

**RESPONSE OF AUSTRALIA TO THE VIEWS OF THE COMMITTEE AGAINST  
TORTURE IN COMMUNICATION NO. 701/2015 (H.K v AUSTRALIA)**

1. The Australian Government (Australia) presents its compliments to the members of the Committee against Torture (the Committee).
2. Australia has given careful consideration to the Views of the Committee expressed in Communication No. 701/2015 (*H.K v Australia*) (the Communication) adopted on 10 May 2017. These Views will be published on the website of the Australian Attorney-General's Department.<sup>1</sup>
3. Australia acknowledges its obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), including its obligation under article 3 of the Convention not to return a person to another State where there are substantial grounds for believing that the person would be in danger of being subjected to torture. Australia takes its obligations under international human rights law seriously, including the obligation under article 3 of the Convention, and has implemented these obligations in good faith through its domestic migration processes.
4. The Committee came to the view that the author had provided sufficient evidence for the Committee to consider that his return to Pakistan would put him at a real, present and personal risk of being subjected to torture.<sup>2</sup> On this basis, the Committee concluded that the return of the author to Pakistan would constitute a breach of article 3 of the Convention.<sup>3</sup> Australia respectfully disagrees with the Committee's Views. Australia is also concerned with certain aspects of the Committee's approach to assessment of the Communication and the extent to which it has explained its reasoning.
5. Having carefully considered the Committee's Views, Australia wishes to express the following particular concerns relating to the Committee's consideration of the Communication:
  - a. In Australia's view, the Committee has not given due weight to relevant findings of fact made by decision-makers in Australian domestic processes, including

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<sup>1</sup> Human Rights Communications, Australian Commonwealth Attorney-General's Department website: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Humanrightscommunications.aspx>.

<sup>2</sup> *H.K v Australia*, CAT Communication No. 701/2015 (10 May 2017), paragraph 8.

<sup>3</sup> *Ibid*, paragraph 9.

findings in respect of the author's past treatment in Pakistan and has made contrary findings to those of domestic decision-makers without explaining its reasons;

- b. In its analysis of country information, the Committee has considered only one source of such information, dated July 2011, and has not reached a conclusion in its Views as to how that information is relevant to a personal risk faced by the author if returned to Pakistan, or as to the weight that ought to be given to such information;
- c. In assessing whether the author is at a foreseeable, real, personal and present risk of being subjected to torture on return to Pakistan, the Committee has focused entirely on the author's factual claims regarding ill-treatment in the past and has not explained why the Committee considers the author to be at risk of torture in the future, even if those factual claims were to be accepted; and
- d. The Committee has not reached a conclusion on whether or not the author could safely relocate to another location in Pakistan and has espoused a position on the well-established international law principle of internal relocation which fundamentally differs from that of other human rights treaty bodies and of Australia.

6. Australia provides the following further comments on these matters.

***Engagement with findings of fact of domestic decision-makers***

- 7. Australia reiterates that the author's claims have been thoroughly considered by a series of domestic decision-makers through Australia's comprehensive administrative and judicial processes and determined not to be credible and not to engage Australia's *non-refoulement* obligations, including under article 3 of the Convention. Domestic decision-makers have concluded that there are not substantial grounds for believing that the author is at a foreseeable, real, personal and present risk of being subjected to torture on return to Pakistan, as detailed in the Australian Government Submissions on Admissibility and Merits.
- 8. As the Committee observed in its Views, the Committee 'gives considerable weight to findings of fact that are made by organs of the State party concerned', though 'at the same time it is not bound by such findings and has the power, provided by article 22(4) of the Convention, of free assessment of the facts based upon the full set of circumstances in

every case'.<sup>4</sup> Noting the Committee has accepted that it is to give 'considerable weight' to the findings of fact of domestic decision-makers, in Australia's view, where the Committee disagrees with those findings, it is incumbent on the Committee to explain and provide comprehensive reasoning for its differing position.

