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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 719/2015*, **

Communication submitted by:	H.A. and G.H. (represented by counsel, P.J. Schuller)
Alleged victims:	The complainants
State party:	Netherlands
Date of complaint:	2 December 2015 (initial submission)
Date of present decision:	17 May 2018
Subject matters:	Risk of torture in the event of deportation to country of origin (non-refoulement); prevention of torture
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issue:	Deportation of the complainants from the Netherlands to Armenia
Articles of the Convention:	3 and 22

1.1 The complainants are H.A. and G.H., nationals of Armenia, born in 1982 and 1983 respectively. They sought asylum in the Netherlands, but their asylum applications have been rejected twice. They submit that, should the Netherlands proceed with their deportation to Armenia, it would be violating article 3 of the Convention. The complainants are represented by counsel.

The facts as presented by the complainants

2.1 H.A. worked as a nurse at Arsen Hayryan Armash Medical Hospital in Armenia. The director of the hospital was a good friend of Hovik Abrahamyan, the then-speaker of the National Assembly. On 1 March 2008, the director of the hospital compelled H.A. to provide medical assistance to the police and the military during demonstrations that took place in Yerevan in the aftermath of the presidential elections. She was ordered to inject several civilian detainees with an unknown substance, but she refused and destroyed the capsules containing the substance. Consequently, she was severely beaten, held at the hospital overnight and required to turn over her passport. The next day, accomplices of Mr.

* Adopted by the Committee at its sixty-third session (23 April–18 May 2018).

** The following members of the Committee participated in the examination of the communication: Essadia Belmir, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

Abrahamyan forced H.A. to sign three statements containing false details of the demonstrations.[1]

2.2 Following the events of 1 March 2008, accomplices of Mr. Abrahamyan regularly visited H.A., and forced her to memorize witness statements containing false information about Nikol Pashinyan, a leading member of the Armenian National Congress and supporter of Levon Ter-Petrosyan, a candidate in the 2008 presidential elections. The statements were to be made during Mr. Pashinyan's upcoming trial. In March 2009, accomplices of Mr. Abrahamyan held H.A. hostage for three weeks in a house in Arashat, regularly beating and abusing her. Her brother, Garik, her partner, G.H., and two friends freed her, and she fled to Georgia. Garik was later murdered for freeing her.[2] Accomplices of Mr. Abrahamyan subsequently harassed G.H., after he told his manager about H.A.'s situation. He was dismissed from his job and his home was raided by three men, who told him to make sure that H.A. returned to Armenia or she would be hunted down due to her protest and knowledge of the plot to produce false incriminating evidence against Mr. Pashinyan concerning crimes allegedly committed in February and March 2008. Soon afterwards,[3] G.H. fled to Georgia, where he joined H.A. They then travelled together to the Netherlands via Kiev. On 28 October 2010, the complainants entered the Netherlands and applied for asylum.

2.3 On 1 June 2011, the Immigration and Naturalization Office issued a notice of intention to reject the asylum applications on the basis that the complainants had provided insufficient identification and travel documents.[4] The Office did not dispute the events of 1 March 2008, including H.A.'s forced administration of medical assistance, her beating and her forced signature of three statements regarding the demonstration. However, it challenged the credibility of both complainants' statements regarding the subsequent harassment at the hands of Mr. Abrahamyan's accomplices, the identity of those accomplices, and H.A.'s kidnapping and memorization under duress of witness statements. On 18 July 2011, the complainants requested an individual investigation into, and a report on, the evidence available. However, on 19 July 2011, the Office rejected both complainants' applications based on their insufficient identity and travel documents, and consequently applied the strict credibility test to their accounts.

2.4 The complainants' appeals against that decision were rejected by the Regional Court of the Hague and the Administrative Jurisdiction Division of the Council of State on 8 May and 24 September 2012, respectively. In a summary judgment without reasoning, the Administrative Jurisdiction Division declared that their appeals were ill-founded.

2.5 On 21 July 2014, the complainants filed a second asylum application based on a medical report by the Netherlands Institute for Human Rights and Medical Research, in which it was found that H.A.'s physical ailments and post-traumatic stress disorder were consistent with her asylum application. The report concluded that it was likely that her symptoms had impeded her ability to present complete, coherent and consistent statements during her initial asylum interviews.[5] On 18 August 2014, the Immigration and Naturalization Office determined that the Institute's report was not a new fact and thus could not alter the initial asylum application decision. They issued a notice of intention to reject, also noting new information from the Belgian authorities that both complainants had applied for visas for Italy in Yerevan on 27 September 2010 and had been granted single-

[1] The statements included information that H.A. had witnessed Nikol Pashinyan and his accomplices telling other demonstrators to use violence against the police, distributing weapons and ordering the demonstrators to use those weapons.

