



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

Distr.: General
6 February 2013

Original: English

Committee against Torture

Communication No. 412/2010

**Decision adopted by the Committee at its forty-ninth session,
29 October to 23 November 2012**

<i>Submitted by:</i>	A.A. (represented by counsel)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Denmark
<i>Date of complaint:</i>	30 September 2009 (initial submission)
<i>Date of decision:</i>	13 November 2012
<i>Subject matter:</i>	Ill-treatment while in detention in Denmark; failure to investigate such ill-treatment; deportation of the complainant to Iraq; risk of torture or ill-treatment following the deportation to Iraq
<i>Substantive issues:</i>	Ill-treatment while in detention; failure to investigate such ill-treatment; risk of torture or ill-treatment following the deportation to Iraq
<i>Procedural issues:</i>	Substantiation of claims and exhaustion of domestic remedies
<i>Articles of the Convention:</i>	2; 3, paragraph 1; 12; and 16, paragraph 1

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-ninth session)

concerning

Communication No. 412/2010

Submitted by: A.A. (represented by counsel)
Alleged victim: The complainant
State party: Denmark
Date of complaint: 30 September 2009 (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 13 November 2012,

Having concluded its consideration of complaint No. 412/2010, submitted to the Committee against Torture by A.A. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following:

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

1.1 The complainant is A.A., a national of Iraq, born on 27 December 1963, who was deported from Denmark to Iraq on 2 September 2009. The complainant submits that his detention in Denmark as a refused asylum seeker from 18 June 2009 to 2 September 2009, including in solitary confinement, amounted to a violation of articles 16 and 2 of the Convention. He further claims to be a victim of a violation by the State party of article 12, for failure to carry out a proper investigation into the alleged violations of articles 16 and 2 of the Convention. Moreover, he claims that his deportation constituted a violation by Denmark of article 3, paragraph 1, of the Convention as it was foreseeable that he would be subjected to torture upon return as he had been subjected to torture and ill-treatment in Iraq in 2005 and that he was exposed to threats from the families of nine other inmates who were executed. The complainant is represented by counsel.

1.2 The complainant requested that the Committee issue interim measures of protection to allow him to travel back to Denmark so that the examination according to article 12 of the Convention may be carried out, in order to allow for exhaustion of domestic remedies in Denmark. In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 26 February 2010. The Committee decided not to issue a request for interim measures.

Facts as presented by the complainant

2.1 The complainant submits that he had nine friends who worked for the intelligence service of Saddam Hussein and served in his palaces. When visiting one of them in 1995, he was detained, as it turned out that these friends were members of the Communist Party. The complainant was tortured in order to have him confess that he also belonged to the Communist Party. All nine of his friends were executed and the complainant was sentenced to seven years' imprisonment for holding back information on them. During the two first years of imprisonment, he was exposed to severe torture, including kicks to the crotch and beating with electrical wires. After the complainant's release in February 2002, he started to fear revenge from the family members of the nine executed persons, who threatened the complainant's family as they thought he was responsible for their fate. In November 2002, the complainant's house was searched by the intelligence service, and when the complainant fled, he was shot in the leg.

2.2 On 27 December 2002, the complainant arrived in Denmark and submitted a request for asylum based on the fact that he had been imprisoned for seven years in Iraq for political reasons, that he had been tortured during his detention and that he was exposed to threats from the families of nine friends who had been executed. On 11 June 2004, the Refugee Appeals Board rejected the complainant's asylum request, as Saddam Hussein's regime was no longer in power, stating that the fear from families is of a private character, and that the complainant could reside in another part of Iraq. On 22 January 2008, the complainant's request to reopen the case based on the same facts and information of continuing threats from the families of the nine executed friends was rejected.

2.3 On 31 August 2009, a second attempt to reopen his asylum case, based on a report by the Medical Group of Amnesty International on his past torture, was rejected. In the report, dated 12 February 2009, his torture is described in detail. The report concludes that the complainant shows clear physical marks of torture and many symptoms of post-traumatic stress disorder. Following the rejection of his second attempt to reopen the asylum case, no further remedies were available to the complainant.

2.4 After the rejection of the complainant's first asylum request by the Danish Refugee Board, during the period 2004-2009, he was subjected to "motivational incentives" with the purpose of provoking a voluntary return to Iraq, including the termination of allowances, a food box instead of food money, moving between asylum centres, and frequent reporting to the immigration police. In the same period, 2004-2009, the complainant's health deteriorated, as ascertained by the respective psychiatric and medical reports of 13 April 2004, 12 February 2009, 6 July 2009 and 7 September 2009.

2.5 On 13 May 2009, the State party signed a Memorandum of Understanding with the Government of Iraq concerning the return of rejected asylum seekers, with the priority of voluntary returns, but also covering forced returns. On 18 June 2009, the complainant was detained in the Ellebaek Institution for Detained Asylum Seekers. During his stay in the Ellebaek detention centre, the complainant experienced twice that other rejected asylum seekers were woken up in the middle of the night and forcefully taken on a flight to Bagdad, thus causing fear and severe flashbacks of the complainant's torture experiences from Iraq.

