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COMMITTEE AGAINST TORTURE
Thirty-ninth session
(5-23 November 2007)

DECISION

Communication No. 297/2006

Submitted by:	Bachan Singh Sogi (represented by counsel, Johanne Doyon)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	11 June 2006 (initial submission)
Date of the present decision:	16 November 2007
Subject matter:	Expulsion to his country of origin of complainant, allegedly a member of a Sikh terrorist organization, despite request for interim measures
Substantive issues:	Risk of torture in case of expulsion to country of origin
Procedural issues:	Complaint not compatible with the provisions of the Convention; failure to substantiate allegations
Articles of the Convention:	3, 22

[ANNEX]

Annex

DECISION OF THE COMM ITTEE AGAINST TORTURE UNDER ARTICLE 22 OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATM ENT OR PUNISHMENT

Thirty-ninth session

concerning

Communication No. 297/2006

Submitted by:	Bachan Singh Sogi (represented by counsel, Johanne Doyon)
Alleged victim:	The complainant
State party:	Canada
Date of the complaint:	11 June 2006 (initial submission)
Date of the present decision:	16 November 2007

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 2007,

Having concluded its consideration of complaint No. 297/2006, submitted on behalf of Bachan Singh Sogi 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 and the State party,

Adopts the following:

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

1.1 The complainant, Bachan Singh Sogi, an Indian national born in 1961, was resident in Canada at the time of submission of the present complaint and subject to an order for his removal to India. He claims to be a victim of a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel, Ms. Johanne Doyon.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention by note verbale dated 14 June 2006. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, requested the State party not to deport the complainant to India while his complaint was being considered.

1.3 On 28 June 2006 the Committee was informed by the complainant and the State party that the complainant would be removed despite the Committee's request for a suspension of removal.

1.4 By note verbale of 30 June 2006 the Committee repeated its request to the State party to suspend removal of the complainant.

1.5 The Committee was informed by counsel that the complainant had been expelled on 2 July 2006 and that the Canadian Border Services Agency (CBSA) refused to reveal the destination. The State party confirmed that the complainant had been returned to India and justified the decision by the fact that he had failed to establish that there was a substantial risk of torture in his country of origin.

1.6 On 5 July 2006 counsel informed the Committee that the complainant was in a local prison in Gurdaspur, in Punjab, India, and that, according to police information, he had been beaten and subjected to ill-treatment by the local authorities. She also said that Amnesty International had agreed to monitor the complainant's case.

The facts as presented by the complainant

2.1 The complainant states that he and his family were falsely accused of being Sikh militants and on the basis of that allegation were arrested and tortured several times in India. The complainant was therefore compelled to leave the country.

2.2 According to the pre-removal risk assessment (PRRA) of 26 June 2003, the complainant had told the Canadian authorities that he was a farmer in Punjab in India, and that his home was not far from the border with Pakistan, which meant that he and his family had on several occasions been forced to harbour Sikh militants. In May 1991, February 1993, August 1997, December 1997 and January 2001, the complainant was arrested by the police on suspicion of belonging to the Sikh militant movement. He states that whenever an attack took place that was attributable to the terrorist militants in the region, the police turned up at his home and searched the house. His brother and his uncle had also been accused of being terrorists and his uncle had been killed by the police in 1993; his father, too, had been killed in an exchange of fire between terrorist militants and police in 1995.

2.3 The complainant was in the United Kingdom from July 1995 to February 1997 and applied for refugee status there. His application was turned down in September 1996. He decided to return to India, as the Akali Dal party had just been elected to govern the province in February 1997 and had promised to stop police violence and abuse in Punjab State; on his return he reportedly joined Akali Dal. He says that he continued to be harassed by the police. His brother had earlier left India for Canada and been granted refugee status there. This prompted the complainant to flee the country too, in May 2001.

2.4 On 8 May 2001 the complainant arrived in Toronto and claimed refugee status. In August 2002 the Canadian Security and Intelligence Service (CSIS) issued a report stating that there were reasonable grounds to believe that the complainant was a member of the Babbar Khalsa International (BKI) terrorist group, an alleged Sikh terrorist organization whose objective is to establish an independent Sikh state called Khalistan, taking in the Indian province of Punjab. Based on this report a warrant was issued for his arrest as he was deemed a threat to Canada's national security.

