



## International Covenant on Civil and Political Rights

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### Human Rights Committee

#### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3073/2017\*\*, \*\*\*

<i>Communication submitted by:</i>	Nadeem Khan (represented by counsel, David Matas)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Canada
<i>Date of communication:</i>	3 August 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 2 November 2017 (not issued in document form)
<i>Date of adoption of Views:</i>	18 July 2023
<i>Subject matter:</i>	Denial of permanent residence of a refugee
<i>Procedural issues:</i>	Admissibility – incompatibility <i>ratione materiae</i> ; level of substantiation of claims
<i>Substantive issues:</i>	Cruel, inhuman or degrading treatment or punishment; right to respect for family life and home
<i>Articles of the Covenant:</i>	7 and 17
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (b)

1. The author of the communication is Nadeem Khan, a national of Pakistan born on 25 October 1967. He claims that the State party has violated his rights under articles 7 and 17 of the Covenant. The Optional Protocol entered into force for Canada on 19 August 1976. The author is represented by counsel.

\* Reissued for technical reasons on 27 February 2024.

\*\* Adopted by the Committee at its 138th session (26 June–26 July 2023).

\*\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Carlos Gómez Martínez, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobayyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu. Pursuant to rule 108 of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.



### **Factual background**

2.1 On 13 May 1997, the author arrived in Canada and requested refugee status. On 3 February 1999, the Refugee Protection Division of the Immigration and Refugee Board found him to be a refugee under the Convention relating to the Status of Refugees. On 24 February 1999, the author applied for permanent residence in Canada.

#### *Proceedings pursuant to section 34 (1) of the Immigration and Refugee Protection Act*

2.2 In order to determine the admissibility of the author, he was interviewed on 1 November 1999 and 15 March and 18 October 2005. As a result of the information obtained, an officer of the Canada Border Services Agency concluded, pursuant to section 34 (1) of the Immigration and Refugee Protection Act, that there were reasonable grounds to believe that the author was ineligible for permanent residence due to his having been a member of organizations engaged in acts of terrorism, namely the Mohajir Quami Movement (MQM)<sup>1</sup> and the Mohajir Quami Movement – Haqiqi (MQM-H). On 31 October 2005, the officer of the Canada Border Services Agency wrote a report on the author's admissibility, which was referred to an admissibility hearing by the Immigration Division of the Immigration and Refugee Board. The author submits that he was not provided with an explanation as to why he was not asked to contest his inadmissibility on the grounds identified by the Canada Border Services Agency, given that such grounds for inadmissibility existed at the time that he made his claim for refugee status.<sup>2</sup> Furthermore, the determination of the author as a refugee under the Convention relating to the Status of Refugees meant that there was no serious reason to consider that he had been complicit in an act of terrorism, pursuant to the definition of a refugee under article 1 of the Convention.

2.3 Following the admissibility hearing, which took place on 16 June 2006, the Immigration and Refugee Board found that the author was not covered by section 34 (1) of the Immigration and Refugee Protection Act and was therefore not inadmissible to Canada. The appeal of the Minister for Public Safety against the decision of the Immigration and Refugee Board was successful and, on 30 October 2007, the Immigration Appeals Division found the author to be inadmissible. A deportation order was issued against him.

2.4 In November 2007, the author applied to the Federal Court for leave to appeal, and judicial review of, the decision of the Immigration Appeals Division. In August 2008, the Federal Court rejected the author's request for leave to appeal. The author, however, continued to remain a refugee under the Convention Relating to the Status of Refugees.

2.5 In July 2014, Immigration, Refugees and Citizenship Canada refused the author's application for permanent residence based on his inadmissibility pursuant to section 34 (1) of the Immigration and Refugee Protection Act. The author applied to the Federal Court for leave to apply for judicial review of the decision. Although leave was granted, on 1 September 2015, the Federal Court dismissed his application, as it found the decision refusing the author's application for permanent residence, on the grounds of his inadmissibility, reasonable.

#### *Ministerial relief proceedings*

2.6 On 22 February 2006, in parallel to the admissibility proceedings, the author applied for ministerial relief under section 34 (2) of the Immigration and Refugee Protection Act, which provided that "matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest".<sup>3</sup> On 28 July 2011 and 27 January 2012, the author provided additional submissions to his ministerial relief application, including a letter of support from a former Member of Parliament for Victoria.

