



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

Distr.: General
16 January 2012

Original: English

Committee against Torture

Communication No. 365/2008

Decision adopted by the Committee at its forty-seventh session, 31 October to 25 November 2011

<i>Submitted by:</i>	S.K. and R.K. (unrepresented)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Sweden
<i>Date of the complaint:</i>	19 November 2008 (initial submission)
<i>Date of decision:</i>	21 November 2011
<i>Subject matter:</i>	Deportation of the complainants to Afghanistan
<i>Procedural issue:</i>	Non-exhaustion of domestic remedies
<i>Substantive issue:</i>	Prohibition of refoulement
<i>Article of the Convention:</i>	3

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-seventh session)

concerning

Communication No. 365/2008

Submitted by: S.K. and R.K. (unrepresented)

Alleged victims: The complainants

State party: Sweden

Date of the complaint: 19 November 2008 (initial submission)

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

Meeting on 21 November 2011,

Having concluded its consideration of complaint No. 365/2008, submitted to the Committee against Torture by S.K. and R.K. 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 complainants and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture

1.1 The complainants are R.K., born in 1981, and S.K., born in 1980, both brothers and nationals of Afghanistan, currently awaiting deportation from Sweden to Afghanistan. They claim that their removal to Afghanistan would constitute a violation by Sweden of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. They are unrepresented.

1.2 On 21 January 2009, the State party was requested, pursuant to rule 115, paragraph 1 (formerly rule 108, para. 1), of the Committee's rules of procedure (CAT/C/3/Rev.5), not to expel the complainants while their complaint is under consideration by the Committee.

The facts as presented by the complainants

2.1 In 1980, during the war with the former Union of Soviet Socialist Republics, the complainants' family left Afghanistan for the Islamic Republic of Iran. At that time, S.K. was 6 months old, while his brother, R.K., was born in Iran.

2.2 In 1990, due to the harsh living conditions in the Islamic Republic of Iran, the family decided to leave for Pakistan, where they lived as refugees in Quetta from 1990 to 1995. In 1995, the complainants' father died from a heart attack and left them with no means to survive. In the same year, the family moved back to seek asylum in Iran.

2.3 In 2000, the complainants began to working illegally in the Islamic Republic of Iran. They claim that Afghan refugees in Iran were always denied formal employment. In September 2000, Iranian police arrested the complainants for working illegally and kept them detained for 20 days. The complainants submit that during their detention Iranian police ill-treated and tortured them.

2.4 In December 2000, the complainants were deported to Afghanistan and were threatened with death by Iranian police if they returned to the Islamic Republic of Iran. After arrival in Afghanistan, the complainants were arrested by the Taliban and taken to Kandahar, where they were allegedly tortured, beaten, ill-treated and insulted. The complainants were subjected to torture on a daily basis for about two weeks, which included being electrocuted on their genitals, forced to be naked at night, beaten and dragged through the mountains blindfolded, and threatened with death. They claim that they still have physical and psychological scars as a result of the torture inflicted. The Taliban considered them as enemies of the State, infidels of Islam, and spies, because they grew up in Iran and did not speak Pashto (the language spoken in most areas of Afghanistan).

2.5 The complainants managed to escape the Taliban and fled to Quetta in Pakistan, where they lived for some time with one of their sisters and her husband. In Pakistan, they learned that their mother and other sisters, who had stayed in the Islamic Republic of Iran, had resettled as refugees in Sweden on 30 December 2000. The complainants' mother advised them to travel to Tehran and apply for family reunification at the Swedish embassy. They travelled to Tehran to start the application process at the Swedish Embassy.

2.6 In May 2001, the complainants had their first interview at the Swedish embassy. After one year, the Swedish embassy informed them that their application for family reunification was rejected because they were no longer minors. According to the complainants, some unidentified officials at the Swedish embassy as well as an official representing the Office of the United Nations High Commissioner for Refugees (UNHCR) in Tehran advised them to travel to Sweden illegally and to seek asylum there.

2.7 In the Islamic Republic of Iran, R.K. was arrested on an unspecified date by Iranian police and deported back to Afghanistan. According to the complainant, when the Afghan police saw the documents from the Swedish embassy, they reacted brutally, and beat him on his head with a Kalashnikov to the point that he almost lost his life. He claims that he was imprisoned, beaten and tortured again in Afghanistan. After a few weeks in jail, he managed to escape by bribing prison guards and returned to Pakistan to join his brother and sister. S.K. travelled back to Quetta, Pakistan as well.

2.8 In July 2003, the complainants' mother and two of their sisters visited them in Quetta. Their mother obtained false identity papers for both complainants and arranged their marriage with their own sisters so that they could travel to Sweden. They reached Sweden and admitted to the Swedish Migration Board that they carried false identity papers and were married to their own sisters. On an unspecified date, the Swedish Migration Board withdrew their permits to stay in Sweden and they applied for asylum under their real identities.

2.9 On 31 March 2006, both complainants were granted a residence permit by the Swedish Migration Board for one year. After one year, these residence permits were not extended. Their expulsion order was issued on 3 October 2008.