[2] No details provided.

[3] No dates provided.

[4] Under the domestic law of the Netherlands, failure to provide this information means that the Immigration and Naturalization Office applies a strict credibility test to asylum applications, setting a higher standard of proof for the complainants. The test was applied pursuant to section 31 (2) (a)–(f) of the Aliens Act of 2000.

[5] Pursuant to section 4:6 of the General Administrative Law Code, a new asylum application will only be judged on its merits if the applicant adduces new facts and circumstances that could not have been adduced previously.

entry visas.[6] On 19 August 2014, the Office rejected the second asylum application. On 10 September 2014, the complainants filed a judicial appeal and a request for injunctive measures. On 2 October 2014, Utrecht District Court declared that the appeal was ill-founded because the Institute's report could not be considered to be a new fact and because there was no "legally justifiable" reason why the complainants could not have presented the report before the rejection of their first application.

2.6 The complainants submit that a higher appeal to the Council of State would not be an effective legal remedy due to the Council's consistent case law regarding the need for a justifiable, legal reason as to why the complainants did not present medical reports of torture in the initial application.[7] This jurisprudence shows that a request for the report following an initial negative decision and the impossibility of procuring a medical report in the eight-day period of initial application consideration do not constitute legally justified reasons.[8] The complainants note that an application for appeal will not stay their deportation and argue that a legal remedy in deportation cases is only effective if it has "automatic suspensive effect" on deportation procedures.[9]

The complaint

3.1 The complainants claim that their deportation to Armenia would constitute a violation by the Netherlands of article 3 of the Convention.

State party's observations on admissibility

4.1 By note verbale of 20 January 2016, the State party challenged the admissibility of the complaint on the basis that the complainants failed to exhaust domestic remedies. The State party notes that Utrecht District Court rejected the complainants' application for a judicial review of the Immigration and Naturalization Office's decision to reject their second asylum application, and that they did not appeal against that decision before the Administrative Jurisdiction Division. Therefore, they failed to exhaust available domestic remedies.

4.2 The State party disputes the claim that an appeal to the Division would have been ineffective due to the complainants' failure to provide a legally justified reason as to why the Netherlands Institute for Human Rights and Medical Research report had not been submitted during the initial asylum procedure. The State party refers to two judgments in which the Division considered the question of whether a medical report could alter a prior decision on an asylum application.[10] It also refers to a case where the Division explicitly states that a medical report submitted in a prior asylum procedure was insufficiently taken into account when evaluating the risk of violation of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).[11] This case law demonstrates that the Division's decisions are not limited by

[6] Obtained from the Belgian authorities through the Schengen visa consultation network. The complainants allege that their passports were used as a part of identity theft, and that the burden is on the State party to further investigate the matter by requesting the photographs and fingerprints submitted with the visa application to prove that the complainants did, in fact, apply for visas.

[7] See European Court of Human Rights, *Salah Sheekh v. the Netherlands* (application No. 1948/04), judgment of 11 January 2007, para. 121, in which the Court concludes that "an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case law or other suitable evidence, that an available remedy which he or she has not used was bound to fail".

[8] See Anouk Biersteker and Emily Wu, "Medical reports in subsequent asylum applications: does Dutch law comply with international law?" (Migration Law Clinic, June 2015); and Margarita Fourer and Julia Smeekes, "Medical reports in subsequent asylum applications: does Dutch law comply with international law?" (Migration Law Clinic, June 2015).

[9] See European Court of Human Rights, *Turgunov v. Russia* (application no. 15590/14), judgment of 22 October 2015, para. 36.

[10] See Administrative Jurisdiction Division, ECLI: NL: RVS: 2012: BX0767, judgment of 28 June, 2012 (in Dutch); and ECLI: NL: RVS: 2011: BQ0793, judgment of 14 January 2011 (in Dutch).

[11] See Administrative Jurisdiction Division, ECLI: NL: RVS: 2015: 4068, judgment of 28 December 2015, para. 3.1.

consideration of whether a medical report should have been submitted in the first asylum application and that they are, therefore, an effective remedy.

4.3 The State party disputes the complainants' statement that an appeal would not be an effective remedy as it has no automatic, suspensive effect and allows the Government of the Netherlands to initiate the complainants' expulsion. The State party maintains that the complainants had the opportunity to apply to the Division for an injunction to prevent their expulsion pending appeal. Pursuant to sections 8:81 and 8:83 (4) of the General Administrative Law Act, a judge responsible for provisional measures in appeal proceedings must assess the risk of a violation of article 3 of the Convention upon the asylum seeker's return to his or her country of origin and must deliver his or her judgment before expulsion. Therefore, the complainants' conclusion that the higher appeal did not have to be exhausted is not warranted.

