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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2357/2014[*] [**]

Submitted by:	A (represented by counsel, Joseph W. Allen)
Alleged victim:	A
State party:	Denmark
Date of communication:	17 March 2014 (initial submission)
Document references:	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 17 March 2014 (not issued in document form)
Date of adoption of decision:	30 March 2016
Subject matter:	Deportation of author to Afghanistan
Procedural issues:	Admissibility – manifestly ill-founded; admissibility – *ratione materiae*
Substantive issues:	Aliens' rights – expulsion; *non-refoulement*; refugee status; right to life; torture; fair trial
Articles of the Covenant:	Articles 6, 7, 13 and 14
Articles of the Optional Protocol:	Articles 2 and 3

[*] Adopted by the Committee at its 116th session (7-31 March 2016).

[**] The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelic, Dunkan Muhumuza Laki, Photini Pazartzis, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

1.1 The author of the communication is Mr. A, an Afghan national born *in* 1987 and currently residing in Denmark. He is subject to deportation, following the rejection of his application for refugee status in Denmark. He asserts that by removing him to Afghanistan, the State party would violate his rights under articles 6, 7, 13 and 14 of the International Covenant on Civil and Political Rights. The first Optional Protocol to the Covenant entered into force for Denmark on 23 March 1976. The author is represented by counsel.

1.2 On 17 March 2014, pursuant to rules 92 and 97 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from removing the author to Afghanistan while the communication is under consideration by the Committee. On 4 November 2014, the Committee granted the State party's request to lift interim measures. The author remains in Denmark.

Facts as presented by the author

2.1 The author's father purchased property from a man named Q. Shortly after this transaction, Q died of illness. Thereafter, three of Q's relatives, including a man named S, approached the author's father in order to claim the property. A fight ensued between the author's family and Q's relatives. During the fight, the author's brother killed S. The author and his father and brother fled to stay with a family friend. In order to resolve the land dispute, they decided to let Q's brothers keep the property. In addition, they decided to give one of their family's girls to Q's brothers. However, when they were on their way to meet with Q's family to discuss this resolution, they came across Q's brothers, who shot at them and killed the author's father and brother.

2.2 Fearing that Q's brothers would kill him to prevent him from testifying against them and from reclaiming the property, the author fled Afghanistan. His wife remains in Afghanistan; the couple does not have children.

2.3 The author has exhausted domestic remedies in Denmark. His appeal of the negative asylum decision was denied by the Refugee Appeals Board *in the beginning of* 2014. This decision is final and may not be appealed before the Danish courts. The author's request to reopen asylum proceedings was denied *in the beginning of spring* 2014.

The complaint

3.1 The author submits that the State party would violate his rights under articles 6, 7 and 14 of the Covenant by forcibly removing him to Afghanistan, where he fears being killed by Q's brothers, who killed the author's father and brother due to a land dispute. Neither the Danish Immigration Service nor the Refugee Appeals Board properly investigated the serious risk of harm or death that the author would face in Afghanistan.[1]

3.2 In violation of article 14 of the Covenant, the State party planned to deport the author on the same date on which the Refugee Appeals Board issued its negative decision, before he could submit a communication before the Committee. Preparations for his removal were not suspended when he filed a request to reopen asylum proceedings.

State party's observations on admissibility and the merits

4.1 In its observations dated 17 September 2014, the State party considers that the Refugee Appeals Board is an independent, quasi-judicial body. The Board is considered as

[1] The author cites United Nations High Commissioner for Refugees, *Eligibility Guidelines for Afghanistan*, 6 August 2013, p. 68.

a court within the meaning of the European Union Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.[2] Cases before the Board are heard by five members: one judge (the chairman or the deputy chairman of the Board), an attorney, a member serving with the Ministry of Justice, a member serving with the Ministry of Foreign Affairs, and a member nominated by the Danish Refugee Council as a representative of civil society organizations. After two terms of four years, Board members may not be reappointed. Under the Danish Aliens Act, Board members are independent and cannot seek directions from the appointing or nominating authority. The Board issues a written decision, which may not be appealed; however, under the Danish Constitution, applicants may bring an appeal before the ordinary courts, which have authority to adjudicate any matter concerning limits on the mandate of a government body. As established by the Supreme Court, the ordinary courts' review of decisions made by the Board is limited to a review of points of law, including any flaws in the basis for the relevant decision and the illegal exercise of discretion, whereas the Board's assessment of evidence is not subject to review.