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<sup>1</sup> In 1997, the Movement became known as the Muttahida Quami Movement (MQM).

<sup>2</sup> The author claims that the relevant provision at the time was section 19 (1) (f) (iii) (B) of the Immigration Act 1976.

<sup>3</sup> Section 34 (2) of the Immigration and Refugee Protection Act has since been repealed and replaced with a similar provision in section 36 (3) (c) of the current Act.

2.7 On 16 May 2012, the Minister of Public Safety denied the author's application for ministerial relief. The author filed an application before the Federal Court seeking leave to appeal and a judicial review of that decision. In September 2013, following the ruling of the Supreme Court of 20 June 2013 in the *Agraira v. Canada (Public Safety and Emergency Preparedness)* case, the Canada Border Services Agency filed a motion to consent to a redetermination of the author's application for ministerial relief. On 8 October 2013, the Federal Court granted the motion and sent the author's application back for redetermination.

2.8 In January 2014, a draft recommendation on ministerial relief was disclosed to the author. He provided additional submissions to his application on 7 April and 6 October 2014. On 26 February 2015, the author's application for ministerial relief was rejected. In the decision, the Minister considered the author's arguments that his support of the MQM/MQM-H in Pakistan prior to his arrival in Canada did not equate to supporting terrorism. Furthermore, he had argued that the organization was not designated as a terrorist entity by Canada. The author had also submitted that he had been arrested and tortured by the police and members of the Muttahida Quami Movement – Altaf (MQM-A) on 10 April 1997. He had further questioned the relevancy of denying him ministerial relief, while allowing him to remain in Canada as a refugee. He had argued that it would go against the objectives of the Immigration and Refugee Protection Act to leave him in a state of indefinite limbo and that he did not represent a danger. The Minister, nevertheless, considered that the author's sustained participation in the activities of MQM/MQM-H for some 11 years, despite the threats, torture and arrest he had experienced, was indicative of a pattern of commitment to the organization and its associated goals, "through the use of terrorism". The Minister also considered that the author was aware of acts of terrorism committed by MQM/MQM-H and highlighted that considerations regarding national security and public safety were not limited to an assessment of the current threat or risk an individual may pose to Canada. As regards the author's concern that he may remain in an indefinite state of limbo as a refugee, the Minister declared that Canada had respected its obligation of non-refoulement, but that becoming a permanent resident required meeting other statutory requirements found in Canadian law. The Minister argued that the legislative scheme established by Parliament therefore recognized that some refugees recognized under the Convention relating to the Status of Refugees, who may be considered inadmissible on serious grounds, may never acquire permanent resident status.

2.9 The author applied for leave to apply for judicial review of the negative decision on ministerial relief. The Federal Court granted leave, but on 11 December 2015, it dismissed the author's application for judicial review, concluding that the decision on ministerial relief was reasonable after reviewing the author's arguments, which were similar to those that he had raised in his ministerial relief application. The Federal Court dismissed the author's argument that, the fact that he had been granted refugee status and had not been excluded by the Refugee Protection Division for being a member of a terrorist organization was res judicata for the purposes of ministerial relief. The Court noted that that could not be res judicata, as it had not been considered by the Refugee Protection Division. It found that the author's present status was a direct result of the application of the legislation in his personal circumstances and that such an eventuality must have been contemplated by Parliament when passing the Immigration and Refugee Protection Act. The Federal Court added that the jurisprudence dictates that refugees are eligible for permanent resident status if they are not inadmissible. The two questions proposed by the author's counsel for review by the Federal Court were declined by the Court, which meant that the matter could not be appealed to the Court of Appeal.

### **Complaint**

3.1 The author claims that he has suffered emotionally and psychologically because of the stress and fear of his temporary status. He claims that, by denying him permanent residence, the State party has made him live in limbo for the last 20 years, which amounts to cruel treatment within the meaning of article 7 of the Covenant given the possibility of being deported to Pakistan at any time.