Complainant's comments on the State party's observations

5.1 On 26 February 2016, the complainants submitted their comments on the State party's observations. The complainants maintain that their application for asylum is plausible given article 3 of the Convention, arguing that the Committee's jurisprudence requires a flexible approach to plausibility standards in order for the article to be applied effectively.[12]

5.2 The complainants contest the State party's argument that domestic remedies provide an opportunity for suspension of their expulsion. They state that neither the lodging of an appeal, nor of an injunction pending the appeal, have automatic suspensive effect. They refer to the European Court of Human Right's decision that the possibility of requesting a suspension of an impugned measure through an urgent procedure is not a sufficient remedy unless it allows for the rigorous scrutiny of the merits of the claim.[13] Rather, this remedy allows for possible expulsion without complete scrutiny of the claim, violating article 3 of the Convention.

5.3 The complainants also refute the State party's argument that the scope of a higher appeal to the Administrative Jurisdiction Division would not be limited to the procedural question of whether a medical report submitted after the initial asylum application can be substantively considered as a new fact. They refer to two expert opinions stating that the Division requires a "legally justified reason" for the late submission of a medical report. Without the "legally justified reason," the appeal would be strictly limited to the question of whether new facts have been presented, with no substantive assessment of the merits of the case. As to the three decisions referred to by the State party, they point out that, in its decisions of 14 January 2011 and 28 June 2012, the Division ruled that the applicant had failed to provide a legally justified reason why he did not initially request a medical report. Thus, these cases support their allegations that a further appeal would be limited to the question of whether the medical report constituted a new fact. Furthermore, the decision of 28 December 2015 held that the medical report was insufficiently taken into account in reviewing the article 3 violation in the light of new facts presented by the complainant regarding a deteriorating situation. By itself, the medical report did not constitute a new fact that allowed for substantive investigation. The complainants conclude that the State party's provision of only three cases out of Division case law stretching back over more than 15 years, none of which demonstrate that the appeal will focus on more than the validity of the Netherlands Institute for Human Rights and Medical Research report as a new fact, suggest that a further appeal has virtually no prospect of success in determining the merits of their application.

State party's observations on the merits

6.1 In its submission dated 9 June 2016, the State party provided information on the merits of the case. After briefly restating the facts of the case, the State party elaborated on

[12] See, e.g., *Mutombo v. Switzerland* (CAT/C/12/D/13/1993), para. 9.2.

[13] See European Court of Human Rights, *M.S.S. v. Belgium and Greece* (application no. 30696/09), judgment of 21 January 2011, paras. 387–390.

the applicable domestic law and policy. Referring to the Aliens Act of 2000, it asserts that if an applicant is unable to submit travel, identification or other documents required in support of his or her asylum application, the examination of his or her application will take this circumstance into account, unless he or she can establish satisfactorily that the absence of these documents is not attributable to him or her. The State party emphasizes, however, that an application for a temporary asylum residence permit cannot be denied on the sole ground that the alien has not produced any documents, or has produced false or forged documents. Only if it is established that this fact can be attributed to the alien, will the credibility of his or her statements be impaired. In these circumstances, the alien bears an elevated burden of proof to establish the plausibility of his or her asylum application. The alien must supply all the information, including relevant documents, on the basis of which it can be decided whether legal grounds exist for granting him or her a residence permit. The above-mentioned system of statutory provisions thus places upon the asylum seeker the burden of proof to establish the validity of his or her account and gives an opportunity to demonstrate the veracity of his or her account by means of statements, if he or she is unable to produce documents for this purpose.

6.2 With regard to available legal remedies, the State party submits that an alien may apply to The Hague District Court for judicial review of a decision rejecting his or her asylum application. In principle, in the case of a first application for asylum, an alien may await the result of the application for review in the Netherlands. Appeals against the District Court's judgments are submitted to the Administrative Jurisdiction Division. Under Section 53 of the Council of State Act, the Division may either uphold the District Court's judgment or reverse it in whole or in part. Under Section 91 (2) of the Aliens Act of 2000, the Division may uphold the District Court's judgment without giving reasons if it holds that the arguments presented on appeal are insufficient to warrant the quashing of the judgment. In contrast to an alien applying to the District Court for review in his first procedure, an alien who makes a subsequent asylum application, or who has lodged an appeal with the Division, may not, in principle, await the decision in the Netherlands. However, he or she may lodge an objection to his or her actual expulsion, including on the grounds that it would be contrary to article 3 of the European Convention on Human Rights, or apply to the courts for an injunction so that he or she cannot be expelled from the Netherlands pending the outcome of the decision on his or her notice of objection.

