



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2462/2014\*, \*\*

<i>Communication submitted by:</i>	M.K.H. (represented by counsel, Helle Holm Thomsen)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	26 September 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and rule 97 of the Committee's rules of procedure, transmitted to the State party on 29 September 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	12 July 2016
<i>Subject matter:</i>	Deportation to Bangladesh
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Risk of torture and ill-treatment
<i>Articles of the Covenant:</i>	7
<i>Articles of the Optional Protocol:</i>	2 and 5 (2) (b)

1.1 The author of the communication is M.K.H.,<sup>1</sup> a national of Bangladesh, of Bengal ethnicity and a Muslim, allegedly born on 21 December 1994. He is a failed asylum seeker in Denmark and faces deportation. He claims that in case of return to Bangladesh, he would

\* Adopted by the Committee at its 117th session (20 June-15 July 2016).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Ahmed Amin Fathalla, Yuji Iwasawa, Ivana Jelić, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Víctor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerajlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

<sup>1</sup> Counsel requested anonymity for the author.



be a victim of a violation by Denmark of his rights under article 7 of the Covenant. The police have contacted him several times and requested his cooperation to facilitate his return.<sup>2</sup> The risk of the author's deportation was imminent at the time of submission of the initial communication.<sup>3</sup> The Optional Protocol entered into force for Denmark on 23 March 1976. The author is represented by counsel, Helle Holm Thomsen.

1.2 When registering the communication on 29 September 2014, the Committee, acting through its Special Rapporteur on new communications and interim measures pursuant to rule 92 of its rules of procedure, requested the State party to refrain from deporting the author to Bangladesh, while his case was under consideration by the Committee. The Committee also indicated that it might review the necessity of maintaining this request upon receipt of the State party's observations. On 29 September 2014, the Refugee Appeals Board suspended the time limit for the author's departure from Denmark until further notice in accordance with the Committee's request. On 30 March 2015, the State party requested that the Committee review its request for interim measures in the present case. On 4 June 2015, the Committee, acting through the Special Rapporteur decided to deny the request to lift interim measures. On 26 February 2016, the State party again requested that the Committee review its request for interim measures. On the same date, the Committee, acting through the Special Rapporteur, rejected the new request.

#### **The facts as submitted by the author**

2.1 From July 2010 to July 2011, the author maintained a homosexual relationship with a childhood friend. They were caught one evening at a rice field, following which they were brought to a village council where they were beaten and tortured, including by being hung from a tree, having hot water poured over them and being beaten on the soles of their feet.<sup>4</sup> The author was expelled from his family and village and was threatened with death if he returned. He first went to Rangpur, where he was recognized by one of the villagers. He then went to Dhaka and on 5 January 2012, he moved to India, from where he left for Europe. On 3 February 2012, the author arrived in Denmark without valid travel documents and applied for asylum.

2.2 On 15 February 2012, the police interrogated the author about his identity and travel route. He explained that he had been born on 21 December 1994 in Rangalibosh in the Nagashre region and that he went to school until the ninth grade but did not finish it owing to personal circumstances. On 17 February 2012, the author submitted a request for asylum in Denmark, alleging that he had left his home country because citizens in his village had found out that he was a homosexual and he feared for his life if he returned to Bangladesh. The author has not been a member of any political or religious association or organization, nor has he been politically active in any other way. He was considered to be older than 18 by the police because of his physical appearance, even though he claimed he was a minor. On 7 March 2012, the Section of Forensic Pathology of the Danish National Police carried out an examination to determine his age. He was estimated to be 19 years old or more. However, the Section considered that "a certain probability existed" that he might be as young as 17.<sup>5</sup> On 11 April 2012, the author was confronted by the police. He maintained his explanation with respect to his age on the basis of the information that he had always been provided by his parents. On 4 June 2012, the Danish Immigration Service decided to

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<sup>2</sup> Travel documents have been issued for the author.

<sup>3</sup> The author was requested to leave the State party within seven days of 4 December 2012, the date of the Refugee Appeals Board decision.

<sup>4</sup> See the statement of facts in the Refugee Appeals Board decision of 4 December 2012.

<sup>5</sup> Ibid., p. 4 (last sentence).

consider the author as not a minor. It set his date of birth as 21 December 1992 and amended his application accordingly.

2.3 On 31 July 2012, the author had an interview with the Immigration Service, during which he referred to his homosexual relationship with a friend and maintained that he was 17 years old. On 28 August 2012, the Immigration Service rejected the author's asylum claim as not credible, considering that several aspects of his explanations were unreliable. On an unspecified date, the author appealed to the Refugee Appeals Board, claiming that the information he had provided was accurate, that he was at risk of persecution from the local community and that he would not be able to seek protection in Bangladesh where homosexuality is illegal. He further submitted that he could not be forced to hide his homosexuality to avoid persecution and that as a member of a particular social group exposed to persecution, he was in need of protection in accordance with article 1A (2) of the 1951 Convention relating to the Status of Refugees. On 4 December 2012, the Board upheld the rejection of the author's asylum application, finding his allegations to be not credible.