2.10 The complainants submit that they fear for their lives as they are considered as traitors by people in Afghanistan. R.K. claims that he is allegedly "blacklisted" in Afghanistan for his work at the Swedish integration unit as a translator for refugees and asylum-seekers, many of whom were Afghans. He claims that he receives telephone calls from unknown persons questioning him on his work as a translator and asking why he is interrogating people from Afghanistan in Sweden. He explains that he only translates from the Iranian language as he hardly speaks Pashto. He claims that he has received several

threatening phone calls from unknown people. They claim that they are certain to be arrested in Afghanistan for having sought asylum, which is considered a crime.

2.11 On 20 January 2009, the complainants submitted that their financial situation in Sweden had worsened, that they had lost their jobs, and have no means to live or right to health care. They submitted that one of the reasons why they had to leave the Islamic Republic of Iran initially was that their father, who was a lawyer and Member of Parliament, had made many enemies in Afghanistan, who are now officials in the present Government, and they fear to be killed if returned, simply on the basis of their name.

The complaint

3. The complainants claim that their forcible return to Afghanistan, where there is a real risk that they will be tortured, would amount to a breach by Sweden of their rights under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

State party's observations on admissibility

4.1 On 26 January 2009, the State party contested the admissibility of the complaint on the grounds of failure to exhaust domestic remedies. It submits that under chapter 12, sections 18 and 19 of the Aliens Act of 2005, an alien may be granted a residence permit even if a refusal-of-entry or expulsion order has gained legal force. If during enforcement of such an order, information comes to light that may constitute an impediment to the enforcement, the Swedish Migration Board may grant a permanent residence permit if the impediment is of a lasting nature, or a temporary residence permit if the impediment is of a temporary nature. This may be the case, where, for example, new circumstances emerge on the basis of which there are reasonable grounds for believing that an enforcement of the order would put the alien in danger of being sentenced to death or of being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment. In such cases, the Migration Board may issue an order staying the enforcement case.

4.2 The State party submits that under chapters 14 and 16 of the Aliens Act, the Migration Board's decision can be appealed to a Migration Court with a further appeal to the Migration Court of Appeal, subject to leave to appeal to be granted. On 6 March 2008, the Migration Court decided, due to, inter alia, the deterioration of the situation in the complainants' country of origin, to grant them a re-examination of the question of residence permits and therefore remitted the matter to the Migration Board. On 3 October 2008, the Board, taking into account the possibility of an internal flight alternative, rejected the complainants' application for residence permits. The complainants appealed against the decisions of the Board to the Migration Court, which rejected their appeals in judgements dated 3 December 2008. The complainants did not appeal against the Migration Court's judgements, which gained legal effect on 29 December 2008.

4.3 According to the State party, before even the Migration Court delivered its judgements, the complaint was lodged with the Committee. Thus, domestic remedies had not been exhausted at that time. Furthermore, the State party argues that the complainants did not appeal to the Migration Court of Appeal, which if successful, could have lead to the granting of residence permits. They did not thereby give the domestic authorities the full possibility of examining the new circumstances invoked. In the light of the foregoing, the State party maintains that the complainants have not exhausted all domestic remedies available to them. Consequently, the complaint should be declared inadmissible pursuant to article 22, paragraph 5 (b), for failure to exhaust domestic remedies.

The complainants' comments on admissibility

5.1 On 6 March 2009, the complainants indicated their surprise at the State party's argument that they had not exhausted domestic remedies as, prior to being granted interim measures of protection, they had received several summonses to meetings to organize their deportation. In their view, they must have exhausted domestic remedies if the State party was in a position to deport them. They recall that the situation in Afghanistan is critical. Therefore, they express their surprise that the Migration Board, after having re-examined the question of residence permits, advocates an internal flight alternative, particularly in a country where there is so much violence.

5.2 The complainants believe that they have the right to live peacefully in Sweden instead of being expelled to a country where they endured torture, faced imprisonment and their father was subjected to persecution and retaliation by his enemies who currently hold the power in Afghanistan. They also maintain that their names are blacklisted in Afghanistan because of their father's past activities, as explained thoroughly by their mother who is a refugee in Sweden.

State party's observations on admissibility and merits

6.1 On 30 September 2009, the State party provided its observations on the admissibility and merits. It presents detailed information on the pertinent Swedish asylum legislation and further submits the following information concerning the facts of the complainants' case, based primarily on the case files of the Swedish Migration Board and the migration courts. The complainants' applications for asylum have been examined in several sets of proceedings, including under the 1989 Aliens Act and under the temporary amendments to the 1989 Aliens Act. Furthermore, they have applied for permanent residence permits on several occasions under the 2005 Aliens Act, arguing that there were lasting impediments to the enforcement of the expulsion orders. These applications have been examined by the Migration Board, and as regards the second complainant, also once by the Migration Court, without being accepted for a re-examination. After the latest application, a re-examination of the matter of a residence permit was granted by the Migration Court. The Migration Board and the Migration Court subsequently undertook a re-examination of the matter.

6.2 The two complainants are brothers, born in 1981 (the first complainant) and 1980 (the second complainant). They are both citizens of Afghanistan. They applied for residence permits at the Swedish embassy in Tehran on 25 April 2001. Their applications were based on the fact that their mother and four of their eight siblings resided in Sweden. The applications were rejected by the Migration Board on 29 January 2002. It made the assessment that no special relationship of dependence had existed between the complainants and their relatives at the time when the latter moved to Sweden. The appeal was rejected by the Aliens Appeals Board.