6.3 With regards to the assessment of supporting medical evidence in the asylum procedure, the State party notes that, if such evidence provides strong indications that the alleged inhuman treatment in the country of origin caused the injury suffered by the asylum seeker, the Government may be required to further investigate the medical evidence. This is in order to eliminate any doubt about the risk of the asylum seeker being exposed to treatment incompatible with article 3 of the Convention if expelled to the country in question. The issue of whether the medical evidence obliges the Government to carry out further investigations depends, in the first place, on the credibility of the asylum seeker's account of the inhuman treatment suffered, viewed in the light of the general situation in the country concerned.[14] An obligation to carry out further investigations may, however, also arise when other parts of the account lack credibility. In such cases, the authorities must consider whether: (a) significant scarring or injuries are present; (b) the scarring corresponds to credible statements; (c) general sources show that asylum seekers who return are examined for scars by the local authorities; (d) other evidentiary material has been submitted that substantiates the claim that there is a risk of a violation of article 3 of the Convention.

6.4 Concerning the events of 2008 in Armenia, the State party submits that, according to various country reports and other background information,[15] the first round of the

[14] See, inter alia, European Court of Human Rights, *R.C. v. Sweden* (application no. 41827/07), judgment of 9 March 2010, paras. 53–56; *D.N.W. v. Sweden* (application no. 29946/10), judgment of 6 December 2012, paras. 41–44.

[15] See Ministry of Foreign Affairs country reports on Armenia of 24 October 2013, 10 February 2012, 2 August 2010 and 23 January 2009. Available respectively at www.rijksoverheid.nl/documenten/ambtsberichten/2013/10/24/armenie-2013-10-24 (in Dutch), www.rijksoverheid.nl/documenten/ambtsberichten/2012/02/13/armenie-2012-02-10 (in Dutch),

presidential election, held on 19 February 2008, was won by Serzh Sargsyan. His opponent, Mr. Ter-Petrosyan, came second but refused to accept the results, accusing Mr. Sargsyan of fraud and demanding new elections. Supporters of Mr. Ter-Petrosyan held mass demonstrations that drew thousands of people in the days following the election. There was a large police presence in the centre of the city, and access to government buildings and embassies was closed off. On the morning of 1 March 2008, the police used forced to clear Liberty Square, one of the main squares in Yerevan. Around 20,000 demonstrators gathered again later that day at another location in the centre of Yerevan to continue their protest. In the evening, the police again took action, this time with more serious consequences: in the confrontation between demonstrators and security forces, 10 persons were killed and many more were injured.[16] According to several human rights organizations, including Human Rights Watch, the police made unnecessary use of lethal force. Afterwards, around 100 of Mr. Ter-Petrosyan's supporters were arrested and imprisoned. They included many prominent members of opposition parties who had led national and local campaigning for Mr. Ter-Petrosyan. Mr. Pashinyan went into hiding after the events of 1 March 2008. Along with seven others, he was wanted by the State party authorities on various charges. On 1 July 2009, he came out of hiding and surrendered to the police. He was sentenced to seven years in prison for organizing the protests of February and March 2008, and later released in 2011 due to an amnesty.

6.5 The State party also submits that, although the human rights situation in Armenia gives cause for concern, given the information from various public sources, there is no reason to conclude that expulsion to Armenia would, in itself, involve a risk of a violation of article 3 of the Convention. The six prisoners who numbered among the opposition supporters connected with the disturbances in 2008 have all been released. According to the April 2016 country report of the Ministry of Foreign Affairs of the Netherlands,[17] there is considerable public dissatisfaction with widespread corruption, social inequality and the poor economic situation in Armenia. In general, people have little faith in the Government, with many trying to find a job abroad, if not for themselves then for their children.