2.5 On 8 October 2002 a hearing was held to consider the report showing the complainant to be a member of a terrorist organization and an order was issued for his removal by the Immigration and Refugee Board.

2.6 The complainant applied for judicial review of the 8 October 2002 removal decision. On 8 December 2003 the Federal Court concluded that the hearing officer had not erred in determining that certain information was relevant but could not be disclosed for reasons of national security, and confirmed that that information should not be disclosed, but could nevertheless be taken into account by the Court. This ruling was upheld on appeal in a Federal Court of Appeal judgement dated 28 May 2004.

2.7 In parallel with this the complainant applied for a pre-removal risk assessment (PRRA). According to the PRRA decision of 26 June 2003, although the complainant had denied any involvement with any militant movement in Punjab, the CSIS report had found that there were substantial grounds for believing that he was a member of BKI and he was suspected under several aliases of having planned attacks on a number of Indian political figures. Given the profile established of the complainant, namely, a suspected member of BKI, the fact that BKI was listed as an international terrorist organization in several countries, and the treatment meted out by the police to suspected terrorists, the decision stated that "the complainant ran a real risk of torture and cruel and unusual punishment and treatment if returned to India".

2.8 In a decision of 2 December 2003, the Minister's delegate rejected the complainant's application for protection. While recognizing that there was a risk of torture in the event of deportation, she decided, after having weighed the interests at stake, that Canada's overall security interests should prevail in this case. She found that there was sufficient evidence of the complainant's membership of BKI and of his intention under various aliases to assassinate Indian public figures, including the Chief Minister of Punjab and the former Chief of Police of Punjab.

2.9 The complainant applied for judicial review of the 2 December 2003 decision of the Minister's delegate. On 11 June 2004, the Federal Court in Toronto noted that, according to Supreme Court case law, in particular the *Suresh* judgement cited by the complainant,[1] the prohibition of torture was "an emerging peremptory norm of international law" and international law rejected deportation to torture even where national security interests were at stake. The Court

[1] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

nevertheless considered that exceptional circumstances in the present case[2] led to the conclusion that the complainant was a "skilled BKI assassin who will lie to protect himself", for the exceptional circumstances were very different from those prevailing in the *Suresh* case. The Court found that, in the deportation decision, the Minister's delegate had erred in two respects. Firstly, the decision did not address any alternatives to deportation to torture: any such decision must consider, in the balancing exercise, any alternatives proposed to reduce the threat. Secondly, the decision failed to adequately describe and explain the threat posed to national security. Consequently the Court referred the deportation decision back for the Minister's delegate to prepare a revised version of the decision which would consider the alternatives to deportation suggested by the applicant and specifically define and explain the threat.

2.10 On 6 June 2005 the Court of Appeal upheld the appeal and referred the case back for a fresh PRRA. A second PRRA decision was issued on 31 August 2005, again finding that the complainant was at risk of torture in India since he was suspected of being a senior member of BKI.

2.11 On 11 May 2006 another decision on protection was handed down by the Minister's delegate, this time finding that, while the complainant might be prosecuted in India for his alleged part in assassination attempts, new legislation had entered into force protecting accused

[2] According to the Federal Court ruling cited here, the evidence before the Minister's delegate showed the following exceptional circumstances:

- The applicant, on behalf of BKI, used an alias to facilitate his plan to assassinate the Chief Minister of Punjab, his son and the former Chief of Police of Punjab;
- A *Times of India* article dated 9 June 2001 described the assassination plot and said that, had it succeeded, it would have destabilized the Indian Government;
- Information corroborated by reliable sources verified that the applicant is the same person as the Gurnam Singh mentioned in the article;
- BKI is implicated in the bombing of Air India flight 182;
- The secret evidence showed that the applicant has used six aliases including the name Gurnam Singh;
- The applicant is skilled in the use of sophisticated weapons and explosives;
- The letters suggest that, contrary to the applicant's statement in his PRRA application (that he had never claimed refugee status elsewhere), the applicant is a failed refugee claimant in the United Kingdom.

persons from abuses that had been tolerated under the old law.[3] On that basis she had determined that the complainant would run no risk of torture if he was returned to India. She also determined that the complainant posed a threat to national security. The request for protection was therefore denied.