2.6 On 5 August 2009, Inge Genefke, MD,¹ and Bent Sørensen, MD,² submitted a complaint and a request for investigation to the Danish police, claiming a violation of

¹ The founder of the Medical Rehabilitation Centre for Torture Victims and the International Rehabilitation Council for Torture Victims.

articles 16, paragraph 1, and 12 with regard to the complainant's detention, and of article 3, paragraph 1, of the Convention, if the complainant were to be deported to Iraq. They claimed inhuman treatment of the complainant in breach of article 16 by keeping him in detention since 18 June 2009, despite the fact that he was a victim of torture. They requested the authorities to perform an investigation into the complainant's detention in accordance with article 12 of the Convention. The police referred the complaint to the State prosecutor, who referred it to the Immigration Service.

2.7 As a disciplinary measure following unrest between a group of asylum seekers and staff of the Ellebaek detention centre, the complainant was put in solitary confinement in Vestre Prison from 9 to 10 August 2009, and his isolation continued for two more days following his transfer back to the Ellebaek detention centre. During the complainant's isolation, his psychiatric condition deteriorated.

2.8 On 1 September 2009, the Ministry of Refugee, Immigration and Integration Affairs, which examined the complainant's request for a residence permit on humanitarian grounds,³ requested a clarification of the medical certificates by Dr. Østergaard of 28 August in support of the complainant's claim that his solitary confinement constituted torture. On 2 September 2009, however, the complainant was unexpectedly deported to Iraq.

2.9 The complainant's counsel is in contact with the complainant through the complainant's wife, who is residing in Denmark. According to the complainant's wife, the complainant lives in hiding near Mosul, Iraq. She also alleges that the complainant was detained upon arrival in Bagdad for about 27 hours and obliged to report regularly to the airport police, which remains in possession of his original documents. After his arrival, the complainant received new threats from the families of his nine friends who were executed.

The complaint

3.1 The complainant claims that his detention as a rejected asylum seeker, awaiting deportation, in Ellebaek detention center from 18 June 2009 to 2 September 2009, including two days of detention in solitary confinement at Vestre Prison, amounted to a violation of articles 16, paragraph 1, and 2 of the Convention, since it caused the complainant to experience severe flashbacks from his seven years of imprisonment in Iraq, during which he had been regularly subjected to torture, and led to renewed mental suffering.

3.2 He further claims to be a victim of a violation by the State party of article 12 of the Convention, for failure to carry out a proper investigation into the alleged violations of articles 16 and 2 of the Convention by the State party. The complainant maintains that this is underscored by the fact that he was unexpectedly deported from Denmark on 2 September 2009, before the last medical report had been received by the State party

3.3 The complainant submits that domestic remedies should be considered exhausted, as a request with reference to investigation under article 12 was sent to the police, which forwarded it to the State prosecutor, who referred it to the Immigration Service. However, before the start of the investigation, the complainant was forcibly deported and the investigation was made impossible.

3.4 Moreover, he claims that his deportation constituted a violation by Denmark of article 3, paragraph 1, of the Convention, as he had been subjected to torture and ill-

² A former member of the Committee against Torture and the European Committee for the Prevention of Torture.

³ It is unclear from the file when the complainant filed this request.

treatment in Iraq in 2005, and he would be exposed to threats from the families of nine friends who had been executed in 1995.

State party's observations on admissibility and merits

4.1 On 26 August 2010, the State party submitted observations in respect of both the admissibility and the merits of the complainant's communication. In its observations, the State party submits that the complaint should be declared inadmissible, or alternatively that no violation of the provisions of the Convention has occurred.

4.2 The State party recalls that the complainant entered Denmark on 27 December 2002, and applied for asylum, stating that he had been detained in Iraq from 1995 until February 2002 and subjected to torture; that he fled his home in November 2002 when the Iraqi authorities searched for him; and that he feared revenge, especially from three families of executed fellow prisoners, if he returned to his country of origin.

4.3 The Danish Immigration Service refused asylum to the complainant on 10 March 2004, with the motivation that the fact of having been subjected to physical outrages did not in itself justify asylum, since the former Iraqi regime was no longer in power in Iraq and opponents of the former Iraqi regime did not risk persecution upon return to Iraq.⁴ Even though it accepted that the families of the complainant's fellow prisoners might search for him, this could not justify asylum as there were no travel restrictions in Iraq, and the complainant could therefore take up residence somewhere else in Iraq if he did not want to take up residence in his home region. Finally, the Danish Immigration Service found that the situation in Iraq, although generally unsafe, did not justify asylum.