2.4 On 12 April 2013, the author requested the Refugee Appeals Board to reopen the asylum proceedings and submitted new documents in support of his claim: a newspaper article alleging that the author's mother had committed suicide because of problems related to the homosexuality of her son<sup>6</sup> and a copy of his birth certificate, stating that he was born on 21 December 1994. In that connection, the author submits that his age has not been reassessed since the production of his birth certificate and that the Board failed to take into account that he was a minor at the time of the initial asylum proceedings. He further submits that it is difficult for a minor who has grown up in a country in which homosexuality is linked to stigma and shame to talk openly and elaborate on the grounds of his asylum application when they are linked to his sexual orientation. On 4 March 2014, a statement from a non-governmental organization, LGBT Asylum, confirmed that the author had been a member of the organization since October 2013 and had been taking part in their meetings. On 19 September 2014, the Refugee Appeals Board confirmed its decision of 4 December 2012, refusing to reopen the asylum proceedings, without examining the new documents submitted by the author.<sup>7</sup> The Board considered that it was not plausible that the author would be at risk of persecution only because of his homosexuality since, even if homosexuality is illegal in Bangladesh, the relevant legislation is not enforced. The author asserts that the Board should have followed the procedure as applied in other countries. In that connection, he refers to the jurisprudence of the Supreme Court of the United Kingdom of Great Britain and Northern Ireland when determining whether an asylum seeker is a homosexual and whether, if returned to his country of origin, he risks persecution or abuse that would make him entitled to asylum.<sup>8</sup>

2.5 As part of the asylum procedure, the applicant stated that the authorities in his country of origin were unable to protect him from the people of his village. The author admitted he did not know about the law, but that he was clear that homosexuality was unacceptable from a religious and social perspective. He also feared starvation in case of his return to his country of origin, as he had no home and no clothing.

2.6 Since the decisions of the Board cannot be appealed before the Danish courts,<sup>9</sup> the author maintains that he has exhausted all available and effective domestic remedies.

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<sup>6</sup> The author only produced the document in its original language.

<sup>7</sup> As of that date, the author's expulsion to Bangladesh became imminent.

<sup>8</sup> The author refers to the judgment of the British Supreme Court in the joined cases of *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* of 7 July 2010.

<sup>9</sup> See article 56 (8) of the Danish Aliens Act.

2.7 The author has not submitted his communication to any other procedure of international investigation or settlement.

### **The complaint**

3.1 The author claims that by returning him to Bangladesh, the State party would put him at risk of torture and other forms of inhuman or degrading treatment or punishment, contrary to article 7 of the Covenant, owing to the risk of persecution he would face there because of his homosexuality.

3.2 The author submits reports on homosexuality in Bangladesh, which indicate that homosexuality is illegal in that country, and that the police use the law to discriminate and exercise violence against, and constantly threaten homosexual persons.

3.3 He considers that he could not avoid persecution through the concealment of his sexual orientation, as that would be incompatible with his rights under the provisions of the Covenant. Finally, the author maintains that the State party's authorities, including the police and the Immigration Service, did not take into consideration the fact that he was a minor when they initially interviewed him.

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

4.1 On 30 March 2015, the State party submitted its observations on the admissibility and merits of the communication and requested the Committee to lift the interim measures. It considers that the communication should be held inadmissible, as the author has failed to establish a *prima facie* case. In that connection, the State party argues that the author has not provided substantial grounds to demonstrate that he would be at risk of torture or other cruel, inhuman or degrading treatment or punishment if returned to Bangladesh. The State party also considers that the author has failed to provide specific details about his personal situation; that the Refugee Appeals Board made a thorough assessment of the author's credibility, of the background information available and of the author's specific circumstances; and that the national authorities are best placed to assess the facts and credibility in asylum cases.<sup>10</sup> The State party further argues that the asylum procedure that has been applied fully complies with the principles of due process.<sup>11</sup>

4.2 The State party further submits that in case the Committee holds the author's complaint admissible, it should consider it unsubstantiated, as the author failed to establish that his deportation to Bangladesh would constitute a violation of article 7 of the Covenant. In that connection, the State party submits that the Refugee Appeals Board generally considers that the conditions for granting a residence permit under section 7 (1) of the Aliens Act are met when the relevant asylum seeker has a well-founded fear of being subjected to specific, individual persecution of a certain severity, if returned to his country of origin. When the Board finds that an asylum seeker's statements on his ethnicity, religion, political views or membership of a particular social group can be found to be facts, but his activities or the measures taken against him in his country of origin do not constitute sufficient grounds for him to fall within the scope of article 1A (2) of the Convention

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<sup>10</sup> The State party draws attention to the jurisprudence of the European Court of Human Rights on this issue. See, for example, *R.C. v. Sweden* (application No. 41827/07), para. 52. The State party further refers to the jurisprudence of the Committee: communication No. 2186/2012, *X and X v. Denmark*, Views adopted on 22 October 2014, para. 7.5.