The complaint

3.1 The complainant alleges a violation of article 3 of the Convention. He argues that the 2 December 2003 decision denying him protection was taken on the basis of irrelevant criteria such as the nature and gravity of past actions and the threat he posed to Canada's security, and that it violates the Convention, which allows for no exceptions with respect to return to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture. He recalls that, where it is shown that the person would be in danger of torture, it is against the principles proclaimed by the Convention to use irrelevant considerations to justify the denial of protection.[4] He argues that, in the 11 May 2006 decision on protection, the Minister's delegate again applied irrelevant considerations to justify the denial of protection to the applicant, in violation of the Convention and of international law. He also claims that the evidence in the case file shows beyond a doubt that there was a risk of torture if he was returned to India, as established in the three decisions preceding the 11 May 2006 denial of protection.

3.2 The complainant claims that the Minister's delegate had put him in even greater danger in her 11 May 2006 decision by attributing to him crimes he had not personally committed. Furthermore, there were several errors in the decision, for the Minister's delegate had failed to take account of the documents showing that torture was practised in India. According to these documents, torture was commonly used as an interrogation technique and the police were trained in its use, employing sophisticated methods that did not leave visible traces. The complainant argues that, rather than assessing the risk of the police using torture, the Minister's delegate merely asserted that the worst problems in Punjab were rural employment and the lack of food industries. He also points out that the delegate's claim that conditions in Punjab had improved overall in no way proved that a person believed to be a high-profile member of BKI would not be tortured. The delegate had also failed to address his specific situation. She ultimately had rejected out of hand the objective evidence such as Amnesty International's January 2003 report showing that, notwithstanding the legislative reform intended to stamp out torture, Punjab's judicial system remained most unsatisfactory. Lastly, the complainant states that the background documentation submitted clearly shows that torture is practised by the Indian authorities, particularly against militants or suspected terrorists. He claims that he would still be at risk of torture if he was returned to India.

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[3] The Minister's delegate stated that the Prevention of Terrorism Act 2001 had been replaced by the LOTA of 2002. The new law apparently established certain safeguards for the accused, such as a prohibition on forced confessions and a guarantee of the accused's right to have complaints of torture considered.

[4] The complainant cites the European Court of Human Rights judgement in *Chahal v. United Kingdom* [1996] 23 ECHR 413.

State party's observations on admissibility and the merits

4.1 The State party transmitted its observations on admissibility and the merits by note verbale dated 12 January 2007. The State party notes that, even though two requests for judicial review are still pending before the Federal Court, it will not at this stage challenge the admissibility of the communication for non-exhaustion of domestic remedies, though it reserves the right to do so once the proceedings in the Canadian courts are concluded.

4.2 The State party maintains that the complaint should be rejected on the merits because the complainant has failed to establish that he personally would run a real and foreseeable risk of torture in India. The State party notes that the human rights situation in Punjab has improved considerably since the end of the Sikh insurrection.

4.3 The State party further argues that the delegate of the Minister of Citizenship and Immigration has given careful consideration to the complainant's claims and determined that he was not in danger of being subjected to torture in India. The Committee should not substitute its own findings for those of the Minister's delegate except in case of manifest error, abuse of process, bad faith, bias or serious procedural irregularities. In the State party's view the complainant's claims to the Committee call into question the delegate's decision to reject his request for protection, and indirectly invite the Committee to conduct a judicial review of the decision. The State party recalls that the Committee's role is to establish a violation of article 3 of the Convention, not to carry out a judicial review of the delegate's decision.