4.4 The State party accepts that the complainant was imprisoned in 1995 by the former Iraqi authorities due to his friendship with several members of the special security organization in the presidential palace who were members of the Communist Party. During his arrest, the intelligence service tried to extract a confession from the complainant that he was also a member of the Communist Party. During the trial before a special court, the complainant's friends were sentenced to death and subsequently executed, while the complainant was sentenced to seven years' imprisonment. The complainant was subjected to torture during his prison stay, as demonstrated by scars and permanent injuries. Upon his release in February 2002, the complainant was placed under surveillance. Following a night search of his house by the intelligence service, the complainant left Baghdad on 18 November 2002. The complainant's spouse was arrested in December 2002 and was detained for two months.

4.5 In addition, the families of the executed friends had threatened the complainant's family after the fall of Saddam Hussein's regime. The main recipients of the threats, including death threats, were the complainant's family-in-law, in particular his brother-in-law. The families had inquired about what happened during the trial at which the complainant's friends had been sentenced to death. As there was no evidence available from the court, the complainant was unable to prove that he had had nothing to do with their deaths. The complainant fears revenge from the family members of the nine executed persons if he returns to Iraq.

4.6 In its decision of 11 June 2004, the Refugee Appeals Board found that the complainant's detention and the house search in November 2002 did not justify granting asylum in 2004. In that connection, the Board emphasized that Hussein's regime was no longer in power in Iraq.

⁴ The decision was taken following the suspension of asylum proceedings of Iraqi nationals between 20 March 2003 and 28 October 2003.

4.7 Even though the Refugee Appeals Board considered as verified that the complainant's family had received threats from family members of the executed friends, it reiterated that this was a private-law issue of insufficient strength to justify asylum. The Board further found that the complainant could take up residence elsewhere than in Baghdad. Finally, the Board found that the general situation in Iraq did not in itself justify asylum. In that connection, it found that the background information available showed that Iraqis could move freely in the entire country. The Board also found that the complainant did not meet the conditions for a residence permit and that there was no basis for assuming that the complainant, upon return to his country of origin, risked the death penalty or being subjected to torture or inhuman or degrading treatment. The Board upheld the decision of the Danish Immigration Service of 10 March 2004, and the complainant was ordered to leave Denmark immediately, as provided for by section 33, paragraphs 1 and 2, of the Aliens Act.

4.8 On 8 July 2004, the complainant stated that he did not want to leave voluntarily or to be assisted in his return to Iraq. Therefore, he was subjected to incentive measures in the form of discontinuation of cash benefits, transfer to a return centre and the imposition of a duty to report to the police twice a week.

4.9 On 29 June 2005, the complainant applied to the Ministry of Refugee, Immigration and Integration Affairs for a residence permit on humanitarian grounds. The complainant appended a supporting opinion of 13 April 2004 from a psychiatrist, from which it appeared that he had received treatment since November 2003 due to medium to severe post-traumatic stress disorder and that he suffered from and was being treated for mental sequelae following torture. On 29 August 2005, the Ministry refused the complainant's application for a residence permit on humanitarian grounds, as it found that no essential humanitarian considerations of such strength existed as to conclusively make it appropriate to grant the application. In that connection, it observed that even though the complainant suffered from post-traumatic stress disorder, the disorder was not, according to the Ministry's practice, sufficient to justify the issuance of a residence permit on humanitarian grounds.

4.10 On 14 March 2007, the Danish Refugee Council requested the Refugee Appeals Board to reopen the asylum proceedings. On 22 January 2008, the Board refused the request for the reopening of the proceedings. In addition to reiterating the reasoning behind its negative decision of 11 June 2004, the Board considered it unlikely that the complainant would still be pursued for actions which he had not committed and which were solely based on the assumptions of the bereaved families.

4.11 On 20 January 2009, Leif Bork Hansen, a priest, requested the Refugee Appeals Board to reopen the complainant's asylum case, referring to an upcoming examination by the Medical Group of Amnesty International in Denmark. On 21 February 2009, this request was supplemented by the report of the Medical Group of 12 February 2009. By letter of 21 February 2009, the complainant again applied for a residence permit on humanitarian grounds. The letter enclosed the report from the Medical Group, from which it appeared that the complainant suffered from obvious physical and mental effects of the torture to which he had been subjected in Iraq and that he had many symptoms compatible with post-traumatic stress disorder.⁵ On 30 April 2009, the Ministry of Refugee,

⁵ According to the Medical Group of Amnesty International report, the complainant suffered from memory and concentration difficulties, sleeping difficulties, nightmares and depressed mood, he avoided contact with others and was tense and irascible. There were also both subjective and objective physical symptoms: he had constant pain in his shoulders and arms, he had injuries to his shoulders and lower arms, and suffered from diabetes.

Immigration and Integration Affairs refused the complainant's request for the reopening of the application for a residence permit on humanitarian grounds.