6.3 In July 2003, the complainants applied for residence permits in Sweden under false identities. The applications were based on the allegation that they had married two women with residence permits in Sweden. On 18 June 2004, they were granted temporary residence permits for six months under their false identities. They arrived in Sweden on 30 June 2004. The State party submits that the complainants have incorrectly stated in their complaint to the Committee that they willingly revealed their real identities to the Migration Board once in Sweden. During the process of extending the temporary residence permits, the Migration Board found out that the complainants had been granted residence permits under false identities and that their alleged wives were in fact their own sisters. They admitted to this only after having been confronted with this information by the Migration Board. As a result, the Migration Board initiated a process of ordering their expulsion to the country of origin and appointed a legal counsel for them. It also reported the complainants to the police.

6.4 The complainants lodged applications for asylum on 7 June 2005. Interviews were held on 14 December 2005 in the presence of their counsel and an interpreter. The first complainant stated that he was born in the Islamic Republic of Iran but he is an Afghan citizen. He has lived in Iran his entire life, with the exception of a few years when he lived in Pakistan. Being a national of Afghanistan, he could not get a work permit in Iran and he was not allowed to go to school. In Iran, he was arrested twice due to lack of a residence permit. On both occasions he spent a few months in a refugee camp in Iran, where he was maltreated, and on both occasions he was sent to Afghanistan and spent a few weeks there. He never had any problems with Afghan authorities. He had no problems entering the country. The only question posed by Afghans was whether he was Afghan and whether he had been to Iran. He cannot return to Iran or Pakistan. He cannot return to Afghanistan since he has no connection to that country. He went to Sweden because his family is there.

6.5 The second complainant stated that he was born in Afghanistan and that he left Afghanistan for the Islamic Republic of Iran together with his family when he was six months old because of the war against the former Soviet Union. He has lived in Iran his entire life, with the exception of six years when he lived in Pakistan. He had a temporary residence permit in Iran and he worked there under harsh conditions. The Iranian authorities interned him and his brother in a refugee camp, where a soldier hit him on one of his knees. Since then, he has had problems with the knee. He does not know anyone in Afghanistan and he does not speak the language. He cannot return to Iran or Pakistan since he will not be given a residence permit. The reason for giving false information about his identity was that he wanted to join his family in Sweden.

6.6 On 19 December 2005, the Migration Board rejected the complainants' applications for residence permits, work permits, declarations of refugee status and travel documents, and ordered that they be expelled to Afghanistan, unless they could show that some other country was willing to receive them. They were prohibited to return to Sweden without the permission of the Migration Board for a period of two years from the date of the decision. The Migration Board initially stated that the complainants' applications were to be considered in relation to Afghanistan due to their Afghan citizenship. It found no reasons to examine their applications in relation to Pakistan or the Islamic Republic of Iran, since they had allegedly no residence permits there. According to the Board, the general situation in Afghanistan was not in itself sufficient reason for granting residence permits in Sweden. The complainants had failed to substantiate that they were to be regarded as refugees or aliens otherwise in need of protection and therefore entitled to asylum. Furthermore, the Board found no reasons to deviate from the assessment previously made by both the Board and the Aliens Appeals Board regarding residence permits based on their relationship to their mother and siblings residing in Sweden. There were no humanitarian or other reasons to grant the complainants residence permits. Due to the fact that they had appeared under different identities, used false documents, withheld important information and stated reasons for residence permits that were substantially incorrect, the expulsion orders were combined with a prohibition to return to Sweden for a period of two years. The decision was appealed to the Aliens Appeals Board. On 28 March 2006, the Appeals Board decided to strike the case from its list after the complainants had withdrawn their appeals. The Migration Board's decision thereby gained legal force.

6.7 On 31 March 2006, the Migration Board decided to grant the complainants temporary residence permits valid for one year according to the temporary amendments to the 1989 Aliens Act, on grounds that, due to the situation in Afghanistan, Sweden did not expel people there by force. However, it was envisaged that it would likely be possible to expel single men in the foreseeable future since they would have good chances of reintegrating into the Afghan society. The Board also stated that UNCHR did not oppose forcibly expelling persons to Afghanistan. Therefore, the orders to expel the complainants were not repealed.

6.8 The complainants applied for an extension of their temporary residence permits. Their applications were rejected by the Migration Board on 30 May and 13 June 2007 respectively. The Board considered that the circumstances presented by the complainants could not be considered as lasting impediments to the enforcement of the expulsion orders.

6.9 In an application of 14 June 2007, the first complainant requested to be granted a residence permit, stating that he had settled down in Sweden and his entire family was here. He was a Shia Muslim and hence particularly vulnerable in Afghanistan. Upon return he would be forced to join the army. On 21 June 2007, the Migration Board rejected the application. The first complainant appealed against the decision to the Migration Court. The appeal was rejected on 6 July 2007 on grounds that the individual circumstances stated by the complainant had already been examined. Even considering the situation in Afghanistan, no new circumstances had been brought forward that could be considered as lasting impediments to the enforcement of the expulsion order.