Further observations by the State party

5. On 28 February 2007 the State party informed the Committee that the complainant's two requests for judicial review, one in respect of the decision of the Minister's delegate rejecting his application for protection and the other in respect of the decision to enforce the removal order, had been rejected by the Federal Court of Canada on 1 February 2007. The Court had found that the applications were now moot and that there were no grounds for it to exercise its discretion to consider the cases on the merits. The Court's judgement may be appealed in the Federal Appeal Court if the judge certifies that the matter raises a serious question of general importance. Since neither the complainant nor the Canadian Government requested certification of such a question within the time set by the Court, and since the Court itself has not certified that there is such a question, the Federal Court ruling has become enforceable.

Counsel's comments on the State party's observations

6.1 On 6 April 2007 counsel contested the State party's observations and communicated to the Committee certain new facts that had arisen since the complaint was submitted to the Committee.

New facts arising since submission of the complaint to the Committee

6.2 Counsel states that an application for judicial review of the decision to enforce the removal of the complainant had been made on 11 June 2006. Another application, for judicial review of the 11 May decision on protection, was still pending before the Federal Court at the time.

Counsel states that she was notified on 12 June 2006 that the complainant's removal had been set for 16 June 2006. She claims that, despite several requests for the exact time and destination of removal, she was given no information.

6.3 A provisional application for a stay was then made to the Federal Court, together with a request for an emergency hearing by telephone conference. The Canadian Government agreed to a temporary stay of removal pending a Federal Court hearing on the application for a stay, to be held on or around 16 June 2006. On 23 June 2006 the Federal Court rejected the application for a stay and the removal order then became enforceable.

6.4 On 30 June 2006 counsel filed a notice of appeal against the decision on the application for a stay with the Federal Court of Appeal, which rejected it the same day.

6.5 The Canadian Government deported the complainant to India on 2 July 2006, despite the Committee's request for interim measures. Counsel repeats that she was not informed of the destination, but notes that after the deportation she was told, on or about 5 July 2006, that the complainant had been arrested by the local police on arrival at the airport and taken to the Gurdaspur police station, where he remained in detention until 10 July 2006 on a number of serious criminal charges. She also says she was told that the complainant had been beaten and ill-treated by the Indian authorities while in detention at the Gurdaspur police station. Counsel states that the complainant was then taken from the police detention centre to the Chief Judicial Magistrate.

6.6 After the complainant had been deported, the two applications for leave and judicial review of the 11 May 2006 protection decision and of the removal order were granted. On 29 August 2006 the judge found that the case raised serious questions and the applications were accordingly heard in the Federal Court on 22 January 2007.

6.7 On 1 February 2007 the applications for leave and judicial review were rejected by the Federal Court, which found that they had become moot by virtue of the enforcement of the removal order against the complainant. His removal despite the fact that those requests were still before the Court deprived the complainant of the remedies available to him in Canada and he has therefore exhausted all domestic remedies.

6.8 Counsel contacted the complainant in India on 13 March 2007. He told her that he was charged with having supplied explosives to a person who had been convicted under Canadian arms and explosives legislation. He also told her he had been beaten by the police while in prison and threatened with further beatings if he reported that ill-treatment.

Comments on the merits

6.9 Counsel notes that, by sending the complainant back to India, the State party violated his rights under the procedure for determining the risks of torture and article 3 of the Convention. She recalls that the Canadian authorities denied that the complainant ran any risk of torture in order to be able to send him back legally. The Canadian Government erred in its assessment of the risk of torture in the event of return, in part by having recourse to secret evidence that the complainant did not have access to and could not challenge.

6.10 Counsel further claims that the Canadian Government was a party in the decision on protection for the complainant, thereby violating his right to be judged by an independent, impartial decision maker. She notes that it is clear from an e-mail sent to CBSA on 10 May 2006 by an official of the Government's Security and War Crimes Unit that CBSA was already aware that the protection decision would be negative and that the removal procedure had been set in motion, even though the decision had not yet appeared in the immigration computer files (FOSS). Yet the complainant was only notified of the negative decision on his case on 15 May 2006. The enforcement of the complainant's removal had thus already begun, despite the fact that he himself had not yet been informed of the decision and at this stage still had several remedies available to him against the decision. In counsel's view, the Minister's delegate responsible for taking the decision on protection failed to act in an independent and impartial manner.