6.6 The State party notes that every asylum application made by an Armenian national must be assessed on its own merits. The State party cites recent decisions related to the events of March 2008. In particular, with regard to an Armenian asylum seeker who claimed to have had problems as a result of the disturbances in February and March 2008, the European Court of Human Rights held that it considered that there was nothing to indicate that, more than five years after the events, the applicant would be of particular interest to the authorities, that he would be arrested upon his arrival in Yerevan and that he would be subjected to treatment contrary to article 3 of the Convention.[18] In a similar case, the Human Rights Committee stated that, with regard to the version of the author's allegations that the State party did find credible, the question remained whether he would face a real risk of torture or ill-treatment in Armenia in the future. The Committee noted its concern over the fact that the author's documents had been erroneously sent to the Armenian Embassy. Still, given that the author had never been politically active, given that he was no longer a police officer, and given the passage of time since the disputed 2008 election, the Committee could not conclude that the author would face a real risk of treatment contrary to article 7 of the Covenant if he were returned to Armenia.[19]

www.rijksoverheid.nl/documenten/ambtsberichten/2010/08/27/armenie-02-08-2010 (in Dutch) and www.rijksoverheid.nl/documenten/ambtsberichten/2009/01/23/armenie-2009-01-23 (in Dutch); and the *Economist*, Intelligence Unit, Country profile on Armenia, May 2008. Available at www.eiu.com/FileHandler.ashx?issue_id=723138257&mode=pdf.

[16] See Ministry of Foreign Affairs country report on Armenia, 23 January 2009, p. 15. Available at www.rijksoverheid.nl/documenten/ambtsberichten/2009/01/23/armenie-2009-01-23 (in Dutch).

[17] Ministry of Foreign Affairs' country report on Armenia, April 2016. Available at www.dienstterugkeerenvertrek.nl/binaries/algemeen-ambtsbericht-armenie-(april-2016)_tcm49-218446.pdf (in Dutch).

[18] See European Court of Human Rights, *S v. France* (application No. 37229/11), judgment of 6 May 2014, para. 57 (in French).

[19] See *G.H. v. Netherlands* (CCPR/C/104/D/1801/2008), para. 11.7.

6.7 The State party submits that the complaint fails to clarify on what grounds the complainants now believe that their return, in view of the current political situation in Armenia, would involve a personal and present risk of treatment incompatible with article 3 of the Convention. They do not claim that they are still being sought by Mr. Abrahamyan or his men, or that they are otherwise the object of adverse attention from the authorities. Nor do they explain what kind of treatment they claim to fear on their return or by whom. The State party notes that the complainants have not substantiated their travel route by providing the documents they used to cross the border or any other evidence, and that they were unable to provide detailed, coherent and verifiable statements about the route they took. Since they state that they travelled from Georgia to Ukraine by air, it is not unreasonable to assume that this journey can be substantiated by documentary evidence. The State party rejects the complainants' explanation that an intermediary who arranged for them to travel was in possession of both the passports and tickets used for their journey, and finds it implausible that two adults would not have been required to show their passports at the border control post at the airport. The complainants were unable to say from which city their flight departed, which airline was used and at what time the aircraft left Georgia. The State party submits that these facts undermine the credibility of the complainants. Although account has been taken of the fact that H.A. was heavily pregnant at the time of the flight, this does not mean that G.H. would be unable to provide such basic information.

6.8 The State party notes that the fact that no credibility can be attached to the complainants' alleged travel route is confirmed by the information regarding the visa applications for Italy they submitted using their passports. The State party is convinced that the complainants have made incorrect statements and have withheld information. During their second interview, H.A. said that she had been forced to hand over her passport on 29 February 2008, and G.H. stated that he had handed his passport over on 28 September 2010. However, it has been established that the complainants submitted visa applications for Italy in Yerevan on 27 September 2010, and that, at that moment, they were in possession of their passports. The State party cannot accept the complainants' explanation that this was not possible because, at that time, they were in Georgia, and that they must have been victims of identity theft. Since the complainants handed over their passports two and a half years apart from each other, and to different people, it would be remarkable if, by sheer coincidence, the two passports were used simultaneously to apply for European visas. In this context, the State party takes into account the fact that the visas were applied for and granted a very short time (one month) before the complainants reported to Ter Apel asylum centre in the Netherlands.

6.9 The State party notes that the complainants' accounts of their reasons for fleeing Armenia were deemed to be partially credible. The description of the events that occurred on the night of 29 February to 1 March 2008, the fact that H.A. was compelled to provide medical assistance during the demonstrations, and that she refused to inject people with a fluid unknown to her were all deemed credible. However, the description of subsequent events about how H.A. was taken away on 25 to 35 occasions against her will, detained and ill-treated to compel her to memorize testimony against Mr. Pashinyan, including for a week in March 2009, were deemed not to be credible. The State party further notes that G.H. had no problems with the authorities until the raid on 28 September 2010. It finds G.H.'s claim that he was dismissed from his job for telling his manager about H.A.'s situation and his claim that his parents' home was raided by men who identified themselves as Mr. Abrahamyan's men to be lacking in credibility. The State party finds it implausible that the Armenian authorities or Mr. Abrahamyan still needed H.A.'s testimony, since Mr. Pashinyan had already been convicted in January 2010 (nine months prior to the alleged raid). In the light of the above, the State party concludes that the reasons given by the complainants for leaving Armenia cannot be deemed to be credible. This conclusion is strengthened by the above-mentioned information regarding the visa applications for Italy submitted by the complainants in September 2010 in Yerevan.

