal Circuit Court of Australia dismissed the complainant's application for judicial review, since the reviewer had applied the complementary protection tests to the facts he found and had therefore been procedurally fair.

4.10 On 6 August 2014, the Federal Court of Australia dismissed the author's appeal of the decision of the Federal Circuit Court. The author appealed to the Federal Court claiming that the primary judge had erred when finding that the reviewer had applied the right test to assess whether he met the complementary protection criteria. The reviewer had accepted that the Taliban had mistreated the author, but had rejected his claim that he had been targeted by the Taliban. Accordingly, the reviewer had concluded that the author would not be of significant interest to the Taliban if returned to Afghanistan and there was no real risk he would suffer significant harm. The Federal Court concluded that there was no merit in the author's submission that the reviewer had erred by transposing findings of fact made in relation to the criteria in the Convention relating to the Status of Refugees to his consideration of the complementary protection criteria. It also noted that the author had failed to demonstrate any error on the part of either the primary judge or of the reviewer and dismissed the appeal. However, the Court also observed that: "It is difficult not to find some considerable sympathy for the appellant. He has been found to have suffered greatly at the hands of the Taliban in Afghanistan. He was himself tortured. He witnessed the

[16] The author was allegedly not allowed to comment on all the background documents relevant to the recommendation.

beheading of his father and other brutality by the Taliban. Not surprisingly, it has been found that he has a real fear of returning to Afghanistan. Nevertheless, he has been assessed by a departmental officer and a reviewer as not being someone to whom Australia owes protection. That is essentially because both the officer and the reviewer consider that it is safe for the appellant to return to Kabul. Whilst this administrative process took place, the appellant spent some two years in immigration detention. He has now been released into the community and is working. … The appellant will most likely be returned to Afghanistan. On any view this is a harsh outcome for the appellant. It must be one that is difficult for him (and perhaps many others) to comprehend. Nonetheless, whatever one may think of the outcome, and whatever sympathy may be felt for the appellant in all the circumstances, the review has not been shown to have involved any legal error. There is no basis in law to overturn it."

4.11 Subsequently, the complainant made two requests for an assessment of the post-review protection claims with a request to the Minister to grant him a visa in the public interest. The Department of Immigration and Border Protection determined that the complainant's protection claims had been comprehensively considered at the second independent merits review and the author had not advanced any new and credible information since that review to warrant referral to the Minister for consideration. In relation to the author's potential humanitarian and health issues, the Department determined that there were no unique and exceptional circumstances in the complainant's case. Consequently, the complainant did not comply with section 195A of the guidelines for referral to the Minister. However, according to the decision of the Department of 8 October 2014, "there has been a decline in the complainant's psychological health since 2012, related mainly to having seen his father killed and the prolonged stay in immigration detention, in the wake of conceded errors in the previous IMR assessment". On 16 October 2014, the Department of Human Services, by way of complex case resolution, assessed the complainant's case and concluded that his request for assessment under section 195A did not meet the guidelines for referral to the Minister. In that regard, the departmental records indicated that the complainant had an ongoing physical and mental health-care plan, which was being monitored by the Australian Red Cross, and had been examined by a neurologist on 27 August 2014 for convulsions and loss of consciousness. The report indicates that the complainant suffers from anxiety, depression and post-traumatic stress disorder and that he receives community support assistance for medical services and has access to medical treatment as required. Notwithstanding the comparably inferior state of mental health care in Afghanistan, "there was nothing before the Department to suggest that he would be denied medical care or treatment for any reason, or that his condition(s) would raise his risk profile such as to expose him to serious or significant harm in Afghanistan in the reasonably foreseeable future".

4.12 As regards the complainant's reference to various media articles and reports in his submissions in support of his claims regarding the risk of torture for returned failed asylum seekers, and the failure of the Afghan Government to provide protection from torture, the State party submits that the existence of a general risk of violence does not constitute a sufficient ground for determining that a particular person would be at risk of torture upon return to that country. Additional grounds must exist to show that the individual concerned would be personally at risk.[17] The State party has reviewed the material provided by the author and does not consider it establishes such grounds.

State party's additional observations on the admissibility and merits

5.1 On 31 March 2016, the State party submitted additional observations. It considers that the author's claims of a risk of irreparable harm have not been substantiated and requests the Committee to lift the request for interim measures, and to expedite the consideration of the case. Following the State party's assessments in the context of its interim measures request policy, it reiterates that there have been no new and credible information in the author's submissions and therefore no substantial grounds for believing that he would face a real risk of torture if returned to Afghanistan.