3.2 The author claims that the State party's refusal to grant him the right to reside there on a permanent basis constitutes an interference with the exercise of the right to respect for

his home under article 17 (1) of the Covenant. He claims that the notion of “home” under article 17 (1) encompasses a person’s home country, which not only refers to a person’s country of nationality, but the place where a person has developed a network of personal, social and economic relations that make up private life. The author claims that he has not been able to establish long-term relationships or have a family because of his uncertain future in Canada. He claims to have suffered immense anxiety and stress from being separated from his family in Pakistan and not being able to see his father before he died in 2013. He also fears not being able to see his mother before she passes away. The author claims that he has been unable to establish permanent economic roots in Canada and has had difficulty, for example, securing long-term employment due to temporary work permits. He also claims that he has never truly felt like a full member of Canadian society. He claims that the State party’s interference with the right to respect for his home is arbitrary and disproportionate, as it fails to strike a fair balance between national security and that right, in violation of article 17 of the Covenant.

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

4.1 In a note verbale dated 6 June 2018, the State party submitted its observations on admissibility and the merits of the communication.

4.2 The State party presents an account of the facts and the domestic proceedings regarding the author’s application for permanent residence. Regarding the current status of the author in Canada, the State party indicates that he remains a refugee under the Convention relating to the Status of Refugees and holds a statutory right not to be removed from Canada to a country where he would face persecution or a risk of torture or cruel, inhuman or degrading treatment or punishment, in light of the principle of non-refoulement. It submits that it has not signalled any intention or taken any steps towards deporting the author and that the potential risks that he may face if he were ever to be returned to Pakistan are not the subject of the communication. The State party submits that the author is entitled to submit another application for ministerial relief. In the event that his application is granted, his admissibility would not bar him from obtaining resident status.

4.3 The State party submits that the author’s claim that he finds himself in a state of limbo, amounting to cruel treatment in violation of article 7 of the Covenant and resulting from the denial of permanent resident status in Canada, should be declared inadmissible *ratione materiae* and for lack of substantiation. The State party argues that the Covenant does not provide for a right to residency and that a distinction must be made between the human rights obligation of non-refoulement and permanent residence, which is an immigration status subject to domestic law and statutory requirements. It submits that the author is not alleging that he will be refouled to Pakistan, but rather that he is being denied permanent resident status, which, as the Committee has previously noted, is not spelled out under the Covenant or international law.<sup>4</sup> The State party adds that the author’s communication is based on the same facts and arguments that have already been examined by its domestic bodies during the different proceedings and that it is not for the Committee to re-evaluate facts and evidence unless a tribunal’s evaluation was manifestly arbitrary or amounted to a denial of justice. The author has failed to support the view that this was the case.

4.4 The State party submits that article 7 of the Covenant applies to acts but does not apply to the author’s feeling of being in limbo, which cannot in and of itself constitute torture or punishment. Although article 7 also protects mental integrity and includes the prohibition of acts that cause “mental suffering”, the State party submits that the author’s own feelings of uncertainty over his immigration status do not attain the threshold of mental suffering under article 7.

4.5 With regard to the author’s claim under article 17 (1) of the Covenant, the State party rejects the author’s interpretation of the term “home” country. It argues that the term “home” under article 17 includes the place where persons reside or carry out their usual occupations, in reference to privacy rights and not to residence in a foreign country. Nor can it be interpreted to include a positive obligation to grant a certain immigration status, as the

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<sup>4</sup> *Tsarjov v. Estonia* (CCPR/C/91/D/1223/2003), para. 7.5.

Committee has previously taken the view that the Covenant does not include rights to asylum, permanent residence or citizenship. The State party submits that the author's reliance on the jurisprudence of the European Court of Human Rights is irrelevant, as it is not a party to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and therefore not bound by its decisions. Furthermore, the decision of the European Court of Human Rights in *Sisojeva and others v. Latvia* concerned different facts. Moreover, in that case, the Court stated that "only reasons of a particularly serious nature could justify refusal" to regularize a status.<sup>5</sup> The State party submits that the author's inadmissibility on the grounds of membership of a terrorist organization is one such reason. It also submits that the provisions of the European Convention on Human Rights and the Covenant are worded differently and use different tests.

4.6 The State party submits that the author, by his own admission, has been able to work in Canada, to form romantic relationships, to participate in community and social activities and maintain emotional ties with his family who also reside in Canada. It reiterates that the author's inability to obtain permanent resident status does not constitute an interference with his rights protected under article 17 of the Covenant. With regard to the author's concern about seeing his mother, the State party adds that article 17 does not apply to family reunification in the context of family members who have been separated for many years.<sup>6</sup> It concludes that the author's situation is in accordance with the law and proportionate in his personal circumstances and is not arbitrary.