4.2 Pursuant to section 7 (1) of the Aliens Act, a residence permit will be granted to an individual who falls within the provisions of the Convention relating to the Status of Refugees. For this purpose, article 1.A of that Convention has been incorporated into Danish law. Pursuant to section 7 (2) of the Aliens Act, a residence permit will be issued to an applicant who risks being subjected to the death penalty or to torture, inhuman or degrading treatment or punishment in his/her country of origin. In practice, the Refugee Appeals Board considers that these conditions are met if there are specific and individual factors rendering it probable that the person will be exposed to such a real risk.

4.3 Decisions of the Refugee Appeals Board are based on an individual and specific assessment of the case. The Board applies a lower standard of proof when the applicant is a minor or has a mental disorder or impairment. When assessing inconsistent statements by the applicant, the Board also takes into account cultural differences, age and health. Particular consideration is shown towards illiterate individuals, victims of torture and persons who have been sexually assaulted. The asylum seeker's statements regarding the motive for seeking asylum are assessed in the light of all relevant evidence, including general background material on the situation and conditions in the country of origin, in particular whether systematic gross, flagrant or mass violations of human rights occur. Background reports are obtained from various sources, including the Danish Refugee Council, other governments, the Office of the United Nations High Commissioner for Refugees (UNHCR), Amnesty International and Human Rights Watch. The Board is also legally obligated to take into account Denmark's international obligations when exercising its powers under the Aliens Act. To ensure this, the Board and the Danish Immigration Service have jointly drafted a number of memoranda describing in detail the international legal protection offered to asylum-seekers under, *inter alia*, the Convention against Torture, the European Convention on Human Rights, and the International Covenant on Civil and Political Rights. These memoranda form part of the basis of the decisions made by the Board, and are continually updated.

4.4 The author's claims under articles 6 and 7 of the Covenant are manifestly ill-founded and are therefore inadmissible. The author was assisted by counsel before the Refugee Appeals Board, whose decisions were based on a comprehensive and thorough examination of the oral and written evidence in the case. When assessing the author's credibility, the Board considered the author's statements and demeanour at the Board hearing, in conjunction with the other information available in the case. Specifically, the

[2] The State party cites article 39 of European Union Council Directive 2005/85/EC.

Board found that the author's statements were lacking in detail, did not seem "self-experienced," and were implausible in several respects. It was unlikely that Q's brothers were not involved in the property transaction even though, according to the author's account, they were aware of the negotiations. It was also unlikely that the author physically attacked Q's brothers even though they were angry and armed, and even though he alleged that everyone feared them due to their link to organized crime. In addition, it was unlikely that Q's brothers did not attempt to visit the author's family at their house during the month that the family was in Zari. Moreover, the author made several inconsistent statements concerning the number of rifles used in the conflict; whether it was S or one of Q's brothers who hit him with the butt of a rifle; whether other people were occupying the house in Zari where they had hidden; whom the house in Zari belonged to; whether Q was in India or Pakistan; and whether the brothers visited the plot of land once or twice.

4.5 Furthermore, the author made material additions to his narrative during proceedings before the Board. In particular, he mentioned before the Board that the land agreement involved a dowry to be given by his father to Q's brothers, whereas he had not mentioned this before the Danish Immigration Service. He also stated before the Danish Immigration Service that Q's brothers had gone door-to-door to look for him, whereas he stated at the Board hearing that the brothers had searched his neighbour's house, where the author was hiding. The author has also added to his statement concerning his brother's role during the fight on the plot of land. During his interview with the Danish Immigration Service, he stated that his brother was present during the entire incident, whereas he stated at the Board hearing that his brother was initially at home during the fight and only arrived later. The Board, in assessing the author's statements, was aware that the author is illiterate, has a special dialect, and has been under medication. The Board also noted that the author has not been a member of any political or religious associations or organisations, and has not been politically active in any way.

4.6 In addition, the Board found that the documents the author provided with his request to reopen asylum proceedings were not credible. The documents were dated *the same month*, when the Board considered the author's asylum application. The Board also observed that according to available background material, forged documents were widely used and easy to obtain in Afghanistan.[3] In conjunction with its finding that the author's statements were implausible and inconsistent, the Board found it reasonable to deem that the documents were fabricated.

4.7 The author is attempting to use the Committee as an appellate body to have the factual circumstances of his case reassessed; he has not provided any new or specific details about his situation. For the foregoing reasons, the author will not risk treatment contrary to articles 6 or 7 of the Covenant if returned to Afghanistan. Moreover, the author's argument under article 14 of the Covenant is inadmissible *ratione materiae*, because this provision does not apply to asylum proceedings. For the reasons discussed above, the communication is also wholly without merit.