6.10 In subsequent applications, the complainants again requested, through their legal counsel, that they be granted residence permits, maintaining their previous claims and adding that they originate from Kandahar, which is a very dangerous place. There was also a clear risk that they would be forced to perform military service or to join militia forces. It had been argued that their mother suffered from senile dementia because of her sons' problems in obtaining residence permits. The second applicant also added that he had undergone a knee surgery and had still not completely recovered. He was likely to need further surgery which he could not get in Afghanistan. The Migration Board rejected the applications on 25 September 2007.

6.11 In applications submitted on 18 January 2008, the complainants reiterated their previous claims and added that the second complainant suffers from depression as documented by a medical report attached to their applications. They also referred to their adaptation to Sweden and the general situation in Afghanistan, and maintained that they would not be let into Afghanistan, should their expulsion be enforced. On 30 January 2008, the Migration Board rejected their applications and decided not to re-examine them. It noted that the scope of taking into account medical obstacles or adaptation to Sweden is very limited and shall only apply in exceptional situations. The Board considered that a return to Kandahar province in the south of Afghanistan was not possible at that moment, however it was reasonable to demand that the complainants seek protection internally, for example in Kabul. Although the situation in Kabul was difficult with regard to maintenance and housing, the investigation did not show anything other than that the complainants would be received in Afghanistan and that they had the right to apply for work in Kabul. The complainants appealed against this decision to the Migration Court, claiming that there was a political impediment to the enforcement of the expulsion orders, namely the Migration Board's general decision not to expel persons originating from the south of Afghanistan.

6.12 On 6 March 2008, the Migration Court decided to grant a re-examination of the matter of residence permits and therefore remitted the matter to the Migration Board. The Court found that the situation in Kandahar province constituted an impediment to the enforcement of expulsion orders to that particular province. On 13 March 2008, the Migration Board decided to stay the enforcement of the expulsion orders regarding the complainants.

6.13 The Migration Board held supplementary interviews with the complainants on 3 September 2008. The complainants claimed that they do not know anyone in Afghanistan and they do not know where to turn. They would be hungry, with no work or place to live. To survive they would perhaps have to participate in the armed conflict or to sell drugs. They do not speak the language of Afghanistan. They speak Dari, but they speak the dialect used in the Islamic Republic of Iran. Due to this, they would risk being killed. They also

risk being killed by the Taliban because they are Shia Muslims. Their mother is ill and it would be a great danger to her health if they were expelled to Afghanistan. The second complainant also stated that he is not feeling well, that he sleeps badly and is stressed.

6.14 On 3 October 2008, the Migration Board rejected the complainants' applications for residence permits. The Board based its decision on a judgment of the Migration Court of Appeal in a similar case, according to which the Migration Board shall determine whether it is reasonable to apply an internal flight alternative. The prerequisite for applying internal flight alternatives is that the alien will be received in the country of return and is entitled to apply for work there. If the alien would be exposed to undue hardship, internal flight is not a reasonable alternative. This determination should be made on a case-by-case analysis. Not only the general situation in the country is to be considered, but also the alien's possibility to settle down in a new place where he or she lacks a social network. In this evaluation such circumstances as gender, age and state of health may be of relevance. The Migration Court of Appeal stated that the situation in Kabul was not such that a person risked serious abuse due to internal armed conflict or other severe conflicts. The security situation in Kabul was much better than in the countryside, above all due to the presence of the International Security Assistance Force (ISAF). In addition, national and international humanitarian organizations were established in Kabul. The Migration Board then noted that the Government of Sweden, the Government of Afghanistan and UNCHR had concluded an agreement of readmission of Afghan nationals. According to the agreement, a person voluntarily returning to Afghanistan would receive financial assistance upon arrival in Kabul. Taking this into consideration, the Migration Board concluded that the complainants could not be considered to risk undue hardship if returned to Afghanistan. As men, they could move freely within the country and had the option of settling down elsewhere than in Kandahar province. There were no reasons to believe that they would not be received in Afghanistan or that they would be expelled from the country. It did not appear likely that it would be difficult for them to acquire identity documents. The Board added that in an examination of impediments to the enforcement of an expulsion order that had gained legal force, there is very little scope for taking into consideration an alien's state of health or adaptation to Sweden. Thus, it found the circumstances presented by the complainants not lasting impediments and considered that internal flight was an alternative for them. They had not given probable cause to believe that they were to be regarded as refugees or as aliens otherwise in need of protection and therefore entitled to asylum.

6.15 The complainants appealed against the decision to the Migration Court. They maintained their previous claims and added that there was no internal flight alternative. They claimed that, according to a report issued by UNHCR on 5 October 2008, people should no longer be sent to Kabul, especially those without any connection to Kabul. The Taliban were only a few kilometres away from Kabul. Their expulsion would constitute a personal disaster for their mother. The Migration Court rejected their appeals on 3 December 2008. The Court stated that there was no scope, within the assessment of the lasting impediments, to consider humanitarian aspects such as the health of the complainants' mother or their adaptation to Sweden. As to the internal flight alternative, the Court relied on a judgment rendered by the Migration Court of Appeal in a similar case (see para. 6.14, above) and pointed out that the complainants were young, healthy and capable of working, and that Kabul was a reasonable alternative for internal flight. The complainants did not appeal against the Migration Court's judgment, and as a result the judgment gained legal force on 29 December 2008.

