



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

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Committee against Torture
Thirty-fifth session
7 – 25 November 2005

DECISION

Communication No. 245/2004

<u>Submitted by:</u>	S. S. S. (represented by counsel, Mr. Stewart Istvanffy)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Canada
<u>Date of the complaint:</u>	25 February 2004
<u>Date of present decision:</u>	16 November 2005

[ANNEX]

*Made public by decision of the Committee against Torture.

Subject matter: deportation with alleged risk of torture and inhuman and degrading treatment

Procedural issues: admissibility *ratione materiae*, unsubstantiated allegations

Substantive issues: risk of torture on deportation, lack of adequate medical care after deportation amounting to inhuman and degrading treatment

Articles of the Convention: 3, 16

ANNEX

DECISION OF THE COMMITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE
CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR
DEGRADING TREATMENT OR PUNISHMENT

Thirty-fifth session

Concerning

Communication No. 245/2004

<u>Submitted by:</u>	S. S. S. (represented by counsel, Mr. Stewart Istvanffy)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Canada
<u>Date of the complaint:</u>	25 February 2004

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

Meeting on 16 November 2005,

Having concluded its consideration of complaint No. 245/2004, submitted to the Committee against Torture on behalf of S. S. S. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following:

Decision of the Committee against Torture under article 22 of the Convention

1.1 The complainant of the communication is S. S. S., an Indian national born on 5 November 1957 in Paddi Jagir, Punjab (India) and currently residing in Canada, from where he faces deportation. He claims that his forcible return to India would constitute a violation by Canada of articles 3 and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 27 February 2004, and requested it, under Rule 108, paragraph 1 of the Committee's rules of procedure, not to expel the complainant to India while his complaint is under consideration by the Committee.

The facts as presented by the complainant

2.1 The complainant is from the Punjab province in India. He is a Sikh; in June 1996 he became a member of the Akali Dal Badal party, campaigning on its behalf during the February 1997 elections. He continued to be involved in politics, organizing meetings and speaking against government policies. He claims that the police arrested him on 20 April 1999 and took him to Gurayan police station. He alleges that he was beaten with sticks and belts, that the police pulled his hair, kicked him in the back, slapped, punched and suspended him from the ceiling. A wooden roller was allegedly used to crush his legs and thighs, and his knee was dislocated. He alleges that he lost consciousness on many occasions and that he was questioned about his cousin and other Sikh militants, as well as his own activities. Finally, the complainant claims that he was released unconscious on 29 April 1999 after a bond of 50,000 rupees was paid. When he regained consciousness he was in a clinic.

2.2 The complainant states further that the police visited him at home while he was undergoing treatment on 12 August and 10 October 1999 and questioned him again about his cousin and other militants. The police allegedly visited his house again on 25 February 2000 while the complainant was out and threatened his wife. On each of these visits, the complainant claims the police received bribes.

2.3 On 23 June 2000 the complainant assisted a group to raise money through his Sikh temple for the children and women of those families whose family members were suspected militants and killed by the police. On 26 June 2000, the police allegedly began arresting persons who had been collecting money with him, and that he hid before finding out that the police had gone to his house, beaten his wife and the children. His wife was arrested, beaten and detained for 5 to 6 hours.

2.4 The complainant then fled to New Delhi and claims that he paid for an agent to help him arrange his trip to Canada. He arrived in Canada on 23 July 2000 after transiting through the United Arab Emirates and England.

2.5 On 28 September 2000, the complainant applied for refugee status. His application was rejected on 12 March 2002 by the Immigration and Refugee Board. He then applied to the Federal Court on 15 April 2002 for leave to seek judicial review of the rejection. That application was rejected on 24 July 2002. The complainant also submitted his case for a post-

determination review on 17 April 2002, which was rejected on 18 April 2002 as it had been made out of time.

2.6 The complainant made submissions under the new pre-removal risk assessment (PRRA) procedure in October 2003, which was denied on 16 December 2003. He also submitted a request for a determination based on humanitarian and compassionate grounds on 11 December 2003; according to the complainant, this procedure has yet to be decided. Finally, he applied for leave to seek judicial review of the PRRA refusal on 28 January 2004, which was dismissed on 2 June 2004, and filed a request for a stay of deportation in the Federal Court on 18 February 2004. This stay of deportation was denied on 23 February 2004.