6.11 Counsel argues that the 23 June 2006 decision rejecting the application for a stay was unlawful and incorrect in fact and in law since the evidence showed that there was a probable risk of torture were the complainant to be returned, in violation of article 3 of the Convention. Counsel argues that the application for a stay had to be presented in provisional fashion because she had been given only very short notice of the date of removal, leaving little time to prepare an application in such a complex case. However, the presiding judge at the hearing had refused to hold an interim hearing on the application and instructed the counsels to present their arguments on the merits. This procedure, she says, violated the complainant's right to proper representation. The judge at first instance had erred in the decision on the stay insofar as he had ignored the evidence of the three PRRAs pointing to probable risk of torture or persecution in the event of return to India.

6.12 Counsel notes that the complainant had been arrested and held for nearly four years on the basis of secret evidence and was never allowed to know the charges or evidence against him. In its recent *Charkaoui* decision,[5] the Supreme Court of Canada had found that the holding of in camera proceedings to consider evidence withheld from the applicant and with no public hearing on the admissibility of that evidence violated the rights to life, liberty and security of person under section 7 of the Canadian Charter of Rights and Freedoms.

6.13 During his four years in detention, the complainant was under constant threat of removal to a country where he risked torture, a situation that was in itself a form of torture and a violation of article 3 of the Convention.[6] As certified in the psychologist's report submitted in 2003, he suffered from serious psychological distress and showed symptoms of insomnia and stress, which made for additional risk in the event of return.

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[5] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.

[6] Counsel cites a report by Physicians for Human Rights entitled "Break them down - Systematic use of psychological torture by US forces" (20 May 2005), which defines the use of threats to return someone to a country where torture is practised as a form of torture in itself.

6.14 Counsel recalls the absolute prohibition in international law on return of a person at risk of torture[7] and claims that the return of the complainant is a deliberate and direct violation of the State party's international obligations and of article 3 of the Convention.

6.15 In counsel's view, therefore, the return of the complainant notwithstanding the decisions establishing a risk of torture and persecution, the absence of any new circumstances, the Committee's request for interim measures, the complainant's state of health and the evidence that there is a current risk of torture is unconstitutional and a direct violation of article 3 of the Convention. This conclusion is borne out by the fact that the complainant was arrested on arrival in India, had serious charges brought against him and was beaten and threatened by the Indian authorities.

Further comments by the parties

7.1 On 26 July 2007 the State party asserted that the only relevant point the Committee had to determine was whether, at the time of the complainant's return, there were substantial reasons to believe that he would personally be at risk of torture in India. Counsel's contentions in respect of various stages of the pre-removal procedure are incompatible ratione materiae with article 3 of the Convention. The State party recalls that article 3 does not recognize the right to be heard by an independent and impartial tribunal, the right to be properly represented by counsel or the right to know the evidence against one. The claims that the decisions rejecting the complainant's applications for protection and a stay of removal were arbitrary and unlawful cannot point to a violation of article 3. The State party considers that counsel is effectively asking the Committee to hear an appeal against the Canadian courts' decisions.

7.2 As to the claim that the State party had "been a party" to the decision of the Minister's delegate, the State party argues that it too is inadmissible, on grounds of non-exhaustion of domestic remedies, insofar as the complainant raised it for the first time before the Committee, whereas he should have raised it first with the Federal Court of Canada.

7.3 The State party argues that counsel's claims in respect of the pre-removal procedure are inadmissible because they do not demonstrate the minimum justification needed to meet the requirements of article 22 of the Convention. In the alternative, the claims in respect of the pre-removal procedure do not constitute a violation of article 3 of the Convention. The State party points out that the complainant's claims with regard to the Federal Court's refusal to grant the parties an interim hearing and his right to be heard by an independent and impartial court were in fact raised in the Federal Court, which found that the time limit for submitting an application for a stay was normal and noted that the complainant had known since 15 May 2006 that his request for protection had been denied and the removal procedure was to be set in motion. The State party argues that the complainant could have prepared his application for a stay well before 12 June 2006. As to the second claim, the presiding judge at the stay hearing

[7] In this context counsel cites the European Court of Human Rights decision in *Aksoy v. Turkey* (100/1995/606/694).

noted that the mere fact that the same case had come before him in earlier proceedings did not in itself give rise to a reasonable apprehension of bias. The State party is therefore of the view that the complainant's claims have been considered by the national courts in accordance with the law and have been rejected.