4.7 The State party reiterates that the communication is wholly inadmissible on the grounds of incompatibility with the scope of the Covenant and for lack of sufficient substantiation. The State party submits that, should the Committee consider the communication admissible in whole or in part, it should consider the communication wholly without merit as the author has failed to establish any violation of the rights protected under the Covenant.

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

5.1 On 12 August 2018, the author submitted comments on the State party's observations. He rejects the argument that it is not credible that he was unaware of the involvement of MQM and MQM-H in terrorist activities. He argues that nothing indicates that his education involved teaching about the terrorist activities of the organizations or that such organizations admitted their involvement in terrorist activities during and prior to the period that he was associated with them. The author asserts that it is credible that he was not aware of such activities and that the State party has not established the contrary.

5.2 The author alleges that an adverse finding concerning credibility in refugee matters without a hearing or even an interview is arbitrary and amounts to a denial of justice, as found by the Supreme Court in *Singh v. Minister of Employment and Immigration*.<sup>7</sup> In his case, the decision regarding his application for ministerial relief was taken without a hearing or interview. Furthermore, the Immigration Appeal Division confusingly mixed up different factions of MQM. The Immigration Appeal Division only addressed the issue of the author's knowledge of violence by MQM-A, which is a faction the author was never involved with. The findings of the Immigration Appeal Division only relate to the credibility of the author's ignorance of violence in the organizations and do not provide evidence of his knowledge that the organizations carried out terrorist activities.

5.3 The author reiterates that, once he was found to be a refugee under the Convention relating to the Status of Refugees, that meant that there were no serious reasons to believe that he had been guilty of an act of terrorism, in accordance with article 1 (F) of the Convention. As opposed to what the State party submits, the author argues that the Refugee

<sup>5</sup> European Court of Human Rights, *Sisojeva and others v. Latvia*, Application No. 60654/00, Judgment, 16 June 2005, para. 108.

<sup>6</sup> *A.S. v. Canada*, communication No. 68/1980.

<sup>7</sup> Supreme Court of Canada, *Singh v. Minister of Employment and Immigration*, Case Nos. 17904 and others, Judgment, 4 April 1985.

Protection Division could have addressed the issue of his ineligibility for refugee status if it had wished to do so but decided to remain silent on the issue.

5.4 The author submits that the facts underlying his inadmissibility, even if they were to be accurate, are of a trivial nature. He was not complicit in any terrorist act and did not know about the involvement of the organizations in any terrorist activity. If there were serious reasons to believe that he had been guilty of an act of terrorism, the Refugee Protection Division should have excluded him from refugee protection. Given the trivial nature of the findings against the author, the author submits that the mistreatment that he was subjected to by the State party should be taken seriously. Although the State party submits that the courts found that domestic legislation allowed for indefinite legal limbo in relation to his status, the author argues that such a finding does not resolve the issue of whether this is permissible under the Covenant. It is for the Committee to determine that.

5.5 The author rejects the State party's submission that the feeling of being in limbo cannot constitute treatment within the meaning of article 7 of the Covenant. He argues that continually granting him only temporary resident status equates to a certain form of treatment and that his feelings about such treatment is relevant in order to consider whether it amounts to mistreatment. He alleges that, for refugees under the Convention relating to the Status of Refugees, the granting of temporary resident status during their whole life is akin to statelessness, as refugees cannot seek protection from their State of nationality. He claims that the treatment by the State party is akin to a denial of his right to nationality and an arbitrary deprivation of nationality, which amounts to cruel treatment prohibited under article 7 of the Covenant. Given his status as a refugee and the underlying risks associated with such a status, his nationality of Pakistan means nothing to him. The author, therefore, submits that his claims under article 7 of the Covenant are compatible *ratione materiae* and sufficiently substantiated.

5.6 The author submits that his claims under article 17 of the Covenant have to be considered in the light of certain underlying and cumulative facts, such as: (a) his inability to return to Pakistan, including to visit his parents; (b) his inability to sponsor a spouse from abroad; (c) his difficulty in finding work in Canada due to his temporary status, although it is de facto permanent; (d) his inability to fully participate in civil society, despite his interest in politics; (e) the fact that he has to engage in elaborate procedures to renew his permit; and (f) the fact that he has been in Canada for more than 20 years.