2.7 The complainant was scheduled to be deported on 29 February 2004¹.

The complaint

3.1 The complainant argues that he would be imprisoned, tortured or even killed if he were returned to India, where human rights violations within the meaning of article 3, paragraph 2, of the Convention are said to be frequent, particularly against Sikhs. Counsel provides reports from non-governmental sources containing information to that effect, including an Amnesty International report of 2003 which concludes that torture and custodial violence continue to be regularly reported from Punjab.

3.2 Counsel submits a medical certificate dated 21 February 2001 which is said to confirm that the complainant was brought to Rohit Hospital on 29 April 1999 in an unconscious state, with bruises on his body, his feet, buttocks and back swollen and his knee dislocated. The same medical report states that his thigh muscles were crushed and torn, and that the complainant stayed at the hospital until 30 May 1999, while house visits continued until 30 November 1999. Counsel submits another medical certificate dated 20 March 2001 from a clinic in Canada, which concludes that the complainant presents symptoms of a mixed anxiety-depressive mood disorder and "that there is sufficient objective physical and psychological evidence that corroborates with the subjective account of torture".

3.3 In support of his application, counsel refers to letters from family members which support his version of the facts, and medical reports relating to the complainant's family and the alleged torture sustained by them. He also refers to affidavits from the Sarpanch (village elder) of the complainant's village in India corroborating the complaint and claiming that police officers informed him that arrest warrants had been issued against the complainant for involvement with Sikh militants.

3.4 Counsel also submits that the complainant's deportation to India would subject him to severe emotional trauma without the possibility of obtaining appropriate medical treatment, which is said to constitute inhuman and degrading treatment within the terms of article 16 of the Convention.

Finally, counsel submits that the member of the Immigration and Refugee Board (IRB) who refused refugee status to the complainant "has a record of refusing every Sikh claim" before him, and that the PRRA procedure of risk analysis "is one where practically everyone is

¹ The State party subsequently informed the Committee that the removal order had not been enforced.

refused and that there is a pattern of systematic violations of fundamental rights in this procedure". In particular, counsel submits that the risk assessment is done by immigration agents without any competence in matters of international human rights or legal matters, and that the decision makers do not meet the criteria of impartiality, independence and recognized competence.

State party's observations on admissibility

4.1 By Note Verbale of 26 August 2004, the State party contests the admissibility of the communication. It states that the complainant has failed to substantiate on a *prima facie* basis that there are substantial grounds to believe that he personally faces a risk of torture on return to India, contrary to article 3 of the Convention. It adds that the complainant has failed to substantiate on a *prima facie* basis that the alleged aggravation of the complainant's health on deportation would amount to cruel, inhuman or degrading treatment for purposes of article 16 of the Convention. Further, the State party submits on the same grounds that there is no merit to the communication.

4.2 On the issue of exhaustion of domestic remedies, the State party does not challenge in principle that the complainant failed to exhaust domestic remedies, except in relation to the new allegation of bias by a member of the IRB. The complainant failed to exercise due diligence in raising this claim in domestic proceedings, and therefore this bias allegation is inadmissible for failure to exhaust domestic remedies. The State party refers to previous decisions of the Committee² where it was found that the complainant had failed to substantiate his claim of bias because he did not raise any objections on those grounds until after his application for refugee status had been dismissed.

4.3 The State party clarifies that the complainant's case was heard under the procedure of the former Immigration Act and thus the final decision was determined unanimously by a panel of two members of the IRB, and not by one member, as implied by the complainant. Subsidiarily, the allegations are unfounded, as they are not supported by any evidence. The negative decision of the IRB was based on the complainant's failure to present credible evidence and on several inconsistencies in his testimony.

4.4 As to the allegations that the procedures in Canada are not effective remedies, the State party submits that the PDRCC, PRRA and humanitarian and compassionate review processes do constitute proper risk assessments. It recalls that the Committee previously found³ that the PDRCC and humanitarian and compassionate review processes constitute effective remedies, and that the same reasoning should apply to the PRRA. The State party adds that the complainant does not submit any evidence to support his claims to the contrary.

² The State party refers to Communication 603/1994 *Andres Badu v. Canada*, Views adopted on 12 August 1997; Communication 604/1994 *Nartey v. Canada*, Views adopted on 12 August 1997; Communication 24/1995 *A.E. v. Switzerland*, Views adopted on 8 May 1995 and Communication 654/1995 *Kwane Williams Adu v. Canada*, Views adopted on 12 August 1997 regarding failure to exhaust domestic remedies.