4.12 Pursuant to the Memorandum of Understanding of 13 May 2009 between Denmark and Iraq, the National Police requested the Danish Embassy in Baghdad in May and June 2009 to submit a number of cases to the Iraqi authorities for the purpose of readmission, including the complainant's case. However, the Iraqi authorities considered the complainant's identification documents to be false, making it impossible to identify him as an Iraqi national. It was decided to bring the complainant before an Iraqi delegation, which would arrive in Denmark in August 2009, in order to assess his Iraqi nationality.⁶

4.13 On 18 June 2009, the complainant was deprived of his liberty and was transferred to the Ellebaek Institution for Detained Asylum Seekers with a view to his deportation. The complainant was brought before Hillerød District Court on 19 June 2009, which found the deprivation of liberty lawful and fixed a time limit of 16 July 2009 for his detention. The Court held that his "presence in connection with identification hearings and implementation of his return to Iraq cannot be ensured by less interfering measures than deprivation of liberty". The order of Hillerød District Court was upheld by the High Court of Eastern Denmark on 23 June 2009. The period of deprivation of liberty was subsequently regularly extended until the complainant's return on 2 September 2009.

4.14 By letter of 16 July 2009, the complainant's counsel again requested the Ministry of Refugee, Immigration and Integration Affairs to reopen the application for a residence permit on humanitarian grounds, submitting a copy of a medical record from the Avnstrup Centre, where the complainant had been treated for a hernia on 16 January 2009. By letter of 29 July 2009, the Ministry again refused to reopen the examination of the complainant's case regarding a residence permit on humanitarian grounds, as a hernia and type 2 diabetes were not considered very serious physical illnesses that could justify the issuance of a residence permit on humanitarian grounds. By letter of 4 August 2009, the complainant's counsel submitted further medical information to the Ministry, which considered the letter as yet another request for the reopening of the application for a residence permit on humanitarian grounds. On 6 August 2009, the Ministry refused the complainant's request for reopening with reference to its previous decisions of 30 April and 29 July 2009.

4.15 By letter of 5 August 2009, Ms. Genefke and Mr. Sørensen made a claim against the Danish authorities with the North Sealand Police about violations of articles 3 and 16 of the Convention. With reference to article 12 of the Convention, Ms. Genefke and Mr. Sørensen requested the police to initiate an investigation. The police forwarded the letter to the Regional Public Prosecutor.

4.16 On 9 August 2009, violent unrest arose in the unit of the Ellebaek Institution in which the complainant was placed. The staff identified the complainant as a very active participant in the unrest. Against that background, he was temporarily excluded from association with other detainees.⁷ As the Ellebaek Institution did not have enough places for

⁶ On 20 August 2009, the complainant was brought before the Iraqi delegation in Denmark, which confirmed that he was an Iraqi national.

⁷ The complainant was temporarily excluded from association pursuant to section 63 (2), cf. section 63(1)(i) and (iii), of the Danish Sentence Enforcement Act as the Ellebaek Institution assessed that there was reason to assume that it was necessary to exclude him from association to prevent criminal activities or violent behaviour, and also assessed that there was reason to assume that he exhibited gross or frequently repeated impermissible behaviour obviously incompatible with continued association with other detainees. The Ellebaek Institution did not have enough places for all participating detainees to be excluded from association, and therefore the complainant was placed in the Vestre Prison from 9 August 2009 at 8:30 p.m. and held until the next day at 4:43 p.m., when the

all detainees to be excluded from association for the participation in the unrest, the complainant was placed in the Vestre Prison until the next day. The complainant's temporary exclusion from association was terminated on 13 August 2009.

4.17 With regard to article 3 of the Convention, the State party argues that it is the responsibility of the complainant to establish a prima facie case for the purpose of admissibility of the communication⁸ and to present an arguable case concerning the merits.⁹ It continues that it is the complainant who "must establish that he/she would be in danger of being tortured ... and that such a danger is personal and present".¹⁰

4.18 As concerns the assessment of whether there were substantial grounds for believing that the complainant would be in danger of being subjected to torture when returned to Iraq, the State party refers to the three decisions of the Refugee Appeals Board which dealt with the issue of torture. According to the State party, the incident of past torture is only one of the elements in examining a risk of being tortured if the complainant were returned to his country of origin.¹¹ It makes a reference to the Committee's jurisprudence according to which it must be considered whether or not the torture occurred recently and in circumstances which are relevant to the prevailing political realities in the country concerned.¹² The State party concludes that the part of the complaint alleging a violation of article 3 of the Convention is inadmissible as manifestly unfounded. Should the Committee find this part of the complaint admissible, the State party argues that the existence of substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Iraq has not been established.

4.19 In regard to articles 2 and 16 of the Convention, the State party points out that the decision on the complainant's temporary exclusion from association was made by the Ellebaek Institution. He was excluded from association from 9 August 2009 at 8:30 p.m. until 13 August 2009 at 4:20 p.m. The State party submits that a decision on temporary exclusion from association of an inmate can be appealed to the Department of Prisons and Probation under the Ministry of Justice,¹³ and that there is no evidence to indicate that the

requisite capacity had been provided through replacement of other detainees. The complainant's temporary exclusion from association was terminated on 13 August 2009 at 4:20 p.m., when it was considered possible to restore association in the unit. The complainant's role in the unrest was made the subject of a disciplinary interview, and he was ordered to be segregated for four days for his part in the unrest. However, the institution did not enforce the sanction as he had already been temporarily excluded from association for almost four days during the investigation of the events.