9. The Committee disagreed with the findings of domestic decision-makers regarding the nature of the ill-treatment suffered by the author in Pakistan prior to his arrival in Australia. In its Views, the Committee has noted the Australian Government Submissions on Admissibility and Merits regarding the findings of fact made by domestic decision-makers.<sup>5</sup> These submissions included that domestic decision-makers accepted the author's claims that he had been arbitrarily detained and subjected to ill-treatment by Pakistani authorities in 2012 but did not accept the author's claims regarding the length of the detention period or that he was pressured into stating that he would provide information on the Balochi nationalist movement to authorities. These findings of fact are of critical relevance to a determination of whether the author was previously a person of interest to Pakistani authorities and to an assessment of whether the author is at a foreseeable, real, present and personal risk.
10. Australia respectfully submits that the Committee has not engaged with these findings of fact sufficiently in its Views to have given them 'considerable weight'. Instead, the Committee has stated that Australia 'does not provide any concrete arguments to justify its conclusion and that no specific information has been presented that would raise doubts' about the author's factual claims.<sup>6</sup> On that basis, the Committee came to the view that Australia had 'failed to take into due consideration the author's allegations regarding the events he experienced in Pakistan when assessing the alleged risk he would face if returned'.<sup>7</sup> Australia respectfully rejects the Committee's view on the basis that the findings of domestic decision-makers regarding the ill-treatment suffered by the author in Pakistan were based on a rigorous assessment of the multiple and varied sources of evidence before them, as detailed in the Australian Government Submissions on Admissibility and Merits.

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<sup>4</sup> *H.K v Australia*, CAT Communication No. 701/2015 (10 May 2017), paragraph 7.4.

<sup>5</sup> *Ibid*, paragraph 7.8.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid*.

11. In finding that Australia ‘failed to take into due consideration the author’s allegations regarding the events he experienced in Pakistan’,<sup>8</sup> the Committee has not explained why it disagreed with the factual conclusions reached by domestic decision-makers. Nor has the Committee made its own assessment of the strength of the evidence provided by the author in support of his factual claims. Australia particularly regrets this aspect of the Committee’s approach to assessing the Communication. Australia submits that the Committee ought to have made explicit why it found the author’s submissions regarding the ill-treatment suffered by the author in Pakistan more compelling than the conclusions reached by domestic decision-makers, in line with the Committee’s own position that considerable weight is given to findings of fact made by domestic decision-makers. Australia also submits that the Committee ought to have undertaken its own assessment of the evidence provided and presented findings regarding the strength of that evidence.

### ***Country information***

12. In its Views, the Committee has referred to only one source of country information, dated July 2011, and has detailed a number of that source’s findings, but has not reached a conclusion as to how the information relates to a personal risk faced by the author if returned to Pakistan or the weight of the information in that regard.<sup>9</sup> Australia respectfully submits that the Committee ought to have considered a range of sources of current country information and ought to have made findings regarding how such information relates to the level of personal risk faced by the author if returned to Pakistan, and the weight to be given to such information.

### ***Assessment of the risk to the author on return to Pakistan***

13. Following the Committee’s finding that Australia had ‘failed to take into due consideration’ the author’s factual claims when assessing the level of risk faced by the author if returned to Pakistan, the Committee concluded that the author had provided ‘sufficient evidence’ that he would be at a real, present and personal risk of being subjected to torture if returned to Pakistan.<sup>10</sup> Australia notes that in reaching this conclusion, the Committee’s assessment of the risk to the author has focused entirely on the author’s factual claims regarding ill-treatment in Pakistan prior to his arrival in Australia. The Committee does not justify why it considers the author to be at risk of

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<sup>8</sup> *H.K v Australia*, CAT Communication No. 701/2015 (10 May 2017), paragraph 7.8.

<sup>9</sup> *Ibid*, paragraph 7.7.

<sup>10</sup> *Ibid*, paragraph 8.

torture in the future, even if it is accepted that the author was detained and ill-treated in Pakistan in the past.