7.4 As to the claim that the decision rejecting the application for a stay was unlawful and incorrect, the State party argues that the Federal Court examined all the documentary evidence, including the fresh evidence submitted by the complainant, and declared itself not convinced that the complainant would be in danger of being subjected to torture in the event of return.

7.5 As to the claim that the State party was involved in the 11 May 2006 decision by the Minister's delegate rejecting the complainant's request for protection, the State party notes that this allegation is based on an e-mail to a CBSA staff member. It states that CBSA had had no say in the delegate's decision and the delegate had acted quite impartially. The State party further points out that there had not been three "preceding decisions" in the complainant's favour but one decision, dated 2 December 2003, which had been annulled, and two torture risk assessments carried out by PRRA officials (dated 26 June 2003 and 31 August 2005). The State party notes that, while delegates should take such assessments into account, they are not bound by them and it is they who must take the final decision on the request for protection.

7.6 As to the "secret" evidence, the State party asserts that there is no connection between the risk assessment conducted by the Canadian authorities and the examination of evidence not disclosed to the complainant for security reasons. In considering the question of risk of torture, the delegate did not consider the threat to Canada's security posed by the complainant. Her conclusion was thus not based on undisclosed evidence. The State party further points out that, under Canada's Immigration and Refugee Protection Act, in any inquiry to determine whether a foreigner is inadmissible, a judge may consider relevant information without disclosing it to the applicant if disclosure would be injurious to national security, although a summary of the information must be provided to the applicant, and that was done in this case.

7.7 The State party notes that the allegations regarding failure to apply the Committee's interim measures and regarding the threats to return the complainant to a country where he would be at risk of torture were never raised before the domestic courts. Canada takes its international obligations under the Convention seriously, but considers that requests for interim measures are not legally binding. As a result, contrary to the Committee's decision in *Tebourski v. France*,[8] the State party contends that non-compliance with such a request cannot in itself entail a violation of articles 3 and 22 of the Convention. It notes that, in *T.P.S. v. Canada*,[9] while the Committee expressed concern at the fact that the State party did not accede to its request for interim measures, it nevertheless found that Canada had not violated article 3 of the Convention in returning the complainant to India.

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[8] Communication No. 300/2006, Views of 1 May 2007, paras. 8.6 and 8.7.

[9] Communication No. 99/1997, Views of 16 May 2000, para. 16.1.

7.8 As to the assertion that the "threat of return to torture" in itself constitutes a violation of article 3, in the State party's view this claim should be declared incompatible ratione materiae with article 3. It is in any case inadmissible because it fails to demonstrate the minimum justification. The State party denies having subjected the complainant to psychological torture and argues that the progress of legal proceedings to determine a person's admissibility to a country and the mere possibility of being returned to a country where there was an alleged risk of torture could not constitute "torture" within the meaning of article 1 of the Convention.

7.9 The State party points out that it always looks very closely at the Committee's requests for interim measures and usually complies with them. In this case, after considering the file, and based in part on the negative findings of the Minister's delegate regarding the risks involved in returning to India and on the Federal Court's denial of the complainant's application for a stay, the State party considered that the complainant had not established that there was a substantial risk of torture in India.

7.10 As regards the allegation of a violation of article 3 of the Convention based on the complainant's return to India, the State party recalls that the matter must be weighed in the light of all the information the Canadian authorities were, or should have been, aware of at the time of expulsion. The State party recalls that, while torture is still occasionally practised in India, including in Punjab, the complainant failed to establish that he personally ran a real and foreseeable risk of torture. It notes that counsel reports having been told by the complainant's brother-in-law that the complainant had been beaten and ill-treated by the Indian authorities while in detention. The State party recalls that the complainant had not been considered credible by the Canadian authorities and the Committee should accordingly attach little weight to these claims. Furthermore, article 3 applies only to torture and does not provide protection against ill-treatment as covered by article 16 of the Convention.