[17] See communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.3.

5.2 The State party recalls the comprehensive domestic processes, including merits review by the Refugee Review Tribunal, judicial review by the Federal Circuit Court and Federal Court of Australia, and a request to the Minister for Immigration and Border Protection to discretionarily intervene in favour of an unsuccessful visa application. It reiterates that the domestic processes consistently determined that the complainant was not entitled to protection under the Convention relating to the Status of Refugees or to subsidiary protection, and that the State party's non-refoulement obligations, including under article 3 of the Convention, had not been engaged with respect to the author.

5.3 If the Committee decides that the request for interim measures should not be withdrawn, the State party requests a timely consideration of the complaint on the basis that it is not complex, the documentation is complete and all domestic procedures have been finalized.

Complainant's comments on the State party's submissions

6.1 On 11 April 2016, the complainant submitted comments on the State party's submission. He argues that the review of the merits of the case by the State party is far from being "robust and comprehensive", as the process was conducted under the non-statutory regime, outside the provisions of the Migration Act of 1958, by internal departmental decision makers and contractors. The complainant submits that the second independent merits review carried out considered the complementary protection provisions only in four paragraphs, which cannot be perceived as a robust and comprehensive review.

6.2 The complainant further considers that he has been denied the opportunity for a "robust and comprehensive" independent merits review by the Administrative Appeals Tribunal, pursuant to the statutory regime of the Migration Act of 1958. In the State party, the grounds of judicial review are limited to a very narrow consideration of any legal errors made by the administrative decision makers. Actual merits review is not permitted under judicial review. The courts do not assess whether the complainant is a refugee or whether he meets the conditions to benefit from the complementary protection provisions.

6.3 Moreover, in the context of the post-review protection claims assessment of 8 September 2014 and the assessment of the Minister's guidelines of 8 October 2014, the unnamed ministerial intervention officer failed to make any assessment of the non-refoulement obligations and only considered whether the findings of the previous internal decision makers were still valid.

6.4 The author also objects to the State party's argument that he did not provide evidence of new circumstances and submits that he did so. In its letter of 8 February 2013, the Hazara Council of Australia stated that an Afghan member of parliament had conducted a review of the case and established that the complainant's father was murdered by the Taliban, allegedly for spying for the Afghan authorities. In addition, the lack of mental health-care services in Afghanistan is widely recognized. While finding that the complainant would not be denied medical care in Afghanistan, the decision makers in charge of his case failed to consider whether his mental health condition could actually be treated in Afghanistan and failed to assess whether such a lack of treatment would result in cruel, inhuman or degrading treatment. The complainant thus requested the Committee not to lift the interim measures request.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim submitted in a complaint, the Committee must decide whether or not 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.

7.2 The Committee notes the State party's submission that the communication is manifestly ill-founded, as the complainant has not substantiated the existence of a personal risk of torture if returned to Afghanistan and is thus inadmissible pursuant to rule 113 (b) of

the Committee's rules of procedure. The Committee recalls that for a claim to be admissible under article 22 of the Convention and rule 113 (b) of its rules of procedure, it must rise to the basic level of substantiation required for purposes of admissibility.[18] The Committee considers that the complainant has sufficiently detailed the facts and the basis of his claims under article 3 of the Convention to enable the Committee to make a decision, and therefore considers that his claims are sufficiently substantiated for the purpose of admissibility.

7.3 The Committee notes that the State party does not challenge the admissibility of the complaint on any other grounds and it therefore finds no obstacles to admissibility. Accordingly, the Committee declares the complaint admissible and proceeds with its consideration on the merits.

Consideration of the merits

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

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

8.3 The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Afghanistan. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned.[19] It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture upon return to that country. Additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.[20]

8.4 The Committee also recalls its general comment No. 1 and reaffirms that the existence of a risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to be shown to be highly probable,[21] the burden of proof generally falls on the complainant, who must present an arguable case establishing that he or she is at "foreseeable, real and personal risk".[22] The Committee gives considerable weight to findings of fact that are made by the organs of the State party concerned, while at the same time it is not bound by such findings and instead has the

[18] See, inter alia, communication No. 308/2006, *K.A. v. Sweden*, decision of inadmissibility of 16 November 2007, para. 7.2.