6.10 With regard to the report of the Netherlands Institute for Human Rights and Medical of 15 April 2014, the State party submits that it does not render the complainants' account fully credible, nor does it justify any further investigation. The State party points to the fact that what H.A. said to the Institute's doctor concerning her alleged torture does not correspond to the statements that she and G.H. made in the various interviews in their first

asylum procedure. The State party observes that it is unclear whether the conclusions in the medical report were arrived at with all due care, as H.A.'s statements were considered as a whole and appear to have been taken as established. It has not been established that the conclusions contained in the Institute's report were based on objective information that could be corroborated. The State party observes that the Institute's report did not concern G.H.

6.11 Finally, the State party observes that not only has a significant period of time elapsed since the events in question, but also that Mr. Pashinyan surrendered voluntarily to the police on 1 June 2009, was subsequently tried, sentenced and released in 2011 under general amnesty. There is nothing to show that he experienced serious problems thereafter, either from the authorities or Mr. Abrahamyan. Furthermore, Mr. Pashinyan is now a member of the National Assembly. In view of these developments, seen in the light of general information to the effect that persons involved in the disturbances in February and March 2008 are no longer in any danger, there are no grounds at all for presuming that the complainants are likely to attract adverse attention from the Armenian authorities or from Mr. Abrahamyan and his supporters.

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

7.1 In his submission of 22 December 2016, the counsel for the complainants refers to his earlier submission of 26 February 2016, and reiterates his position with regard to the admissibility of the complaint. He also refers to a recent decision by the Council of State, the highest judicial body in asylum cases in the Netherlands, which broadened its scope in expulsion cases of asylum seekers and called upon the legislator to change the law in order to comply with article 13 of the European Convention on Human Rights on the right to an effective remedy.[20]

7.2 With regard to the existence of a personal and present risk, the counsel for the complainants emphasizes that, according to paragraph 8 of the Committee's general comment No. 1 (1997) on the implementation of article 3 in the context of article 22, past experiences of human rights violations, in particular torture and other forms of ill-treatment, are highly relevant for establishing the existence of a real risk. The counsel submits that the Committee's approach differs from that taken by the European Court of Human Rights in the case of *S v. France*, therefore, the State party's arguments in that regard are not relevant in the present case. He further submits that, since the State party deems it to be credible that H.A. was ill-treated as a consequence of her refusal to inject people with an unknown fluid, these past experiences of torture or ill-treatment are a strong indication of a possible risk of torture upon return to Armenia.

7.3 The Council also notes that the credibility assessment of asylum seekers has been substantially altered since 1 January 2015 to bring it into line with European Union legislation. Credibility is no longer assessed on the basis of the so-called positive credibility test, which assumed an elevated burden of proof from the outset, but rather on an integral credibility assessment. The basic assumption of the new assessment is that all relevant circumstances of the case are considered and weighed. Under the new policy, the deciding authorities are, in each case, required to substantiate how the elements that have a negative impact on the asylum account influence the credibility assessment. This is particularly relevant for the assessment of second asylum applications, which were previously denied on the basis of the old positive credibility assessment. A second asylum application bringing forward new facts and circumstances should be considered to be an application with an altered set of facts and to be independent from the first application. The deciding authorities cannot, therefore, limit themselves to simply referring to the conclusions regarding the first application.

7.4 The counsel for the complainants further notes that the human rights situation in the country of origin is a relevant factor and must be taken into account. Furthermore, information on the country of origin from various sources consistently highlights the fact

[20] See Administrative Jurisdiction Division, judgment No. 201609138/3/V2, 20 December 2016 (in Dutch).

that high-level corruption remains a problem in Armenia. Whistle-blowers do not receive protection, and anti-corruption organizations have warned that government officials continually ignore reports of corruption. In this context, it is particularly important to remember that Mr. Abrahamyan is still the Deputy Chair of the Republican Party of Armenia and was, until recently, the Prime Minister of the country. Mr. Abrahamyan is considered to be a very powerful person with great influence who is not afraid to use his power in order to achieve his goals. The fact that Mr. Abrahamyan is in a powerful position, and the harmful information H.A. has at her disposal, leave the complainants at a personal and present risk of treatment incompatible with article 3 of the Convention.