6.16 The complainants submitted their complaint to the Committee in November 2008, i.e. before the Migration Court had rendered its judgments. On 26 January 2009, the Migration Board decided to stay the enforcement of the expulsion orders regarding the complainants, as requested by the Committee.

6.17 As regards the admissibility of the complaint, the State party submits that it is not aware of the present matter having been or being subject to any other international investigation or settlement. With regard to the exhaustion of all domestic remedies, as required under article 22, paragraph 5 (b), of the Convention, it maintains its position that the complainants have not exhausted all available domestic remedies, and therefore the complaint is inadmissible for failure to exhaust domestic remedies. Irrespective of the Committee's examination relating to article 22, paragraph 5 (a) and (b), of the Convention, the State party maintains that the complainants' assertion that they are at risk of being treated in a manner that would amount to a breach of the Convention fails to attain the basic level of substantiation required for purposes of admissibility, and therefore the complaint is manifestly unfounded and inadmissible under article 22, paragraph 2, of the Convention.¹

6.18 With regard to the merits, should the Committee consider the complaint admissible, the issue before it is whether the forced return of the complainants to Afghanistan would violate the obligation of Sweden under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. It recalls that, when determining whether the forced return of a person to another country would constitute a violation of article 3, 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 in that country. However, as the Committee has repeatedly emphasized, the aim of the determination is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would be returned. 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 a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. For a violation of article 3 to be established, additional grounds must exist, showing that the individual concerned would be personally at risk.²

6.19 With regard to the human rights situation in Afghanistan,³ the State party submits that the country's human rights record remains poor due to insurgency, weak governmental and traditional institutions, corruption, drug trafficking, and the country's long-term conflict. The human rights violations include torture and unlawful killings by the Government and its agents and the Taliban and other insurgent groups.⁴ During the 2008 and 2009 the situation has worsened, and 2008 was the most violent year since 2001. The conflict has spread from southern, south-eastern and eastern regions to areas that had been relatively stable in the recent past, including Kabul's surrounding central provinces as well as part of the northern and western regions.⁵ However, the situation in Kabul is better than in other parts. In Kabul, police authorities are generally willing to enforce the law, although

¹ The State party refers to communication No. 216/2002, *H.I.A. v. Sweden*, decision adopted on 2 May 2003, para. 6.2.

² Communications No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3; and No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

³ The State party makes reference to the Report on Human Rights issued by the Swedish Ministry for Foreign Affairs; the United States Department of State, "2008 Human Rights Report: Afghanistan", 2008 Country Reports on Human Rights Practices (25 February 2009); the United Kingdom of Great Britain and Northern Ireland, Home Office, "Country of origin information report on Afghanistan" (26 June 2009); the United Kingdom, Home Office, "Operational guidance note on Afghanistan" (8 April 2009); the Amnesty International Annual Report; the Human Rights Watch World Report; and the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (July 2009).

⁴ United Kingdom, Home Office Operational Guidance Note, para. 2.11.

⁵ UNHCR Eligibility Guidelines, p. 42.

their ability to do so is limited by inadequate resources and dependent to some extent on the loyalties of the officers. In Kabul, ISAF (led by NATO), assists the Government in providing and maintaining security. Based on the existence of a limited judicial and legal system, the willingness of police authorities to enforce the law and the presence of ISAF, a sufficiency of protection is generally available in Kabul.⁶ An independent human rights commission (the Afghanistan Independent Human Rights Commission) has been established and is working actively trying to improve the human rights situation in Afghanistan.⁷ On 23 June 2007, the Government of Sweden, the Government of Afghanistan and UNCHR concluded a memorandum of understanding concerning the return of Afghan nationals from Sweden. The major purpose of the agreement is to facilitate the voluntary return of asylum-seekers, but the agreement does not exclude forced return. The agreement expired on 30 April 2009 and has not yet been renewed.

6.20 As to the complainants' personal risk of torture upon return to Afghanistan, the State party notes that the obligation of non-refoulement is directly linked with the definition of torture as laid down in article 1 of the Convention,⁸ and recalls the Committee's jurisprudence to the effect that the obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention. Furthermore, according to the Committee's jurisprudence, for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is to be returned.⁹ The requirement of necessity and predictability should be interpreted in the light of its general comment No. 1 (1996) on the implementation of article 3 of the Convention, according to which it is for the complainant to present an arguable case, i.e. to collect and present evidence in support of his or her account of events.¹⁰ In this context, the State party recalls that the Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee will apply when examining a complaint under the Convention. The national authority conducting the asylum interview is in a very good position to assess the information submitted by an asylum-seeker and to evaluate the credibility of his or her claims. In the present case, the Migration Board held two interviews for each of the complainants regarding their applications, thus the Board had sufficient information, including the facts and the documentation available on file, so as to ensure that it had a solid basis for its assessment of the complainants' need for protection in Sweden. Their applications for residence permits have been examined several times by the migration authorities, including the Migration Court of Stockholm. Therefore, great weight must be attached to the assessment made by the Swedish migration authorities. With regard to the merits of the complaint, the State party relies on the decisions rendered by the Migration Board and the Migration Court.

6.21 The complainants argue that, if deported to Afghanistan, they would risk being tortured or even killed, and invoke the following grounds: they do not speak the language of Afghanistan and they do not share the same culture; they were tortured in Afghanistan after being deported there by the Iranian police; their deportation would put them at risk of

⁶ United Kingdom, Home Office Operational Guidance Note, para. 3.6.6.