5.7 The author submits that the content of article 17 should not be considered in the abstract, but in the context of the facts of his case. He submits that for him, Canada is his home and that the State party's observations stating the contrary fail to consider his status as a refugee. To suggest that his home is Pakistan, which he has not visited for decades and to which he cannot return, and that the country in which he has lived for the past 20 years is not his home, renders the terms "home" and "home country" void of any common-sense meaning.

5.8 The author refutes the State party's observation that he is claiming the right to residency. He argues that what he is claiming is that the denial of his application for ministerial relief under section 34 (2) of the Immigration and Refugee Protection Act, both procedurally and substantively, violates his rights under the Covenant. Although the State party submits that the author's membership of a terrorist organization justifies the decision to refuse to regularize his status, the author reiterates that this ignores the facts of his case, his innocence and the unfair way in which the decision was reached. He adds that, in the event the Committee finds a violation of his rights, this would not immediately lead to the granting of permanent residence, but to the reconsideration of his application for ministerial relief.

#### **State party's additional observations**

6.1 On 6 February 2019, the State party submitted additional observations on the admissibility and merits of the communication. It submits that the author's comments minimize the violence committed by the organizations of which he was a member in Pakistan. MQM-H has been held responsible for numerous cases of kidnapping, torture, murder and acts of terrorism. The State party submits that, by suggesting that the underlying facts that led to the inadmissibility finding were trivial, the author seeks to trivialize the violence

committed. It also submits that the author's inadmissibility was determined in 2008 and is not an issue for the Committee to determine.<sup>8</sup>

6.2 In response to the author's renewed attempt to rely on the fact that he was not excluded from refugee protection, pursuant to article 1 (F) of the Convention relating to the Status of Refugees, the State party submits that his involvement with MQM and MQM-H was only discovered years later during the security screening process for his application for permanent residence. It reiterates that the fact that the refugee determination tribunal did not find that he was excluded from refugee protection is not evidence that he was not a member of an organization that committed terrorist acts.

6.3 With regard to the author's complaint that he did not have an oral hearing or interview during his application for ministerial relief, the State party submits that the author had an oral hearing during his application for refugee protection. He also had a hearing before the Immigration Division and Immigration Appeal Division leading up to the finding that his application was inadmissible. During that hearing, it was determined that it was not credible that he was unaware of the violence committed by MQM and MQM-H. As the author's inadmissibility was not being redetermined and no assessment of his credibility was being made, there was no need for an oral hearing during the application for ministerial relief.

6.4 The State party submits that the author's arguments and relief sought establish that his communication has the nature of an appeal. The State party refers to the Committee's consistent view that it is for domestic decision-makers to evaluate facts and evidence, unless it can be shown that such an evaluation is manifestly arbitrary or amounts to a denial of justice. The State party reiterates that there is no limit to the number of applications for ministerial relief that the author can make, without there being any need for the Committee to make findings in his favour.

6.5 The State party reiterates that the author fails to provide any prior Views or comments of the Committee in support of his position that the "cruel limbo" in which he alleges to find himself constitutes cruel treatment in violation of article 7 of the Covenant. Even if his inability to obtain permanent resident status could be considered as "treatment" by the State party, it argues that such treatment does not rise to the level of "cruel treatment". Furthermore, the author's feelings of uncertainty over his immigration status and complaints about having to renew his work permit do not attain the threshold of mental suffering required under article 7.

6.6 The State party submits that the author's interpretation of article 17 of the Covenant and of the concept of "home" is unsupported by the jurisprudence of the Committee and would be an impermissible expansion of its meaning beyond its primary use in the realm of privacy protection. It cannot be interpreted to include a concept of nationality, which would override a State party's laws on permanent resident status and citizenship. The State party reiterates that the author's inability to obtain permanent resident status as a result of his inadmissibility on security grounds does not constitute interference with any of the interests protected by article 17, and that he has failed to establish that his situation is unlawful, arbitrary or disproportionate to his personal circumstances.

#### **Author's comments on the State party's additional observations**

7.1 On 24 October 2019, the Committee, acting through its Special Rapporteurs on new communications and interim measures, decided to grant the author's request, dated 19 August 2019, to submit further information and evidence.

7.2 The author rejects the State party's argument that he is trivializing the violence committed by the organizations in question. His claim, which the State party failed to address, was aimed at trivializing his connection to such acts of violence and not the violence itself. The author submits that he is not asking the Committee to reevaluate the inadmissibility decision, but to find a violation of articles 7 and 17 of the Covenant in the light of all the relevant facts. He submits that the relevant underlying facts in his case, which the State party

<sup>8</sup> *V.M.R.B. v. Canada*, communication No. 236/1987, para. 6.3.

has neither addressed nor contested, are that he was not complicit in and did not have knowledge of the violence that led to his inadmissibility.