³ The State party refers to Communication 95/1997 *L.O. v. Canada*, Views adopted on 5 September 2000; Communication 86/1997 *P.S. v. Canada*, Views adopted on 16 June 2000; Communication 66/1997 *P.S.S. v. Canada*, Views adopted on 13 November 1998; Communication 42/1996 *R.K. v. Canada*, Views adopted on 20 November 1997.

4.5 With regard to article 3 of the Convention, the State party submits that the complainant has not *prima facie* established any substantial grounds for believing that his removal to India will have the foreseeable consequence of exposing him to a real and personal risk of being tortured. Pursuant to the Committee's General Comment No.1, this provision places the burden on the complainant to establish that he would be at risk of being tortured if returned to India. The State party refers to public reports to demonstrate that the situation of Sikhs in India has improved and stabilized in the recent past, and that there is no evidence that the Punjab police are seeking to harm or apprehend the complainant or his family for their militant connections. In particular, the regional party the complainant fears is no longer in power and he has ceased all political and religious activities since 1992.

4.6 The State party also notes that the complainant first visited Canada on 23 June 1998 to attend his father's funeral. A visitor's visa was granted to him following an interview with a visa officer at the Canadian High Commission in New Delhi, India. The complainant did not claim refugee status and returned to India on 30 June 1998. According to the State party, the complainant's allegations of fear of torture are inconsistent with the fact that he returned to India, after his problems with the Punjab police started. Further, the State party highlights that whilst the complainant entered Canada on 23 July 2000 with a Canadian visitor's visa for a single entry for a period of six months, in order to support his mother who was undergoing coronary surgery, he did not claim refugee status until 28 September 2000.

4.7 The State party notes that the complainant has not provided sufficient evidence that the alleged risk he faces *exists in all parts of India*, and that he would not be able to establish himself anywhere other than in Punjab⁴. Therefore, he has not discharged the burden of establishing substantial grounds to believe that he would be personally at risk of being subjected to torture in India. For the State party, the claim under article 3 is inadmissible.

4.8 With regard to the alleged violation of article 16, the State party refers to the fact that the article 3 obligation does not extend to situations of ill treatment envisaged in article 16 of the Convention⁵. The State party also submits that the complainant has failed to substantiate any exceptional circumstances relating to the alleged aggravation of his physical or mental state through deportation and that appropriate medical care would be unavailable to him upon his return to India. The State party therefore submits that the claim under article 16 should also be declared inadmissible.

4.9 The State party submits that the record before the Committee confirms that the article 3 standard was duly and fairly considered in domestic proceedings. The Committee should not substitute its own findings on whether there were substantial grounds for believing that the complainant would face a real and personal risk of torture upon return to India, since the material before it discloses no manifest error or unreasonableness in the course of domestic proceedings.

4.10 The State party concludes that the communication should be declared inadmissible because the complainant has failed to establish a *prima facie* violation of the rights protected

⁴ The State party refers to Communication 183/2001 *B.S.S. v. Canada*, Views adopted on 17 May 2004.

⁵ The State party refers to Communication 228/2003 *T.M. v. Sweden*, Views adopted on 2 December 2003; *B.S.S. v. Canada*, supra footnote 4.

by the Convention. If the claims were considered admissible, the Committee should then discuss on the merits, based on the same reasons set out above.

Complainant's comments

5.1 The complainant's counsel commented on the State party's observations on 11 April 2005. As to whether there is an Internal Flight Alternative (IFA) available to the complainant elsewhere in India, counsel relies on an article from a human rights group (ENSAAF), the opinion of a psychologist, as well as newspaper articles for the proposition that the Committee should not follow the decision in *B.S.S. v. Canada*. Counsel concludes that there is no IFA for the complainant, that he is targeted for detention and torture and that there is no possibility of living a normal life in India.

5.2 Counsel submits that the IRB and the PRRA assessments in this case, as well as the State party submission, were based on a supposedly objective view of the situation, but that they misunderstood the real situation in India and Punjab. The State party's submissions to the Committee do not acknowledge some new evidence (medical evidence of the mistreatment of the complainant's wife and children), nor some of the reports filed with the application for a stay. Finally, counsel submits that there is a systematic refusal of Sikh torture victims during the PRRA procedure, and that "article 3 of the Convention against Torture is being violated with impunity in Canada without access to an effective legal recourse to protect these torture victims' lives".