⁸ Committee against Torture, general comment No. 1 (1997) on the implementation of article 3 of the Convention, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44 and Corr.1), annex IX, para. 4.

⁹ *Ibid.*, para. 5.

¹⁰ *Ibid.*, para. 7; communications Nos. 270/2005 and 271/2005, *E.R.K. and Y.K. v. Sweden*, decision adopted on 30 April 2007, paras. 7.2 and 7.3; No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006, paras. 7.1 and 7.2; No. 180/2001, *F.F.Z. v. Denmark*, Views adopted on 30 April 2002, paras. 9 and 10; and No. 143/1999, *S.C. v. Denmark*, Views adopted on 10 May 2000, paras. 6.4 and 6.6.

¹¹ Communications No. 235/2003, *M.S.H. v. Sweden*, decision adopted on 14 November 2005, para. 6.5, and No. 277/2005, *N.Z.S. v. Sweden*, decision adopted on 22 November 2006, para. 8.5. See also communications No. 225/2003, *R.S. v. Denmark*, decision adopted on 24 May 2004, para. 6.2; No. 90/1997, *A.L.N. v. Switzerland*, Views adopted on 19 May 1998, para. 8.3; and No. 61/1996, *X, Y and Z v. Sweden*, Views adopted on 6 May 1998, para. 11.2.

¹² See *M.S.H. v. Sweden*, para. 6.5. The Government also refers to communications No. 220/2002, *R.D. v. Sweden*, decision adopted on 2 May 2005, para. 8.3; and No. 245/2004, *S.S.S. v. Canada*, decision adopted on 16 November 2005, para. 8.4.

¹³ See section 97 of the Remand Custody Order. Reference is made to section 2.3.2.

complainant had appealed the decision of the Ellebaek Institution to the Department. The State party thus submits that this part of the communication should be declared inadmissible for non-exhaustion of available and effective remedies. The State party objects to the complainant's claims that his temporary exclusion from association constituted "torture" according to article 1 (in conjunction with article 2) or, alternatively, "cruel, inhuman or degrading treatment or punishment" according to article 16. The State party claims, making a reference to the Committee's concluding observations and jurisprudence, that "solitary confinement" in general does not fall within the definition of torture,¹⁴ and that temporary exclusion pursuant to the Sentence Enforcement Act does not constitute torture as it can only be applied when necessary, such as to prevent escape, criminal activities or violent behavior.

4.20 The State party argues that article 16 of the Convention does not involve a general prohibition of exclusion from association. The Government concedes that exclusion from association may, in specific cases, depending on the circumstances of the case, amount to "cruel, inhuman and degrading treatment or punishment". Nonetheless, the State party submits that the complainant's temporary exclusion only for a brief period did not constitute cruel, inhuman or degrading treatment contrary to article 16 of the Convention, given the overall assessment of the circumstances of the complainant's involvement in the violent unrest that broke out in the Ellebaek Institution on 9 August 2009, as well as the fact that the complainant was interviewed by a psychologist and continued to receive medical treatment during his exclusion from association. Moreover, the State party challenges the medical certificates by Dr. Østergaard of 28 August and 7 September 2009 in support of the complainant's claim that the temporary exclusion constituted torture, as the doctor was not the complainant's treating physician. In addition, the State party submits that the complainant received an explanation of the background of the temporary exclusion prior to its commencement, whereupon he kept composed and calm. The State party adds that there were no restrictions on the complainant's right to receive booked visits and that his cell was equipped with TV and he could take one hour's outdoor exercise alone. The only restrictions imposed on the applicant during his stay in the Vestre Prison were that he was not allowed to associate with other inmates in cells and to take outdoor exercise in association with others. A similar regime applied to his exclusion from association in the Ellebaek Institution.

4.21 In its observations on article 12 of the Convention, the State party acknowledges that this article also applies in cases of "cruel, inhuman or degrading treatment or punishment". Referring to the Committee's jurisprudence interpreting the scope of the obligation to investigate acts of torture or ill-treatment,¹⁵ the State party submits that the complainant was assessed by a psychiatric consultant of the Copenhagen Prisons on 6 July 2009, and that there was no indication that his health had deteriorated so much during the temporary exclusion from association that there were reasonable grounds to fear that the exclusion from association would constitute inhuman treatment within the meaning of the Convention. As of 6 July 2009, the complainant received treatment with chlorprothixene, which he also received during his temporary exclusion from association. The psychiatric

¹⁴ The State party makes a reference to the concluding observations on the fifth periodic report of Denmark (CAT/C/DNK/CO/5, para. 14), in which the Committee against Torture recommended that Denmark "should limit the use of solitary confinement as a measure of last resort, for as short time as possible under strict supervision and with a possibility of judicial review". In the State party's view, the Committee did not state that solitary confinement in general falls within the definition of torture, nor this could be inferred from the Committee's jurisprudence, which had not specifically dealt with this issue.