[19] See, inter alia, communication No. 470/2011, *X. v. Switzerland*, decision adopted on 24 November 2014.

[20] See, inter alia, communication No. 490/2012, *E.K.W. v. Finland*, decision adopted on 4 May 2015, para. 9.3.

[21] See general comment No. 1, para. 6.

[22] See, inter alia, communications No. 203/2002, *A.R. v. the Netherlands*, decision adopted on 14 November 2003, para. 7.3; No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005, para. 8.4; No. 343/2008, *Kalonzo v. Canada*, decision adopted on 18 May 2012, para. 9.3; No. 458/2011, *X. v. Denmark*, decision adopted on 28 November 2014, para. 9.3; and No. 520/2012, *W.G.D. v. Canada*, decision adopted on 26 November 2014, para. 8.4.

power, under article 22 (4) of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.[23]

8.5 The Committee notes that the complainant's claim that he was detained and tortured by the Taliban on account of his ethnicity and religion for about five months in 2008, since it accused him of working for a foreign Government and suspected him of being implicated in the preparation of a suicide bombing. The Committee also notes the complainant's claim that he witnessed the decapitation of his father and another detainee, which resulted in a significant trauma; that the Afghan authorities would be unwilling or unable to protect him from persecution and torture if he returned to Afghanistan since its authorities are infiltrated at all levels by the Taliban (see para. 2.8 above); and that, after his arrival in Australia, he was diagnosed with anxiety, depression and post-traumatic stress disorder, admittedly further exacerbated by the length of his immigration detention in the State party. The Committee further notes that no adequate treatment would be available in Afghanistan to attend his needs, and that the author's psychological health has deteriorated since 2012, mainly due to having seen his father killed and to the prolonged stay in immigration detention in the wake of conceded errors in the first independent merits review assessment (see para. 4.11 above). The Committee further notes the complainant's submission that the decision makers of the State party failed to consider whether his mental health condition could be treated in Afghanistan and whether the lack of adequate treatment would amount to cruel, inhuman or degrading treatment in his case. These allegations, which have presented new circumstances in support of the post-review complementary protection claims, have not been contested by the State party.

8.6 The Committee further notes the State party's claim that the complainant has not substantiated his claim that he would face a real and personal risk of torture if he returned to Afghanistan and that a general risk of violence does not constitute a sufficient ground to determine that a particular person would be in danger of being subjected to torture if returned. Nonetheless, the Committee notes that the State party did not contest the complainant's claims regarding the risk of torture or ill-treatment for him as a returned failed asylum seeker and the failure of the Government of Afghanistan to provide protection from torture. Furthermore, the Committee notes that the State party's Department of Immigration and Border Protection concluded that the complainant could reasonably relocate to another area within Afghanistan, including Kabul, while it accepted that the author and his father were kidnapped and tortured by the Taliban over several months, and that the author witnessed his father's beheading, for which reason he has feared returning to Afghanistan (see para. 4.6 above). The Committee also notes that the State party has pointed to contradictions and inconsistencies in the complainant's statements; however, the Committee considers that complete accuracy is seldom to be expected by victims of torture,[24] whose mental health conditions should be properly taken into account. In addition, while finding that the complainant would not be denied medical care in Afghanistan, the State party accepted that there is a "comparably inferior state" of mental health care in Afghanistan.

8.7 The Committee is aware of the human rights situation in Afghanistan and notes that the Australian authorities took this issue into consideration when assessing the risk that the complainant might face if returned to his country of origin. As regards the complainant's allegations as to the risk he would face as a failed asylum seeker who has lived for several years in a western country, the Committee notes the absence of any arguments refuting this claim by the State party. The Committee further notes the complainant's claim that he was subjected to torture by non-State actors and that the State party would not be in a condition to protect him if he returned to Afghanistan. In that connection, the Committee recalls that

[23] See general comment No. 1, para. 9, and communications No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3; No. 375/2009, *T.D. v. Switzerland*, decision adopted on 26 May 2011, para. 8.7; No. 387/2009, *Dewage v. Australia*, decision adopted on 14 November 2013, para. 10.4; and No. 466/2011, *Alp v. Denmark*, decision adopted on 14 May 2014, para. 8.3.