7.3 The author challenges the State party's argument that he was not excluded from refugee protection because his involvement in the activities of MQM and MQM-H was only discovered later, during his application for permanent residence. He submitted in his personal information form that he had supported MQM-H in different ways, worked for them during the 1997 elections and that he was kidnapped and threatened by MQM-A because of his support for MQM-H. He argues that the State party would have therefore been aware of this during the refugee determination process. He refers to sections 19 (1), 45 and 46.01 (1) of the Immigration Act 1976, which was in place at the time, which would have allowed for an adverse eligibility determination at the time of his refugee claim. Nonetheless, he was found eligible and section 46.4 (1) of the Immigration Act, moreover, provided for the reversal at any time of that decision. The author submits that such a reversal of the decision was never sought. The author argues that the State party could have additionally sought to vacate the author's refugee determination by the Refugee Protection Division, as provided for in section 109 (1) of the Immigration and Refugee Protection Act, which states that: "The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter." Section 69.2 (2) of the previous version of the legislation included a similar provision. Even if it were to be assumed that something was subsequently discovered, the author argues that that could only have occurred because of a lack of due diligence on the part of the Canada Border Services Agency, as he never attempted to hide the extent of his involvement in MQM and MQM-H.

7.4 The author submits that it is the first time that the State party has informed him that the decisions to deny him permanent residence and ministerial relief were based on "subsequently discovered evidence". The State party never suggested that in its initial observations on admissibility and the merits of the present communication and neither was it mentioned in the decisions rejecting the author's applications for permanent residence and ministerial relief. Although the Committee should not substitute its views for the judgment of domestic decision-makers, it is a new fact, which was not assessed at the domestic level.

7.5 The author argues that the State party is mistaken and that there was no subsequent discovery of his involvement in the activities of MQM and MQM-H, but only divergent assessments made by different State entities of already known facts. Such a difference in assessment can only be due to the failure of a senior immigration officer, at the time of determining the eligibility of the author for refugee protection, to ask the pertinent questions and properly assess his answers. The author alleges that the different assessments made at different times by different bodies of the State party constitute arbitrary treatment as permitted by the State party's legal system, which is why he is seeking international recourse.

7.6 The author refutes the claim that he benefited from an oral hearing before the Immigration Division and Immigration Appeal Division, which led to the finding of inadmissibility. His counsel's request for an oral hearing before the Immigration Appeal Division at the time was denied. He proceeded without an oral hearing on the understanding that the issue of his credibility would not be raised without such a hearing. The author submits that the State party's mistake regarding the facts of the proceedings is incontestable. He rejects the State party's submission that an oral hearing was not needed during the ministerial relief process. He claims that an adverse finding by the Immigration Appeal Division regarding his credibility, without an oral hearing being held, amounts to a denial of justice. Subsequent determinations relying on that unjust determination were therefore also unjust.

7.7 With regard to the possibility for the author to apply at any time for ministerial relief, the author responds that the application process is lengthy; his own application took some 10 years. He argues that there is no obligation to exhaust unreasonably delayed or discretionary remedies. A reapplication for ministerial relief or permanent residence would also be a futile remedy, as it would involve essentially the same facts.



7.8 The author refutes that his communication constitutes an appeal. He reiterates that he is claiming violations of the Covenant as the evaluations made by the domestic authorities were arbitrary and unjust.

7.9 The author points to the similarities between article 17 of the Covenant and article 8 of the European Convention on Human Rights and the view of the European Court of Human Rights that any type of residence granted must enable the exercise of the right to respect for private and family life. Measures restricting residence in a country could entail a violation of article 8 of the European Convention on Human Rights if they have a disproportionate impact on the private or family life of an individual.<sup>9</sup> In his case, the measures taken by the State party to restrict the form of his residence in Canada have entailed a violation of article 17 of the Covenant, because they have had a disproportionate impact on his private and family life and home. The interference with his home is arbitrary, not in the sense that it is unlawful according to the State party's laws, but that it is unreasonable in his circumstances.