¹⁵ See communication No. 59/1996, *Abad v. Spain*, Views adopted on 14 May 1998.

consultant also recommended that treatment with antidepressants could be considered if the complainant were to remain in detention for a long period.

4.22 The State party acknowledges its duty to initiate an investigation if there are reasonable grounds, regardless of the origin of the suspicion. However, in the present case, the complaint submitted by Mr. Sørensen and Ms. Genefke prior to the complainant's temporary exclusion from association did not constitute such reasonable grounds. The "information" provided by Mr. Sørensen and Ms. Genefke did not contain such new information about the circumstances during the complainant's deprivation of liberty, including information on the complainant's health, as could, in the State party's view, have implied a duty to initiate an investigation under article 12 of the Convention. According to the State party, the "information" only contained a request to the Danish authorities to initiate an investigation under article 12, but did not present any arguments in support thereof, other than the reference to the fact that the complainant had previously been subjected to torture and therefore had an increased risk of flashbacks if imprisoned.¹⁶ Moreover, according to the State party, the complainant did not at any time allege that he had been subjected to any mistreatment during his detention at the Ellebaek Institution, including the time he spent as temporarily excluded from association. The State party notes in particular that the complainant expressly stated during the interview at the Ellebaek Institution that he did not want to complain of any staff behavior. Against this background, the State party has been of the view that no reasonable ground existed to believe that the complainant was subjected to an act of cruel, inhuman or degrading treatment or punishment while he was temporarily excluded from association.

4.23 The State party concludes that no violations of the Convention occurred in the present case.

Complainant's comments on the State party's observations on admissibility and merits

5.1 In his comments dated 22 November 2010, the complainant's counsel recalled relevant facts of the case.

5.2 With reference to article 12 of the Convention, the complainant opposes the allegations of the State party that the complainant "seemed satisfied and kept composed and calm" during the exclusion from association. He also contests the State party's statement that the complaint submitted by Mr. Sørensen and Ms. Genefke on 5 August 2009, prior to his temporary exclusion from association, did not constitute a reasonable ground for initiating an investigation according to article 12 of the Convention. The two referred experts are considered as the leading experts on issues of torture, and their complaint on behalf of a victim of torture or ill-treatment alleging a risk of flashbacks and deterioration of his mental health as a result of the previously incurred torture should have been considered as a reasonable ground for further investigations. Moreover, the complainant points out that the complaint of 5 August 2009 targeted the conditions of detention since 18 June 2009, not just a punitive four-day exclusion from association, and the deprivation of liberty as a form of torture or ill-treatment against a former victim of torture. In addition, as the complainant was put in a punitive cell, which was even worse for his health condition,

¹⁶ The State party also refers to the fact that the complainant's health following his temporary exclusion from association, taking into account also the contents of the two medical certificates issued by Dr. Østergaard on 28 August 2009 and 7 September 2009, respectively, was assessed in connection with the examination by the Ministry of Refugee, Immigration and Integration Affairs of the complainant's request for the reopening of the application for a residence permit on humanitarian grounds that was refused on 4 December 2009.

this should have been considered as an additional reason to carry out an investigation pursuant to article 12 of the Convention, as demanded by the two experts on behalf of the complainant. Except for the reference to a psychiatric report of 6 July 2009 and the complainant's treatment with chlorprothixene in order to contain his anxiety when in detention, the State party has not, in counsel's view, convincingly explained the frequency and type of medical examination that was afforded to him as a former victim of torture prior to and during his detention. According to the complainant, the examination of his health condition was never done by the State party but only on a private initiative of the medical doctor who concluded, on 28 August 2009, that his health condition had seriously deteriorated. Furthermore, the complainant submits that the certificate was rejected as new evidence by the Ministry of Refugee, Immigration and Integration Affairs on 1 September 2009 as the medical certificate was "not signed" by Dr. Østergaard. Although the Ministry requested that a new and signed medical certificate by Dr. Østergaard be resubmitted by 8 September 2009, the State party deported the complainant to Iraq on 2 September 2009.

5.3 In addition, the complainant reasserts that by refusing to initiate the investigation of his medical condition the State party remained without the basic knowledge concerning the complainant's suffering due to the previous torture and inhuman treatment in Iraq and the new suffering caused by the detention and use of a punitive cell in Denmark, in violation of articles 2 and 16 and article 12 of the Convention. Contesting the State party's claim that the complainant in the present case did not at any time allege that he had been subjected to any ill-treatment during his detention at the Ellebaek Institution, the complainant submits that a request for investigation was filed on his behalf on 5 August 2009, followed by a number of letters and e-mails by his counsel. Moreover, he submits that the State party's claim of the complainant's alleged statement during an interview to the effect that "he did not want to complain of any staff behavior", cannot be considered as proof that he withdrew the complaint of 5 August 2009 by Mr. Sørensen and Ms. Genefke. Finally, the complainant makes a distinction between the possibility to complain about the "concrete behavior" of individual staff members and to complain against the decision to initiate the use of the punitive cell and transfer the complainant to the Vestre Prison, which is used for ordinary criminals. In the complainant's view, the inhumane treatment was first and foremost incurred by the decision to detain the complainant and to transfer him to a punitive cell in Vestre Prison.