8. In a letter of 24 September 2007 counsel repeats her earlier arguments.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering a claim contained in a communication, the Committee against Torture 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, paragraph 5 (a), that the same matter has not been, and is not being, examined under another procedure of international investigation or settlement and that all available domestic remedies have been exhausted.

9.2 The Committee takes note of the State party's argument that the complainant's claims with regard to the pre-removal process, i.e. the allegedly incorrect and unlawful decisions of the Canadian authorities, the non-disclosure of certain evidence, the Federal Court's refusal to grant an interim hearing and its alleged bias, are incompatible ratione materiae with article 3 of the Convention. However, the Committee considers that such irregularities must be considered in order to ascertain whether there has been a violation of article 3 of the Convention.

9.3 As to counsel's claim that the constant threat of being returned to a country where he would be in danger of torture, which hung over the complainant for four years, causing him "serious psychological distress", in itself constituted a form of torture, the Committee recalls its case law to the effect the aggravation of a complainant's state of health following expulsion - or, as in this case, by the threat of return while proceedings are ongoing - does not in itself constitute a form of torture or of cruel, inhuman or degrading treatment within the meaning of articles 1 and 16 of the Convention.[10]

9.4 With regard to the State party's contention that the complaint of a violation of article 3 of the Convention based on the return of the complainant to India is insufficiently substantiated for the purposes of admissibility, the Committee considers that the complainant has provided sufficient evidence to permit it to consider the case on the merits.

9.5 Accordingly, the Committee decides that the complaint is admissible in respect of the alleged violation of article 3 of the Convention based on the return of the complainant to India. The claim relating to non-compliance with the Committee's request to suspend removal also requires consideration on the merits under articles 3 and 22 of the Convention.

Consideration on the merits

10.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 22, paragraph 4, of the Convention.

10.2 The Committee notes the complainant's contention that the Minister's delegate, in her decision of 2 December 2003, used irrelevant criteria as grounds for refusing protection, namely that the person constituted a threat to Canada's security. The Committee recalls that article 3 affords absolute protection to anyone in the territory of a State party, regardless of the person's character or the danger the person may pose to society.[11] The Committee notes that the Minister's delegate concluded in her decision that the complainant personally ran a real risk of torture if he were returned. However, she considered that the general interest of Canada's security should prevail over the complainant's risk of torture, and refused the protection on this basis.

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[10] See *M.B.S.S. v. Canada*, communication No. 183/2001, Views of 12 May 2004, para. 10.2; and *G.R.B. v. Sweden*, communication No. 83/1997, Views of 15 May 1998, para. 6.7.

[11] See *Tebourski v. France*, communication No. 300/2006, Views of 1 May 2007, para. 8.2. Similarly, the European Court of Human Rights has considered the protection from torture to be absolute in the event of removal, as set out in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, recalling that neither the behaviour of the victim nor the threat they might pose to national security should be taken into account when considering a claim (see decision in *Chahal v. United Kingdom*).

10.3 The Committee also takes note of the complainant's argument that, in the decision of 11 May 2006, the Minister's delegate did not take into account the complainant's particular situation, and in denying protection merely cited a supposed improvement in the general conditions in the Punjab. The State party replied to this argument by stating that it is not for the Committee to conduct a judicial review of the decisions of the Canadian courts, and that the Committee should not substitute its own findings for those of the Minister's delegate, except in case of manifest error, abuse of process, bad faith, bias or serious procedural irregularities. The Committee recalls that, while it gives considerable weight to the findings of fact of the State party's bodies, it is entitled to freely assess the facts of each case.[12] In this case, the Committee notes that, in her protection decision of 11 May 2006, the Minister's delegate denied the real, personal threat of torture based on the fresh assessment, and merely accepted that a new law had been adopted in India apparently protecting accused persons from torture, without regard to whether the law would effectively be implemented or how it would affect the complainant's specific situation.