7.5 The counsel submits that the complainants have given a likely and logical explanation for their actions subsequent to the events of February and March 2008. In accordance with the established case law of the Committee, the authorities are under the obligation to verify the facts, which are sufficiently detailed.[21] Counsel submits that the State party failed to verify the facts of the asylum account, even though the complainants provided clear indications of the risks and information on the persons from whom they feared retribution. The lack of a rigorous examination of the asylum claim is all the more unacceptable since some of the facts have been accepted by the parties concerned.

7.6 With regard to medical evidence, counsel notes that the State party failed to take into account the Netherlands Institute for Human Rights and Medical report of 15 April 2014 when assessing the credibility of the complainants' asylum claims. He refers to the European Court of Human Rights jurisprudence, which deems that an excessively restrictive approach to the consideration of whether there are new elements in the second asylum procedure fails to meet the standard of careful and rigorous examination required to ensure effective protection against a risk of a violation of article 3.[22] The counsel notes the Institute's conclusion that mental problems explain discrepancies in the account of H.A., the inconsistent recall of details of torture and detention, and the late disclosure of sexual violence, a particularly shaming form of torture. Scientific research shows that torture victims recall more and different details of painful traumatic experiences after repeated interviewing. In the Institute's report, it is noted that H.A. was interviewed only 23 days after giving birth to her son, an event that may have affected her level of concentration and memory.

7.7 In the light of the above-mentioned explanation and substantiation of some essential elements of the medical aspects of the present case, the counsel for the complainants submits that the arguments of the State party cannot be sustained. The mere fact that some parts of the asylum account have been deemed credible, in conjunction with the lack of rigorous scrutiny by the State party's authorities, and H.A.'s state of mental health as described in the Institute's report, should lead to the conclusion that substantial grounds exist for believing that the complainants will be exposed to torture if returned to the country of origin.

Additional observations by the State party

8.1 On 4 May 2017, the State party submitted additional observations on admissibility and the merits of the case. It reiterated that the complaint is inadmissible due to the complainants' failure to exhaust all available domestic remedies. The complainants had the opportunity to lodge an appeal with the Administrative Jurisdiction Division of the Council of State, and to apply for a provisional measure to prevent their expulsion pending appeal. The State party disagrees with the complainants' position that an appeal to the Division is not a remedy that needs to be exhausted since it does not have an automatic suspensive effect. Although there is no statutory obligation to suspend expulsion while an appeal is pending before the Division, the Division's case law in effect provides a legal guarantee that, when an alien has applied for a provisional measure to prevent expulsion, he or she will not be expelled before the Division's President has rendered a judgment on that application. An appeal to the Division is, therefore, a domestic remedy that can bring

[21] See *A.S. v. Sweden* (CAT/C/25/D/149/1999), para. 8.6.

[22] See the European Court of Human Rights decision in *M.D. and M.A. v. Belgium* (application no. 58689/12), judgment of 19 January 2016, and para. 64.

effective relief to an alien who may run the risk of being subjected to torture or ill-treatment upon expulsion.

8.2 The State party further notes that the Division's case law shows that the Minister for Immigration, Integration and Asylum has an obligation to inform an alien adequately and in a timely manner of an intention to carry out the alien's expulsion, in order to provide for an effective legal remedy.[23] This implies that, if the Minister knows that an alien is being assisted by an authorized representative, the Minister must inform that representative, on the basis of article 2:1 of the General Administrative Law Act, of such intention, including the date and time of the expulsion, and must do so in a timely manner so that the authorized representative has sufficient opportunity to apply for a provisional measure if desired. In such case, the Division's President has sufficient opportunity to assess the application with due care. In case ECLI:NL:RVS:2012:BW0628, the Division ruled that, since the Minister had failed to inform the alien of his intention to carry out the alien's expulsion and had proceeded with the expulsion, he had denied the alien the opportunity to avail himself of an effective legal remedy. This prompted the Division's President to issue a provisional measure ordering the alien to be returned to the Netherlands within 72 hours. Thus, there is a comprehensive system in place that in effect guarantees that, while an appeal is pending before the Division, an application for a provisional measure will have automatic suspensive effect until a decision has been made on that application. In the light of the above, the State party holds the view that the communication is inadmissible.

8.3 The State party notes that the complainants have not satisfactorily demonstrated that the Armenian authorities or Mr. Abrahamyan have, or indeed, have ever had, any personal interest in them. The parts of the complainants' accounts that are considered to be credible are insufficient to warrant the conclusion that they would face a real risk of torture upon return to Armenia. Even if their accounts were deemed credible in their entirety, the State party holds that the complainants would no longer be the object of adverse attention from the Armenian authorities, or from Mr. Abrahamyan and his supporters, upon their return.