5.4 As regards the alleged violation of article 3 of the Convention, the complainant submits that his deportation was initiated on 25 August 2009 when the State Police enquired with the Ministry of Refugee, Immigration and Integration Affairs, the Appeals Board and the Immigration Service whether the police could proceed with the deportation. The complainant asserts that the violation of article 3 of the Convention took effect on 2 September 2009, when the deportation was carried out. He also submits that he was deported to Iraq without an investigation into his health condition resulting from the previously incurred torture and inhuman treatment. He adds that the deportation was carried out in disregard of the report by the Medical Group of Amnesty International of 12 February 2009, as well as of the medical certificate of 28 August 2009. He concludes that his deportation prior to the expiry of a seven-day time limit for the resubmission of a new and signed medical certificate to the Ministry of Refugee, Immigration and Integration Affairs underscores an allegedly clear-cut violation of article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the

Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee shall not consider any communication unless it has ascertained that the individual has exhausted all available domestic remedies; this rule does not apply where it has been established that the application of the remedies has been unreasonably prolonged, or that it is unlikely to bring effective relief to the alleged victim.

6.3 The Committee notes that the State party has challenged the admissibility of the complaint in regard to the claims of a violation of articles 2 and 16 on the ground there was no evidence to indicate that the complainant had appealed the decision of the Ellebaek Institution regarding a temporary exclusion from association to the Department of Prisons and Probation. The Committee notes that the State party requested that this part of the complaint be declared inadmissible for non-exhaustion of all available and effective domestic remedies. However, the Committee notes that the subject matter before it is not exclusively relating to the detention in temporary exclusion from association but to the entire period of detention as of 18 June 2009. The Committee notes that the complainant's detention in Ellebaek Institution was upheld by Hillerød District Court on 19 June 2009 and the High Court of Eastern Denmark on 23 June 2009. In the circumstances, the Committee concludes that it is not precluded by the requirements of article 22, paragraph 5 (b), of the Convention, from considering the complaint.

6.4 The Committee further notes that the State party has challenged the admissibility of the complaint in regard to the claim of a violation of article 12 on the ground that the allegations submitted on behalf of the complainant of being subjected to torture or cruel, inhuman or degrading treatment or punishment did not present a *prima facie* case and thus did not imply a duty upon the State party to investigate. The Committee is of the opinion that the allegations under article 12 raise substantive issues which should be dealt with on the merits and not on admissibility. The Committee thus considers this part of the complaint admissible.

6.5 The Committee notes that the State party has challenged the admissibility of the complaint in regard to a violation of article 3 on the grounds that the complainant has failed to establish a *prima facie* case for the purpose of admissibility of the communication. The Committee however is of the opinion that the allegations raise substantive issues which should be dealt with on the merits and not on admissibility. The Committee considers the part of the complaint in regard to article 3 admissible.

6.6. As the Committee finds no further obstacles to admissibility, it declares the complaint admissible and proceeds to its consideration on the merits.

Consideration of the merits

7.1 In accordance with article 22, paragraph 4, of the Convention, the Committee has considered the present communication in the light of all information made available to it by the parties concerned.

Confinement

7.2 The first issue before the Committee is whether the confinement of the complainant, a former victim of torture, in Ellebaek Institution amounts to torture or to other cruel, inhuman or degrading treatment or punishment contrary to articles 2 and 16 of the Convention.

7.3 The Committee considers that, when detention of refused asylum seekers is applied as a last resort, its duration should be limited, medical checks upon arrival in detention

facilities should be ensured, and a medical and psychological follow-up by a specially trained independent health expert should be provided when signs of torture or traumatization have been detected during the asylum proceedings.¹⁷ In the instant case, the Committee notes that the overall duration of the complainant's detention was less than three months and that both the initial detention and its extensions underwent judicial reviews. The Committee further notes that the complainant received a psychiatric examination on 6 July 2009, some three weeks after his detention in Ellebaek Institution, and was given medication. In the circumstances, the Committee concludes that the detention of the complainant did not amount to violations of article 16 and of article 2 of the Convention.