5.3 As to the State party's arguments of inadmissibility regarding IRB bias, counsel acknowledges that this was not raised before the IRB or the Federal Court⁶. Counsel states that although he will not adduce new evidence on this point, a serious case of institutional bias could be made on the basis of the clear bias of one of the IRB's members.

State Party's further comments

6.1 By further Note Verbale of 28 September 2005, the State party denies any impropriety of the handling of the author's claims in the relevant procedures, as alleged by counsel.

6.2 In conclusion, the State party submits that the Committee should render its views on the merits of the communication based on the same submissions that have been made on admissibility.

Admissibility considerations

7.1 Before considering any claims contained in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee notes, as to the complainant's claim of bias by an IRB officer, that the State party contests admissibility on the ground that domestic remedies have not been exhausted. It observes that the author concedes he has not exhausted domestic remedies, and thus the Committee deems that this part of the communication is inadmissible for failure to exhaust domestic remedies.

7.2 The Committee notes that the State party concedes that domestic remedies have been exhausted in relation to the complainant's other claims. Thus, the issue of whether the legal

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remedies available under the Canadian immigration review scheme are ineffective, as alleged by counsel, need not be considered by the Committee.

7.3 With regard to the complainant's allegation that the decision to return him to India would in itself constitute an act of cruel, inhuman or degrading treatment or punishment in contravention of article 16 of the Convention, the Committee notes that the complainant has not submitted sufficient evidence in substantiation of this claim. In particular, the Committee recalls that, according to its jurisprudence, the aggravation of the complainant's state of health that could possibly be caused by his deportation does not amount to the type of cruel, inhuman or degrading treatment envisaged by article 16 of the Convention⁷. While the Committee acknowledges that the complainant's deportation to India may give rise to subjective fears, this does not, in its view, amount to cruel, inhuman or degrading treatment, within the meaning of article 16 of the Convention. Therefore, the claim under article 16 of the Convention lacks the minimum substantiation, for purposes of admissibility.

7.4 With regard to the complainant's claim under article 3, paragraph 1, of the Convention, the Committee considers that no further obstacles exist to its admissibility and accordingly proceeds with its consideration on the merits.

Merits considerations

8.1 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 India. In assessing the risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2 of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights.

8.2 In this regard, the Committee takes note of the reports submitted by the complainant, which confirm that incidents of torture in police custody have continued after the end of the militancy period in Punjab in the mid-1990, and that perpetrators have not been brought to justice in many cases. It also notes the State party's argument that the human rights situation in the Punjab has improved and stabilized in recent years.

8.3 However, the Committee recalls that the aim of the determination is to establish whether the complainant would be personally at risk of being subjected to torture in India. It follows that, even if a consistent pattern of gross, flagrant or mass violations of human rights could be said to exist in that country, such a finding would not as such constitute a sufficient ground for determining that the complainant would be in danger of being subjected to torture upon his return to India; additional grounds must exist to show that he would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

8.4 The Committee notes that the complainant submitted evidence in support of his claim that he was tortured during detention in 1999, including medical reports, as well as written testimony said to corroborate this allegation. It also notes the 2001 medical report from a clinic in Canada, which concluded that there was sufficient objective physical and

⁷ Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.7; *B.S.S. v. Canada*, para. 10.2.

psychological evidence that corroborated with the subjective account of torture. Finally, it notes that the complainant contends he was detained and tortured because he was accused of being a militant, and not just because he is a Sikh. However, the Committee considers that, even if it were assumed that the complainant was tortured by Punjabi police in the past, it does not automatically follow that, six years after the alleged events occurred, he would still be at risk of being subjected to torture if returned to India. In particular, the Committee notes that the political party against which the complainant campaigned is no longer in power in Punjab.

8.5 Insofar as the complainant claims that he currently remains at risk of being tortured in India, the Committee notes the evidence submitted by counsel on IFA and his allegation that the complainant does not have the option of living elsewhere in India as he would be targeted by the police. On this point, the Committee has noted that some of the available evidence suggests that high-profile persons may be at risk in other parts of India, but the complainant has not shown that he fits into this particular category. In light of these considerations, the Committee does not consider that he would be unable to lead a life free of torture in other parts of India.

8.6 In the light of the foregoing, the Committee concludes that the complainant has failed to establish a personal, present and foreseeable risk of being tortured if he were to be returned to India.

8.7 The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the State party's decision to return the complainant to India would not constitute a breach of article 3 of the Convention.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]