⁷ Report on Human Rights issued by the Swedish Ministry for Foreign Affairs.

⁸ Communication No. 83/1997, *G.R.B. v. Sweden*, decision adopted on 15 May 1998, para. 6.5.

⁹ Communication no. 103/1998, *S.M.R. and M.M.R v. Sweden*, decision adopted on 5 May 1999, para. 9.7.

¹⁰ *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX, para. 5. See communications No. 150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para. 6.4; and No. 265/2005, *A.H. v. Sweden*, decision adopted on 16 November 2006, para. 11.6.

being tortured and killed by “tribal fighters” and the Taliban, who will regard them as traitors and disloyal, and Afghan authorities will not guarantee their safety; they will be arrested for having sought asylum in Sweden, which is considered a serious crime in Afghanistan; the first complainant worked as an interpreter for asylum-seekers in Sweden and he has therefore been registered by the Afghan secret police and is “blacklisted” in Afghanistan; their father, who was a lawyer and a Member of Parliament, had several enemies in Afghanistan and some of them are officials in the present Government, therefore they will be killed because they bear the same name.

6.22 The State party recalls that it is up to the complainants to present an arguable case. In this regard, in the present case the complainants’ claims are vague and unsubstantiated. They have not presented any evidence in support of their claims. Furthermore, there is also a clear contradiction in the first complainant’s story. During the asylum proceedings, he stated that he had had no problems with the Afghan authorities when he was expelled there by the Iranian authorities, which occurred twice. In the Islamic Republic of Iran, on the other hand, he was brutally treated. From his statement to the Migration Board, it seems that the Afghan authorities took very little interest in him. This is in sharp contrast to what is contained in the complaint submitted to the Committee, where the complainants state that the Afghan police had reacted so brutally when they saw documents from the Swedish embassy, which the first complainant brought with him, that he almost lost his life.

6.23 The complainants’ story has escalated considerably from the first asylum interviews held in December 2005 until the present complaint, which was submitted to the Committee towards the end of 2008. Their applications in Sweden were based mainly on the difficult security situation in Afghanistan and the fact that they had never lived there and that their mother and siblings lived in Sweden. Before the Committee they have invoked totally new circumstances. During the interviews held in December 2005, the complainants neither mentioned that they had been tortured in Afghanistan, nor did they express any fear of the Afghan police or other Afghan authorities. During the interviews held in September 2008 (see para. 6.13 above), both complainants stated that they risked being killed by the police because they speak the dialect of Dari used in the Islamic Republic of Iran, and by the Taliban because they are Shia Muslims. In the complaint before the Committee there is further escalation, since they mention for the first time that they have been tortured in Afghanistan. They both claim that they have been tortured by the Taliban and the first complainant also claims to have been tortured by the Afghan police. They invoke entirely new grounds against their expulsion to Afghanistan: first, that they sought asylum in Sweden, which is considered to be a serious crime in Afghanistan; second, that the first complainant is registered with the Afghan secret police because of having worked as an interpreter for asylum-seekers in Sweden; third, that some of their father’s old enemies are officials in the present Government and they will be killed because their name is known.

6.24 In view of the foregoing, there are reasons to question the credibility of the complainants’ claim that they would risk torture upon return to Afghanistan. The general credibility is also undermined by the fact that they obtained residence permits in Sweden based on false identities and untrue statements. In addition, their allegation before the Committee that they willingly told the Swedish authorities that they had lied about their identities is incorrect. They admitted to having lied only after being confronted with this information, which happened more than nine months after their arrival in Sweden. This factor further undermines their credibility.

6.25 As regards the complainants’ allegation that they are at risk of being tortured and killed by “tribal fighters” and the Taliban, it follows from article 1 of the Convention and the Committee’s jurisprudence that the risk of being subjected to ill-treatment by a non-governmental entity or by private individuals, without the consent or acquiescence of the

Government of the receiving country, falls outside the scope of article 3. In any event, the complainants have not substantiated their claim that they would run such a risk.

6.26 There is nothing to indicate that the Afghan authorities would have any particular interest in the complainants. In making the risk assessment, it must be taken into account that the complainants have never lived in Afghanistan, that their parents left the country nearly 30 years ago and that (like more than six million other Afghans) they escaped from Afghanistan because of the war with the former Soviet Union. It is noteworthy that more than one million Afghan refugees have returned from the Islamic Republic of Iran to Afghanistan. In addition, the complainants' own stories as told to the Migration Board do not convey the impression that the Afghan authorities would take any real interest in them. The first complainant expressly stated that he had not had any problems with the Afghan authorities when he was deported there, and the second complainant did not mention that he had been to Afghanistan. Furthermore, two of the reasons given for why the Afghan authorities would take an interest in them – the registration with the secret police of the first complainant and the position within the Government of their father's enemies – are unsubstantiated and lacking in detail and were never presented to the Swedish authorities despite the fact that the complainants had several opportunities and plenty of time to do so. Moreover, with regard to the explanation given by the first complainant that he has been registered with the secret police because of his work as an interpreter for asylum-seekers in Sweden, the Swedish embassy in Kabul has reported that it has no knowledge of the present Afghan security service engaging in "asylum espionage" or if its registers contain information on Afghan asylum-seekers. The third reason, i.e., that the fact that they have sought asylum in Sweden is a very serious crime in Afghanistan, was not presented to the Swedish authorities either. The Swedish embassy in Kabul has reported that it is not aware that seeking asylum in another country would be a criminal offence under the Afghan law. In this context, the State party recalls that the Government of Sweden, the Government of Afghanistan and UNCHR have concluded a memorandum of understanding on the readmission of Afghan asylum-seekers, which would not have been concluded if seeking asylum had been a criminal offence.