4.8 Regarding the author's argument that he did not have sufficient opportunity to submit the present communication before his scheduled removal, the Board's decision was issued *in the beginning of* 2014, and the author could have submitted a communication to the Committee immediately thereafter. However, he did not do so until *[...]*, just before his scheduled involuntary return. He had two months to prepare his communication. The Board did not make its decision concerning counsel's request for reopening until *the beginning of*

[3] The State party refers to the Board's citation of the report of the fact-finding mission of the Danish Immigration Service to Kabul in Afghanistan, "Country of Origin Information for Use in the Asylum Determination Process," 29 May 2012.

the spring 2014 because the Board receives a high number of such requests. It processes them as quickly as possible, endeavouring whenever possible to render a decision before any involuntary removal.

Author's comments on the State party's observations

5.1 In his submission dated 29 October 2014, the author maintains that the State party has also violated his rights under article 13 of the Covenant. The asylum determination process in Denmark has inherent flaws that violate the standards set forth under articles 13 and 14 of the Covenant. Negative decisions of the Board may not be appealed to ordinary courts, and the Board lacks many of the attributes of real courts. For example, meetings are never open to the public, and witnesses are only allowed in a limited number of circumstances. Moreover, one member of the five-member board is appointed by the Ministry of Justice and is usually an employee of that Ministry; this can easily create a conflict of interest. In addition, interpreters who are used by the Immigration Service and the Board are not required to fulfil any specific education requirements in translation or linguistics.

5.2 The Board's adverse credibility determination was erroneous in several regards. Although the Board considered it implausible that Q's brothers were not involved in the property deal at the time of the agreement, the author could not know the reason for this lack of involvement, and it is plausible that the brothers let Q enter into the sale without written consent. The Board found that it was unlikely that the author attacked one of Q's brothers, since the brothers were armed and were known to have links with organised crime. However, the author simply "got carried away" out of anger when faced with the brothers' unjust behaviour and foul language. They were trespassing on his family's property and making unfair demands. Moreover, although the Board found it implausible that Q's brothers did not try to visit the author's family home until the day they killed the author's father and brother, the author cannot explain the behaviour of Q's brothers in this regard. Q's brothers probably realized that the author had fled from the scene of the attack and left the family home. Although the Board found that the author made several inconsistent statements concerning the number of rifles used in the conflict, there was only one weapon used. At one point, the author thought that he had seen his brother with a weapon; however, he later realized that his brother had simply taken hold of S's weapon. Although the Board found that the author made inconsistent statements as to the length of time that passed from the property deal until the incident leading to S's death, the author explained during his first interview that Q's brothers would not have claimed the land during Q's lifetime, since Q would then have been to blame. A month elapsed between Q's and S's death. Although the Board found that the author had made material additions to his narrative during the oral hearing, he had not been asked detailed questions prior to the hearing. Such detailed questions logically elicited more detailed responses from him during the hearing. Finally, the Board's determination that the author's testimony was not "self-experienced" is not the result of a thorough assessment, since his testimony lasted only one and a half hours. Guidelines published by the United Nations High Commissioner for Refugees urge the use of caution in credibility assessments due to geographical and cultural distance.[4] The State party should investigate the accuracy of his statements regarding the land conflict. The State party could perform such an investigation because the author "does not fear [the] authorities in Afghanistan."

[4] The author cites United Nations High Commissioner for Refugees, *Beyond Proof – Credibility Assessment in EU Asylum Systems*, May 2013, p. 30.

5.3 The author is illiterate and presented evidence to the Danish authorities to substantiate his claims. In its observations, the State party raised new concerns that had not been raised during domestic proceedings (regarding the persons who owned and lived in the house in Zari; the countries Q had visited; and the time when the author's brother arrived at the scene of the fight.) These new issues are insignificant compared to the thorough and detailed explanation the author provided in his interview with the Immigration Service. Moreover, minor inconsistencies can hardly be avoided.

State party's further observations

6.1 In its submission dated 25 June 2015, the State party considers that domestic authorities are best placed to evaluate facts and the credibility of witnesses, whom they have an opportunity to see, hear and assess.[5] The State party reiterates its arguments with regard to the admissibility and merits of the communication.

6.2 The author's claim under article 13 of the Covenant is manifestly ill-founded and is therefore inadmissible. Article 13 does not confer a right to a court hearing. The Committee's jurisprudence indicates that mere administrative review of an expulsion order is not *per se* a violation of article 13.[6] Concerning the author's criticism that the interpreters servicing asylum proceedings are not required to meet specific educational requirements, the Board uses interpreters recorded on the list of approved interpreters kept by the Danish National Police. During asylum proceedings, the asylum-seeker is instructed to speak out if he or she experiences any problems with the interpretation. The applicant and the interpreter are asked at the outset of proceedings if they understand one another. At the end of each interview with the Danish Immigration Service, the interview report is read out to the applicant, who then has the opportunity to comment on the contents of the report. At the hearing before the Board, the applicant is normally represented by counsel, who is also given the opportunity to make objections to the interpretation. Thus, the fact that individual interpreters are not subject to educational requirements does not constitute a breach of the right to a fair trial. Interpreters' competence is assessed on a case-by-case basis, and if it is considered inadequate, the interview or hearing is adjourned and another interpreter is retained. Both the Immigration Service and the Board give "the utmost priority to ensuring a high standard" of interpretation.