10.4 As for the Canadian authorities' use of evidence that for security reasons was not divulged to the complainant, the Committee notes the State party's argument that this practice is authorized by the Immigration and Refugee Protection Act, and that in any event such evidence did not serve as a basis for the decision by the Minister's delegate, as she did not consider the threat the complainant posed to Canadian security in her assessment of the risks. However, the Committee notes that, in both her decisions, the delegate considered the threat to national security.

10.5 On the basis of the above, the Committee considers that the complainant did not enjoy the necessary guarantees in the pre-removal procedure. The State party is obliged, in determining whether there is a risk of torture under article 3, to give a fair hearing to persons subject to expulsion orders.

10.6 As to the risk of torture at the time the complainant was removed, the Committee must determine whether, in sending the complainant back to India, the State party failed to meet its obligation under article 3 of the Convention not to expel or return anyone to another State where there are substantial reasons for believing that they would be in danger of being subjected to torture. In order to determine whether, at the time of removal, there were substantial reasons for believing that the complainant would be in danger of being subjected to torture if he was returned to India, the Committee must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which they were returned.

10.7 The Committee recalls its general comment on the implementation of article 3, in which it states that the risk of torture "must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable" (A/53/44, annex IX, para. 6).

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[12] See *Dadar v. Canada*, communication No. 258/2004, Views of 23 November 2005, para. 8.8.

10.8 The Committee must determine whether there were substantial grounds to believe torture would occur in the light of the information the authorities of the State party were, or should have been, aware of at the time of removal. In this case, the Committee notes that all the information before it, in particular the Canadian Security and Intelligence Service (CSIS) report and the two pre-removal risk assessments (PRRA), showed that the complainant was suspected of being a member of BKI, an alleged terrorist organization, and that a number of attacks on Indian political leaders were attributed to him. The information obtained after removal, i.e., his detention and the ill-treatment to which he was allegedly subjected during his detention in Gurdaspur, is relevant only to assess what the State party actually knew, or could have deduced, about the risk of torture at the time the complainant was expelled.[13]

10.9 The Committee also notes that, according to various sources and the reports provided by the complainant, the Indian security and police forces continue to use torture, notably during questioning and in detention centres, especially against suspected terrorists.

10.10 In the light of the foregoing, and taking account in particular of the fact that the complainant is allegedly a member of what is regarded as a terrorist organization, and that he was wanted in his country for attacks on several public figures in Punjab, the Committee considers that, by the time he was returned, the complainant had provided sufficient evidence to show that he personally ran a real and foreseeable risk of being subjected to torture were he to be returned to his country of origin. The Committee therefore concludes that, under the circumstances, the complainant's removal to India constituted a violation of article 3 of the Convention.

10.11 As regards non-compliance with the Committee's requests of 14 and 30 June 2006 to suspend removal, the Committee recalls that the State party, by ratifying the Convention and voluntarily accepting the Committee's competence under article 22, undertook to cooperate with the Committee in good faith in applying and giving full effect to the procedure of individual complaints established thereunder. The Committee also notes that the State party's obligations include observance of the rules adopted by the Committee, which are inseparable from the Convention, including rule 108 of the rules of procedure, which is specifically intended to give meaning and scope to articles 3 and 22 of the Convention.[14] Consequently the Committee considers that, by sending the complainant back to India despite the Committee's repeated requests for interim measures, the State party has committed a breach of its obligations under articles 3 and 22 of the Convention.

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[13] See *Agiza v. Sweden*, communication No. 233/2003, Views of 20 May 2005, para. 13.2; and *Tebourski v. France*, communication No. 300/2006, Views of 1 May 2007, para. 8.1.

[14] See *Dar v. Norway*, communication No. 249/2004, Views of 11 May 2007, para. 16.3; and *Tebourski v. France*, communication No. 300/2006, Views of 1 May 2007, para. 8.6.

11. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the expulsion of the complainant to India on 2 July 2006 was a violation of articles 3 and 22 of the Convention.

12. In conformity with article 112, paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, of the steps taken by the State party to respond to these Views, to make reparation for the breach of article 3 of the Convention, and to determine, in consultation with the country to which he was deported, the complainant's current whereabouts and the state of his well-being.

[Adopted in English, French, Russian and Spanish, the French 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.]