14. Australia recalls that the threshold requirement for article 3 of the Convention is that an individual be at a foreseeable, real, personal and *present* risk of being subjected to torture.<sup>11</sup> Australia therefore respectfully submits that the Committee ought to have substantiated its conclusion that the author would be at such a *present* risk of torture on return to Pakistan, notwithstanding the Committee's acceptance of the author's factual claims regarding ill-treatment in Pakistan in the past. In failing to do so, the Committee has not properly applied the threshold requirement under article 3.

### ***Issue of internal relocation***

15. Following its brief discussion of country information, the Committee has referred to submissions made by the author and by Australia regarding the possibility of internal relocation in Pakistan, but has not reached a conclusion, based on available evidence and country information, on whether or not the author could safely relocate to another location in Pakistan.<sup>12</sup> Australia respectfully submits that the Committee ought to have made a finding regarding the issue of whether or not the author could safely relocate to a location in Pakistan where there would not be substantial grounds for believing that he would be in danger of being subjected to torture.
16. The Committee has recalled from its previous Views that 'the notion of "local danger" does not provide for measurable criteria and is not sufficient to entirely dispel the personal danger of being tortured'.<sup>13</sup> The Committee referred to its Views in *Mondal v Sweden*<sup>14</sup> and *Kalonzo v Canada*<sup>15</sup> as examples.<sup>16</sup>
17. Australia notes that in each of those Communications, and in the present, the Committee has espoused a position on the issue of internal relocation which fundamentally differs from that of other human rights treaty bodies. The Human Rights Committee, for instance, has recognised the 'internal flight alternative' as a well-established principle of international law and has framed it as follows:

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<sup>11</sup> *A.R. v The Netherlands*, CAT Communication No. 203/2002 (14 November 2003), paragraph 7.3 and Committee against Torture, 'General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22' (21 November 1997), UN Document A/53/44, paragraph 3.

<sup>12</sup> *H.K v Australia*, CAT Communication No. 701/2015 (10 May 2017), paragraph 7.7.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Mondal v Sweden*, CAT Communication No. 338/2008 (23 May 2011), paragraph 7.4.

<sup>15</sup> *Kalonzo v Sweden*, CAT Communication No. 343/2008 (18 May 2011), paragraph 9.7.

<sup>16</sup> *H.K v Australia*, CAT Communication No. 701/2015 (10 May 2017), paragraph 7.7.

Individuals are not in need of international protection if they can avail themselves of the protection of their own State; if resettling within the State would enable them to avoid a localized risk, and resettling would not be unreasonable under the circumstances, then returning them to a place where they can live in safety does not violate the principle of non-refoulement'.<sup>17</sup>

18. Australia agrees with the interpretation of the Human Rights Committee. Australia recalls that a State party's *non-refoulement* obligations under article 3 of the Convention will only be engaged where there are substantial grounds for believing that a person would be in danger of being subjected to torture. Australia's *non-refoulement* obligations under article 3 of the Convention will not be engaged by returning a person to a State where that person is able to live in an area where there are not substantial grounds for believing that person would face a real, foreseeable, personal and present risk of being subjected to torture.

### ***Conclusion***

19. Having considered the Committee's Views, Australia remains of the view that the return of the author to Pakistan would not constitute a violation of article 3 of the Convention for the reasons set out in the Australian Government Submissions on Admissibility and Merits and above.

20. It follows that Australia does not accept the Committee's view that Australia is obliged to refrain from returning the author to Pakistan or to any other country where the author runs a real risk of being returned to Pakistan.

21. The author is subject to Australia's domestic migration processes.

22. Australia avails itself of this opportunity to renew to the Committee the assurances of its highest consideration.

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<sup>17</sup> See, for example, *B.L v Australia*, CCPR Communication No. 2053/2011 (16 October 2014), Appendix I (joint opinion of Committee members Gerald L Neuman and Yuji Iwasaw).