Complainant's comments on the State party's additional observations

9.1 In his submission of 4 May 2018, the counsel for the complainants submitted additional comments on the State party's submission on admissibility and the merits of the complaint. With regard to admissibility of the complaint, the counsel once again makes reference to the European Court of Human Rights case of *Salah Sheekh v. the Netherlands* and notes that, besides the lack of automatic suspensive effect of the appeal to the Division, the strict procedural obstacles applicable in subsequent asylum applications render the appeal to the Division ineffective, having "virtually no prospect of success". The procedural obstacles are related to: (a) the consistent refusal of the Division to consider reports from the Netherlands Institute for Human Rights and Medical; and (b) the refusal of the Division to refer preliminary questions concerning the so-called culpability requirement in subsequent applications for international protection to the Court of Justice of the European Union.

9.2 With regard to the provisional measures, the counsel notes that, prior to the 20 December 2016 judgment of the Council of State, the State party did not, or at least not often, issue provisional measures in cases where there was potentially an arguable claim barred by the procedural constraints of a subsequent asylum procedure. Since the complainants' application was filed in 2015, it was unlikely that provisional measures would have been granted.

9.3 With regard to the assessment of the complainants' accounts in support of their asylum application, the counsel reiterates that the State party has failed to duly investigate the false visa applications on behalf of the complainants. He further notes that stress, trauma and pregnancy provide a reasonable explanation for why the complainants, who only spoke Armenian, could not read signs written in Cyrillic script in Georgia, and thus could not answer questions about their travel route.

[23] See ECLI: NL: RVS: 2012: BW0628 (in Dutch).

9.4 Finally, with regard to the medical evidence put forward by the complainants in the form of the Institute report, the counsel notes that the State party has refused to conduct the counter-expertise in relation to the report, meaning that, whereas the complainants adduced (partially) credible statements and solid proof of their fear of torture, the State party failed to rigorously investigate their motives for seeking asylum. The counsel submits that the current political events in Armenia, and the escalation between, on the one hand, Mr. Abrahamyan and his Republican Party of Armenia and, on the other, Mr. Pashinyan, who is trying to become prime minister, only make the position of the complainants more vulnerable. The rising tension between the Republican Party of Armenia and Mr. Pashinyan means that any testimony by H.A. for or against Mr. Pashinyan will lead to Mr. Abrahamyan wanting to control and intimidate her. Thus, her past ordeal, reviewed against the backdrop of the current situation, must lead to the conclusion that there are still substantial reasons for believing that she runs a real risk of torture, if returned to Armenia.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (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.

10.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the present case, the State party argued that the complainants failed to exhaust all available domestic remedies because they failed to appeal against the decision by the Immigration and Naturalization Office to the Administrative Jurisdiction Division. The complainants had the opportunity to lodge an appeal with the Division, and to apply for a provisional measure to prevent their expulsion pending appeal. The Committee notes the complainants' arguments that lodging an appeal does not have automatic suspensive effect, that the State party was able to refer to only three cases out of Division case law stretching back over more than 15 years, none of which demonstrates that the appeal would lead to considering any issues other than the validity of the Institute report as a new fact, and that a further appeal has virtually no prospect of success in determining the merits of the complainants' asylum application. The Committee also notes the State party's submission that the Division's case law in effect provides a legal guarantee that, when an alien has applied for a provisional measure to prevent expulsion, he or she will not be expelled before the Division's President has rendered a judgment on that application.

10.3 The Committee considers that mere doubts about the effectiveness of a remedy do not absolve the complainant from seeking to exhaust such remedy.[24] The Committee concludes that the complainants have failed to advance sufficient elements that would show that an appeal to the Division and an application for a provisional measure to prevent their expulsion pending appeal would have been ineffective in the present case, and have not justified their failure to avail themselves of these remedies.

10.4 Accordingly, the Committee accepts the argument of the State party that, in this particular case, there were remedies, both available and effective, which the complainants have not exhausted.[25] In the light of this finding, the Committee does not deem it necessary to examine the State party's assertion that the complaint is inadmissible as manifestly unfounded.

[24] See, e.g., *R.P. v. Netherlands* (CAT/C/62/D/696/2015), para. 10.4.

[25] See, e.g., *J.S. v. Canada* (CAT/C/62/D/695/2015), para. 6.6; and *S.S. and P.S. v. Canada* (CAT/C/62/D/702/2015), para. 6.6.

11. The Committee therefore decides:

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

(b) That the present decision shall be communicated to the complainants and to the State party.