[24] See communication No. 21/1995, *Alan v. Switzerland*, decision adopted on 8 May 1996, para. 11.3.

it has, in its jurisprudence[25] and in its general comment No. 2 (2008) on the implementation of article 2, addressed the risk of torture by non-State actors and the failure on the part of a State party to exercise due diligence to intervene and stop the abuses that are impermissible under the Convention, for which it may bear responsibility.[26] In that regard, the Committee notes the information contained in the available reports on torture and ill-treatment, arbitrary detention and the violation of fair trial rights in Afghanistan,[27] as well as reports concerning the mistreatment of failed asylum seekers who have profiles similar to the author.[28]

8.8 The Committee further notes that the complainant's arguments, and the evidence he submitted to support them, have been considered by the State party's authorities. The Committee recalls that, although it is for the complainant to establish a prima facie case for an asylum request, it does not exempt the State party from making substantial efforts to determine whether there are grounds for believing that the complainant would be in danger of being subjected to torture if returned.[29] The Committee considers as undisputed the fact that the complainant has been detained and tortured by the Taliban, that he is in a fragile medical condition, as he has been diagnosed with anxiety, depression and post-traumatic stress disorder linked to the trauma he suffered in Afghanistan, admittedly further exacerbated by the length of his immigration detention in the State party, and that the risk of torture or of significant harm could not be excluded as the State party had recommended that he relocate to another area within Afghanistan (see para. 4.6).

8.9 Accordingly, the Committee considers that, while the State party has raised concerns regarding, for example, the credibility of the complainant's arguments as to his fear of the risk of torture, or as to the threats he has suffered, it has drawn an adverse conclusion as to the complainant's credibility without adequately exploring a fundamental aspect of the complainant's claim, namely whether his past experience of torture, exacerbated by his present mental health condition, resulting from the torture and inhuman treatment he suffered in Afghanistan, might not represent a current risk profile owing to exposure to serious or significant harm if returned to Afghanistan. The Committee therefore considers that, by rejecting the complainant's asylum application without giving sufficient weight to the fact that the Afghan authorities are not in a condition to protect the complainant from further persecution by the Taliban, the State party failed to investigate sufficiently whether the complainant would be in danger of being subjected to torture or ill-treatment if returned to Afghanistan. In that regard, the Committee considers, referring to its jurisprudence,[30] that the internal flight or relocation alternative does not represent a reliable and durable alternative, where the lack of protection is generalized and the individual concerned would be exposed to a further risk of persecution or serious harm, in particular when the persecution of the civilian population by anti-government elements is often random in the complainant's country of origin. The Committee further considers that the State party's authorities did not adequately assess the mental health condition of the complainant, the actual availability of adequate treatment in Afghanistan and the potential consequences for the complainant's mental health of his forced removal to his country of origin. The Committee therefore considers that, in the particular circumstances of the present case, the removal of the complainant to Afghanistan would constitute a violation of article 3 of the Convention.

[25] See, inter alia, communications No. 379/2009, *Bakatu-Bia v. Sweden*, decision adopted on 3 June 2011, para. 10.6; No. 322/2007, *Njamba and Balikosa v. Sweden*, decision adopted on 14 May 2010, para. 9.5.

[26] See general comment No. 2, para. 18. See also *Dewage v. Australia*, para. 10.9.

[27] See CAT/C/AFG/2 and A/HRC/31/46, page 10. See also CAT/C/AFG/CO/2.

[28] See, for example, UNHCR Eligibility Guidelines for assessing the international protection needs of asylum seekers from Afghanistan (19 April 2016), pp. 31-32. See also www.theguardian.com/australia-news/2016/mar/14/hazara-asylum-seeker-to-be-forcibly-deported-from-australia-to-afghanistan.

[29] See, inter alia, communication No. 580/2014, *F.K. v. Denmark*, decision adopted on 23 November 2015, para. 7.6.

[30] See, for example, communication No. 338/2008, *Uttam Mondal v. Sweden*, decision adopted on 23 May 2011, para. 7.4.

9. In the light of the above, the Committee, acting under article 22 (7) of the Convention, is of the view that the State party has an obligation, in accordance with article 3 of the Convention, to refrain from forcibly returning the complainant to Afghanistan or to any other country where he runs a real risk of being expelled or returned to Afghanistan.

10. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken to respond to its observations above.