Exclusion from association

7.4 With regard to the question of whether the author's detention in "exclusion from association" constituted a separate violation of article 16, the Committee notes the State party's argument that the temporary exclusion from association pursuant to the Sentence Enforcement Act was applied as necessary, for a limited period of time, and was proportionate to a legitimate objective of preventing violent behavior, and that it was not contrary to article 16, given the overall assessment of the circumstances of the complainant's involvement in the violent unrest that broke out in the Ellebaek Institution on 9 August 2009. The Committee considers that the particular conditions of solitary confinement, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned must all be taken into account when determining whether or not it amounts to a violation of article 16 of the Convention. The Committee notes that the complainant's exclusion from association did not exceed four days; that during that period of time he was visited by his girlfriend, his lawyer, a psychologist and a medical doctor; and that he had a television in his cell. In the circumstances, the Committee concludes that the complainant's detention in exclusion from association did not amount to a separate violation of article 16 of the Convention.

Article 12 claim

7.5 The Committee notes that counsel alleges a violation of article 12 of the Convention, since the State party did not conduct an investigation after the report was filed by Mr. Sørensen and Ms. Genefke on 5 August 2009 and since, moreover, the complainant was removed from the territory of the State party before any examination of the complaint that his detention constituted a violation of the Convention had taken place. In this context, the Committee notes the State party's statement that the complaint submitted by Mr. Sørensen and Ms. Genefke during the complainant's detention, preceding his temporary exclusion from association, did not constitute reasonable grounds to initiate an investigation under article 12 of the Convention, since it did not refer to any instances of torture or ill-treatment other than a general reference to the negative effects of the detention on the complainant's health. The Committee further notes the State party's assertion that the complainant did not, at any time, allege that he had been subjected to any mistreatment during his detention.

7.6 The Committee recalls its jurisprudence on the contents and scope of article 12, according to which State authorities have the obligation to proceed to an investigation *ex officio*, wherever there are reasonable grounds to believe that acts of torture or ill-treatment have been committed.¹⁸ In the instant case, however, no allegations have been made by the complainant or on his behalf that he had been subjected to acts of torture or ill-treatment other than the general allegation that his detention as such, in the light of his particular

¹⁷ See, for example, the concluding observations of the Committee against Torture on the fifth periodic report of Germany (CAT/C/DEU/CO/5), para. 24 (a), (b) and (c).

¹⁸ *Abad v. Spain*, para. 8.2.

vulnerability as a former victim of torture, amounted to a violation of the Convention. The Committee recalls its previous jurisprudence that an investigation under article 12 must seek both to determine the nature and circumstances of the alleged acts and to establish the identity of any person who might have been involved therein.¹⁹ In the circumstances of the present case, where the sheer fact of detention was alleged to constitute the violation of the Convention, the Committee considers that no reasonable purpose would have been served by such an investigation. Accordingly, the Committee considers that the facts before it do not disclose a violation of article 12 of the Convention by the State party.

Article 3 claim

7.7 The last issue before the Committee is whether the forced removal of the complainant to Iraq violated the State party's obligation 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 would be in danger of being subjected to torture. The Committee must evaluate whether there are substantial grounds for believing that the complainant would have been personally in danger of being subjected to torture.

7.8 In assessing the risk, the Committee must take into account all relevant considerations pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would have been personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

7.9 The Committee recalls that the aim of such determination is to establish whether the individual concerned would have been personally at a foreseeable and real risk of being subjected to torture on return to that country. The Committee also recalls its general comment No. 1 on the implementation of article 3, in which it stated that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion", but that "the risk does not have to meet the test of being highly probable", and that the risk must be personal and present.²⁰ In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.²¹ The Committee further recalls that, in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,²² while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

7.10 In the present case, the Committee notes that the State party has acknowledged and taken into account the fact that the complainant had been subjected to torture in the past when evaluating the existence of a personal risk of torture the complainant might face if

¹⁹ Ibid., para. 8.8, and communication No. 161/2000, *Dzemajl et al. v. Serbia and Montenegro*, decision adopted on 21 November 2002, para. 9.4.

²⁰ Paras. 6 and 7.

²¹ See, inter alia, communications No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005 and No. 226/2003, *T.A. and S.T. v. Switzerland*, decision adopted on 6 May 2005.

²² See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

returned to his country, including in all three decisions of the Refugee Appeals Board which have dealt with this issue. The Committee further notes that in 2009 the complainant had submitted that he would be exposed to a risk of torture exclusively based on threats from the families of his friends who were executed in 1995. The Committee recalls that the State party's obligation under article 3 is to refrain from forcibly returning a person to another State where there are substantial grounds for believing that there is a risk of torture. The Committee observes that the complainant in the present case has failed to substantiate that he was in such danger.

7.11 In the light of the above, the Committee concludes that the existence of substantial grounds for believing that the complainant would have been in danger of being subjected to torture upon return to Iraq has not been established. The Committee therefore concludes that his removal to that country did not constitute a breach of article 3 of the Convention.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainant's detention as a refused asylum seeker from 18 June 2009 to 2 September 2009 did not amount to a violation of articles 16 and 2 of the Convention, that his rights under article 12 of the Convention have not been violated and that his removal to Iraq by the State party did not constitute a breach of article 3 of the Convention.

[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.]