Issues and proceedings before the Committee

7.1 Before considering any claims contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the claim is admissible under the Optional Protocol to the Covenant.

7.2 The Committee notes, as required by article 5 (2)(a) of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement. The Committee also notes that it is undisputed that the author has exhausted all available domestic remedies, as required by article 5 (2)(b) of the Optional Protocol.

7.3 The Committee notes the author's allegations that Q's brothers, who murdered the author's father and brother in the context of a land dispute, would torture or kill him in Afghanistan in order to silence him as a witness to the murders, and in order to illegally

[5] The State party cites, inter alia, communication No. 2186/2012, *Mr. X. and Mrs. X. v. Denmark*, Views adopted on 22 October 2014, para. 7.5; European Court of Human Rights, *R.C. v. Sweden*, Application No. 41827/07, Judgment of 9 March 2010, para. 52.

[6] The State party cites communication No. 58/1979, *Maroufidou v. Sweden*, Views adopted on 9 April 1981.

seize his family's property. The Committee further notes the author's arguments concerning alleged procedural flaws in the asylum system in Denmark. The Committee takes note of the State party's argument that the author lacks credibility and that his claims under articles 6, 7 and 13 of the Covenant are manifestly ill-founded and are therefore inadmissible under article 2 of the Optional Protocol.

7.4 The Committee recalls its general comment No. 31 in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant.[7] The Committee has also indicated that the risk must be personal[8] and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.[9] The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.[10]

7.5 The Committee notes that the Refugee Appeals Board found, after examining the author's written and oral testimony, that he was not credible concerning the risk of harm he alleges to face from Q's relatives in Afghanistan. The Committee also notes that the author's fears of being killed or subjected to torture relate to the acts of private individuals, and he has not alleged that he contacted the Afghan authorities in order to seek protection from Q's relatives, and has not explained why he did not do so or would not be able to do so in the future. The Committee also observes that the author has not provided information on the documentation that he submitted with his request to reopen asylum proceedings and that was deemed to not be credible. The Committee considers that while the author disagrees with the factual conclusions of the State party's authorities, the information before the Committee does not indicate that those findings are manifestly unreasonable.[11] Moreover, the author's claims regarding the independence of the Board and the procedural integrity of asylum proceedings in Denmark are of a general nature and do not establish that the evaluation of his asylum application by the Danish authorities was clearly arbitrary or amounted to a denial of justice.[12] Accordingly, the author's claims under articles 6, 7 and 13 of the Covenant are insufficiently substantiated and are therefore inadmissible.[13]

7.6 The Committee further takes note of the State party's argument that the author's claim under article 14 is inadmissible *ratione materiae* because this provision does not apply to asylum proceedings. The Committee refers to its jurisprudence that proceedings relating to the expulsion of aliens do not fall within the ambit of a determination of "rights

[7] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

[8] See, inter alia, communication No. 2393/2014, *K v. Denmark*, Views adopted on 16 July 2015, para. 7.3; communication No. 2272/2013, *P.T. v. Denmark*, Views adopted on 1 April 2015, para. 7.2.

[9] See, inter alia, communication No. 2474/2014, Views adopted on 5 November 2015; para. 7.3; 2366/2014, Views adopted on 5 November 2015, para. 9.3.

[10] See, inter alia, communication No. 2393/2014, *K v. Denmark*, Views adopted on 16 July 2015, para. 7.4.

[11] See communication No. 2351/2014, *R.G. et al. v. Denmark*, decision of inadmissibility adopted on 2 November 2015, para. 7.7.

[12] See communication No. 2351/2014, *R.G. et al. v. Denmark*, decision of inadmissibility adopted on 2 November 2015, para. 7.6.

[13] See, inter alia, communications Nos. 2351/2014, *R.G. et al. v. Denmark*, decision of inadmissibility adopted on 2 November 2015, para. 7.8; 2426/2014, *N v. Denmark*, decision of inadmissibility adopted on 23 July 2015, para. 6.6.

and obligations in a suit at law" within the meaning of article 14, paragraph 1, but are governed by article 13 of the Covenant.[14] The Committee therefore considers that the author's claim under article 14 is inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

7.7 The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 3 of the Optional Protocol;

(b) That the decision be transmitted to the State party and to the author.

[14] See, inter alia, communication No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 8.5.