6.27 The complainants allege before the Committee that they were tortured in Afghanistan. This claim is wholly unsubstantiated and it was not presented to the Swedish authorities. Notwithstanding this, it is recalled that the Committee has observed that, while past torture is one of the elements to be taken into consideration when examining a claim under article 3, the aim of the Committee's examination is to determine whether the complainants would risk being subjected to torture now, if returned to their home country.¹¹

6.28 As to the complainants' claim before the Committee that they do not speak the language of Afghanistan, it should be noted that Afghanistan has two official languages, Dari and Pashto, which both belong to the Iranian group of languages. Dari is spoken by about 50 per cent of the population, while Pashto is spoken by about 35 per cent; in Kabul the majority speaks Dari. There is no doubt that both complainants speak Dari, given that the asylum interviews were conducted in this language. In addition, there is certain information indicating that the first complainant, at least, speaks Pashto. When he was interviewed in Islamabad in connection with his application for residence permit in Sweden on account of his alleged marriage to a woman living in Sweden, there was interpretation to and from Pashto and it was stated in the report that the complainant speaks Pashto. In the light of the foregoing, the complainants would have no real language problems if returned to Afghanistan. There is no indication that they would be exposed at any particular risk of

¹¹ Communication No. 61/1996, *X, Y. and Z. v. Sweden*, decision adopted on 6 May 1998, para. 11.2.

torture or of being killed only because they speak a dialect of Dari used in the Islamic Republic of Iran.

6.29 The Swedish Migration Board and the Migration Court of Stockholm both concluded that an alternative of internal flight is available to the complainants, especially in Kabul. The human rights situation is better in Kabul than in other parts of the country. In case of voluntary return it could be possible for the complainants to obtain financial support under the Regulation Relating to Re-establishment Support for Certain Foreigners. Such financial support amounts to 30,000 Swedish krona for an adult who is over 18 (equivalent to about 3,000 euro). It can be granted to aliens who are returning voluntarily to a country where establishment is difficult due to the prevailing situation. Afghanistan is considered to be one of these countries.

6.30 In conclusion, the State party contends that the present complaint should be declared inadmissible (a) under article 22, paragraph 5 (b), for failure to exhaust all domestic remedies; or (b) under article 22, paragraph 2, as being manifestly unfounded, since the circumstances invoked by the complainants do not suffice to show that the alleged risk of torture fulfils the requirements of being foreseeable, real and personal: the complainants have not shown substantial grounds for believing that they would run a real and personal risk of being subjected to treatment contrary to article 3 if deported to Afghanistan, and therefore the complaint fails to attain the basic level of substantiation required for purposes of admissibility.

State party's further observations

7.1 By note verbale of 19 April 2010, the State party informed the Committee that, according to chapter 12, section 22 of the 2005 Aliens Act, an expulsion order that has not been issued by a general court on account of a criminal offence expires four years after the order became final and non-appealable. The Migration Board's decision regarding the expulsion of the complainants became final and non-appealable on 28 March 2006 when the Aliens Appeals Board decided to strike the case from its list of cases after the complainants had withdrawn their appeal. The decision on expulsion hence became statute-barred on 28 March 2010.

7.2 When a decision on expulsion expires, the alien is summoned to a meeting at the Migration Board. At that meeting, the alien is informed that the decision on expulsion has expired and will be encouraged to re-apply for a residence permit. A new application after the original decision has become statute-barred entails a full examination of the reasons for asylum and residence permit put forward by an alien at that time. In principle, a residence permit is granted in cases where a decision on expulsion has become statute-barred without the alien being responsible for that fact by, for example, going into hiding to avoid enforcement of the decision. A rejection of the new application is subject to appeal to the competent migration court and further to the Migration Court of Appeal.

7.3 In the present case, the significance of the decision on expulsion being statute-barred is twofold: firstly, the decision against which the complaint before the Committee is directed is no longer enforceable, i.e. the complainants are no longer under a threat of expulsion; secondly, their new application for asylum and residence permits and the reasons put forward in support thereof will be re-examined in full, and a negative decision is subject to appeal to the Migration Court.

7.4 In the light of the above, the State party requests that the Committee discontinue the examination of the complaint, provided that the complainants withdraw their complaint before the Committee. Should the complainants decide not to withdraw their complaint, the State party maintains its position that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. Considering that the original decision on expulsion is

statute-barred, a new application to the Migration Board with the possibility to appeal to the Migration Court must be seen as an effective remedy against the alleged risk of a violation of article 3. Furthermore, the State party refers to rule 110, paragraph 2, of the Committee's rules of procedure,¹² according to which a decision on inadmissibility for non-exhaustion of domestic remedies may be reviewed upon receipt of a request by or on behalf of the complainant containing information to the effect that the reasons for inadmissibility no longer apply, and states that it will be possible for the complainants to have their case examined by the Committee if their new application for asylum and residence permits is rejected.