7.10 The author submits that the Committee's general comment No. 15 (1986) supports his interpretation of articles 7 and 17 by suggesting that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when consideration of non-discrimination, prohibition of inhuman treatment and respect for family life arise" (para. 5). He argues that he is entitled to protection under the Covenant as such circumstances arise in his case.

### **Additional observations**

#### *From the State party*

8.1 In a note verbale dated 29 November 2019, the State party submitted additional observations. It maintains that it is entitled to take seriously the author's membership of an organization that has committed violent acts and the fact that he remained in such an organization for more than 11 years while being aware, as an educated adult, of the violence taking place.

8.2 The State party observes that the author's complaint seems to be that he should have been found inadmissible at an earlier opportunity or that he should have been excluded from refugee status. The State party submits that it has absolute discretion over the enforcement of its immigration laws. The author has no right in domestic or international law to dictate what enforcement steps it takes, and when. It further submits that the timing of its enforcement proceedings does not constitute arbitrary treatment, as opposed to what the author suggests.

8.3 The State party rejects the author's unfounded attempt to character his case as an issue of "subsequently discovered evidence". It reiterates that the author's involvement was discovered during his security screening leading to the inadmissibility proceedings. He was apprised of this evidence against him and was able to testify orally and provide submissions in response. The State party does not rely on any new evidence.

8.4 With regard to the author's allegation that he did not have an oral hearing before the Immigration Appeal Division, the State party points to the decision of the Immigration Appeal Division indicating that there was an oral hearing, but that no witnesses were called by the parties. It submits that when the Immigration and Refugee Board members resigned before issuing a decision, a new hearing was ordered, and it is only this second hearing of the Immigration Appeal Division that proceeded in writing.

8.5 The State party points to a fundamental inconsistency in the author's story. In support of his refugee protection claim, the author submitted that he had fled Pakistan because, as a member of MQM-H, he feared political violence at the hands of MQM-A and the police. He also provided details in his claim of such political violence. However, the State party observes that, in the present communication, the author wrote that he had no knowledge of any

<sup>9</sup> European Court of Human Rights, *Hoti v. Croatia*, Application No. 63311/14, Judgment, 26 April 2018; *B.A.C. v. Greece*, Application No. 11981/15, Judgment, 13 October 2016; and *Slivenko v. Latvia*, Application No. 48321/99, Judgment, 9 October 2003.

violence – let alone terrorism – deliberately and purposely pursued by the organization. The State party submits that it was not determinative in the decision denying him ministerial relief whether he had been credible in claiming that he was not aware that such violence constituted terrorism. It was his long-term membership of an organization that committed violent acts that was determinative.

8.6 The State party reiterates that the communication should be declared inadmissible *ratione materiae* and for lack of substantiation. The author's feelings resulting from the uncertainty of his immigration status do not attain the level of mental suffering required to constitute a violation of article 7 of the Covenant. The State party reiterates that the author fails to establish a violation of article 17 of the Covenant, as he has admitted that he is able to work in Canada, to have romantic relationships, to participate in social activities and to remain close to his sister who also resides in Canada.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the author's claim that he has exhausted all effective domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

9.4 The Committee notes the State party's argument that the communication is wholly inadmissible *ratione materiae* as the author is, in essence, claiming a right to residency that is not provided for under articles 7 and 17 of the Covenant. It also notes the State party's argument that the author's feeling of limbo does not constitute an act or treatment covered by article 7. The Committee recalls its general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, in which it stated that the Covenant did not contain any definition of the concepts covered by article 7 and that the aim of that provision was to protect both the dignity and the physical and mental integrity of the individual against both intended and unintended harm (para. 2).<sup>10</sup> Insofar as the author's claim concerns his alleged mental suffering resulting from the inability to accede to a permanent resident status, the Committee finds that article 3 of the Optional Protocol does not constitute a barrier to the admissibility of the author's claims under article 7 of the Covenant.

9.5 The Committee notes the State party's argument that the notion of "home" under article 17 (1) does not refer to the country of residence and does not include a positive obligation to grant a certain immigration status. The Committee recalls that the term "home", as used in article 17, is to be understood to indicate the place where a person resides or carries out his or her usual occupation.<sup>11</sup> In those circumstances, the author's claims relating to the State party's interference with the right to his "home country", understood as the country of residence in his case, falls outside the scope *ratione materiae* of article 17 (1) of the Covenant. The Committee therefore declares that claim inadmissible under article 3 of the Optional Protocol as it is incompatible with the provisions of the Covenant.