Complainants' comments on the State party's observations

8.1 In a letter dated 11 March 2011, the complainants state that the situation in Afghanistan is worsening and that the risk to which they would be exposed in case of their deportation is well known, claiming that they will be imprisoned and extrajudicially executed if they were to return to Afghanistan. They add that they lived in Afghanistan for a very short period of time, and during that time they were subjected to persecution and ill-treatment. During many years, they lived in the Islamic Republic of Iran as refugees and they have no connection to Afghanistan. They further claim that they originate from a dangerous region where terrorists, military and other armed groups are waging war. The complainants submit that their mother, brother and sisters live in Sweden and they want to live peacefully in Sweden, close to their relatives, and to continue their studies and plan for their future.

8.2 On 21 March 2011, the complainants commented on the State party's submission of 19 April 2010. They maintain that Sweden rejected their asylum applications despite their claims being well founded. They believe Sweden is determined to deport them to a country which they barely know and where they do not have any siblings. The complainants further state that they have lost their confidence in the Swedish migration authorities and therefore decided not to re-apply for asylum as recommended by the State party, fearing that their new asylum applications would be automatically rejected and that Sweden would proceed to their deportation to Afghanistan without further notice.

Additional submission by the State party

9. On 27 April 2011, in the light of its previous submission of 19 April 2010 (see paras. 7.1-7.4 above), the State party reiterated its position that the examination of the present complaint should be discontinued or it should be declared inadmissible for failure to exhaust domestic remedies, since, after the decision on the complainants' expulsion has become statute-barred, they have now the possibility of submitting new asylum applications to the Migration Board with the possibility of an appeal to the Migration Court and further to the Migration Court of Appeal.

Additional comments by the complainants

10. By letter of 24 June 2011, the complainants maintained that Sweden is still deporting asylum-seekers to war-torn zones in Afghanistan, despite their claims being supported by objective and accurate evidence. Therefore, they have no trust in the migration authorities and they do not want to resume the asylum process in Sweden. They fear that, if they restart any procedural contacts with the Swedish Migration Board, their applications would be turned down and their cases would be automatically referred to

¹² New rule 116, para. 2.

police for initiation of deportation measures. They maintain that they are at risk of inhuman treatment, extrajudicial execution and torture if forcibly returned to Afghanistan.

Issues and proceedings before the Committee

Consideration of admissibility

11.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

11.2 The Committee has ascertained, as it is required to do under article 22, paragraph 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.

11.3 Article 22, paragraph 5 (b), of the Convention precludes the Committee from considering any communication unless it has been ascertained that all available domestic remedies have been exhausted; this rule does not apply if it is established that the application of domestic remedies has been or would be unreasonably prolonged or would be unlikely to bring effective relief. The Committee notes the State party's contention that the complainants failed to appeal against the Migration Court's decision of 3 December 2008 to the Migration Court of Appeal (see para. 6.15 above). The complainants have provided no arguments to the effect that an appeal to the Migration Court of Appeal would have been unlikely to bring any relief but merely argue that domestic remedies must have been exhausted as their deportation was being organized. The Committee also notes the State party's uncontested information, according to which the complainants have never mentioned during the asylum proceedings that they have been tortured in Afghanistan, this claim being presented for the first time in their complaint to the Committee (see para. 6.23 above). Furthermore, it takes note of the information provided by the State party that the decision regarding the complainants' expulsion became statute-barred on 28 March 2010, therefore it is no longer enforceable and the complainants are no longer under a threat of being expelled to Afghanistan. Moreover, they have now the possibility of submitting new asylum applications which will be re-examined in full by the Migration Board, with a possibility of an appeal to the Migration Court and further to the Migration Court of Appeal, if needed. The Committee observes, however, that the complainants have not initiated new asylum proceedings arguing that their applications would be automatically turned down and the Swedish authority will proceed to enforce the deportation without further notice. In this respect, the Committee recalls its jurisprudence, according to which mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such a remedy.¹³ The Committee is of the view that there is nothing to indicate that this new procedure cannot bring effective relief to the complainants, especially noting that they have now the possibility to raise before the migration authorities the claim that they have been tortured in Afghanistan in the past, which they have never done before in the context of the asylum procedure.

11.4 In the light of the foregoing, the Committee concludes that this communication is inadmissible under article 22, paragraph 5 (b), of the Convention for failure to exhaust domestic remedies: (a) because the complainants did not appeal against the Migration Court's decision of 3 December 2008 to the Migration Court of Appeal; (b) because they have never raised their claim of torture in domestic asylum proceedings; and (c) because they have not initiated new asylum proceedings since the decision regarding their expulsion became statute-barred, although they have been given such an opportunity.

¹³ See communication No. 202/2002, *Jensen v. Denmark*, decision of inadmissibility adopted on 5 May 2004, para. 6.3.

12. The Committee therefore decides:

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

(b) That this decision may be reviewed under rule 116, paragraph 2, of the Committee's rules of procedure upon receipt of a request by or on behalf of the complainants containing information to the effect that the reasons for inadmissibility no longer apply;

(c) That this decision shall be communicated to the complainants and to the State party.

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