9.6 The Committee notes the State party's argument that the author's claims are inadmissible because they are not sufficiently substantiated. The Committee notes the author's claim that the State party's decision not to grant him permanent resident status

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<sup>10</sup> *A.H.G. v. Canada* (CCPR/C/113/D/2091/2011), para. 10.4; and *Vanchev v. Bulgaria* (CCPR/C/130/D/2820/2016), para. 7.6.

<sup>11</sup> General comment No. 16 (1988), para. 5; and *Naidenova et al. v. Bulgaria* (CCPR/C/106/D/2073/2011).

constitutes cruel treatment, causing him mental suffering because of the stress and fear of his temporary status. He claims that it has put him in a cruel limbo amounting to cruel treatment in violation of article 7 of the Covenant. The Committee recalls that the Covenant does not contain any definition of the concepts covered by article 7, nor does the Committee consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied.<sup>12</sup> It also recalls its jurisprudence under article 7 that the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects, as well as the sex, age and state of health of the victim.<sup>13</sup> Mental harm must therefore attain a certain threshold in order to constitute a violation of article 7 of the Covenant. In the present case, the Committee accepts that the author's uncertain immigration status has caused him to suffer anguish and stress. However, in light of the facts in the present case, the Committee does not consider that the State party's decision to deny the author permanent residence amounted to cruel treatment. The Committee notes that the author's claims regarding the alleged mental suffering caused by that decision are of a general nature and that he has not adduced any evidence to support his claims that the anguish and distress suffered was of such intense severity that it fell within the scope of article 7 of the Covenant. The Committee therefore considers that the author's claim under article 7 of the Covenant is insufficiently substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

9.7 The Committee, however, considers that the author has sufficiently substantiated his other claim with respect to the arbitrary interference with his family life under article 17 (1) of the Covenant for the purposes of admissibility and proceeds with its consideration of the merits.

#### *Consideration of the merits*

10.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

10.2 The author claims that, by denying him permanent residence, the State party interfered with his right to respect for family life in violation of article 17, as the resulting uncertainty over his immigration status has put him in a cruel limbo. The Committee notes the State party's argument that the author has admitted to, inter alia, being able to work, form romantic relationships and maintain ties with his family residing in Canada and that his inability to obtain permanent residence is lawful, not arbitrary, proportionate and does not constitute an interference with his rights under article 17.

10.3 The Committee must first ascertain whether the denial of the author's application for permanent residence constitutes an interference with his right to respect for family life within the meaning of article 17 of the Covenant. It recalls its general comment No. 15 (1986), according to which the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that it is in principle a matter for the State party to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.<sup>14</sup> The Committee also recalls its general comments No. 16 (1988) on the right to privacy and No. 19 (1990) on the family, according to which the concept of the family is to be interpreted broadly.<sup>15</sup> In the present case, the Committee observes that the author has been established in Canada since 1997; he was granted refugee status in 1999. It also observes that the State party has no intention, and has not taken any steps, to remove the author to Pakistan. Nor has the author claimed that in the present communication. The Committee notes that, from the information available on file, the author has been able to maintain strong ties with his sister, brother-in-law and nieces, who all live in Canada. It also notes, from the

<sup>12</sup> General comment No. 20 (1992), para. 4.

<sup>13</sup> Ibid.; and *Vuolanne v. Finland*, communication No. 265/1987, para. 9.2.

<sup>14</sup> General comment No. 15 (1986), para. 5.

<sup>15</sup> General comment No. 16 (1988), para. 5; and general comment No. 19 (1990), para. 2.

information on file, that the author has been able to develop social, economic and sentimental ties, including a two-year romantic relationship with a Canadian woman. Although the author claims to have faced difficulty in maintaining long-term relationships and forming his own family, the Committee notes that he has failed to provide sufficient information, other than making general statements, to suggest that that is in itself due to his residence status. With regard to the author's alleged inability to visit his mother, the Committee similarly notes that the author has not provided specific information indicating how the State party has interfered with his ability to maintain family ties with his mother. In the light of all those circumstances, the Committee is unable to conclude that the denial by the State party to grant the author permanent residence amounted to an arbitrary interference with his family, within the meaning of article 17 (1) of the Covenant.

11. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the information before it does not reveal a violation by the State party of article 17 of the Covenant.

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