<sup>11</sup> The State party also refers to the judgment of the European Court of Human Rights which dealt with the national procedures applied in the author's asylum case, *M.E. v Denmark* (application No. 58363/10), para. 63.

relating to the Status of Refugees, his application for residence under section 7 of the Aliens Act will be refused.

4.3 The State party observes that according to the case law of the Refugee Appeals Board, homosexuals are considered to belong to a particular social group and that, depending on circumstances, they may fall within the Convention relating to the Status of Refugees. In the present case, the Board took into account the information provided on persecution prior to the author's departure from his country of origin and based itself on the assessment of his situation if he returned to his country of origin. In its decision of 4 December 2012, the majority of the members of the Board considered that the author's allegations lacked credibility and appeared fabricated for the occasion. The Board found it peculiar that the applicant had not himself contacted his mother, who had obtained valuables worth approximately 600,000 taka,<sup>12</sup> which was paid to the agent who arranged for the author's departure. The author allegedly made contact through a person whom he had met at random. The Board also considered it suspicious that the author had dared to have sexual intercourse with a friend in a paddy field several times. Finally, the Board considered that the applicant had given inconsistent statements: he had stated to the Danish Immigration Service that he was sitting at a café when the person from the village spotted him in Rangpur, whereas he had stated before the Board that he was recognized by a village citizen who was sitting in a tea-house, while he was in the street. Based on an overall assessment, the majority of the Board found that the author had failed to render his grounds for asylum credible. It concluded that the author would not be at a real risk of persecution under section 7 (1), or abuse falling within section 7 (2), of the Aliens Act if he returned to his country of origin. For those reasons, the Board upheld the decision of the Immigration Service

4.4 On 12 April 2013, the author requested the reopening of the asylum proceedings. As a reason for reopening them, he submitted that it appeared from the decision of the Board that it had not considered the fact that he was a homosexual. The author claimed that he would risk persecution simply because of his sexual orientation, regardless of whether he had had a homosexual relationship or not. He also objected to a wrongful assessment of his credibility, arguing that crops in paddy fields could be so tall that a person could hide there. On 19 September 2014, the Board ruled on three documents produced by the author (annexes A, B and C to his request for the reopening of the asylum procedure), which were also provided to the Committee, and found that no new information rendered the risk of persecution probable or substantiated if the author returned to Bangladesh. The State party observes that the author did not provide any new information to the Committee that would justify a revision of its assessment of the author's case by the authorities in the State party. The State party further submits that even when a person makes consistent statements, they are not necessarily true and cannot necessarily be considered as facts when their content is unlikely and do not seem to reflect a personal experience.

4.5 In that connection, the State party observes that the author's educational and personal skills enabled him to repeat the same narration several times without any essential discrepancies. It further argues that the author's statement alleging that the Immigration Service and the Refugee Appeals Board based their decisions on the fact of his homosexuality is suspicious, insofar as in none of the decisions was it concluded that it could be assumed that the author was homosexual. The State party observes that the author consistently stated that his homosexual relationship with his friend Tuhin had been discovered; that he had therefore been subjected to abuse and persecution prior to his departure; and that he feared that he would again be subjected to treatment falling within

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<sup>12</sup> Approximately \$7,638.

section 7 of the Aliens Act if he returned to Bangladesh. In the Board decision of 4 December 2012, the author was found not to have rendered probable that he had been subjected to abuse and persecution prior to his departure in the way he described. Consequently, the Board dismissed the author's statements as unlikely and apparently fabricated. In its decision of 19 September 2014, the Board concluded that the reasons given by the author as to the risk of persecution he would face upon his return were closely connected to those events and no other reason was provided. It therefore concluded that the author had failed to substantiate his claim that his possible homosexuality had resulted in a conflict with the authorities or private individuals in Bangladesh that would justify granting him asylum.

4.6 On the contrary, the State party considers as a fact that the author was not subjected to persecution, abuse or similar treatment prior to his departure, because he was able to live in Bangladesh as a homosexual until his departure in 2011/2012 without coming into conflict with the authorities of the State party or with private individuals. The State party agrees with the assessment of the Refugee Appeals Board that the mere reference to the general background information available on the condition of lesbian, gay, bisexual and transgender people in Bangladesh is not sufficient to substantiate the claim that the author would be at risk of persecution or abuse upon his return to Bangladesh. In its decision of 19 September 2014, the Board noted that the situation of homosexuals in Bangladesh had improved considerably in recent years and that although homosexuality was illegal pursuant to section 337 of the Criminal Code, the act was not enforced in practice. The State party further notes that numerous support networks for homosexual men have been established in the country. As regards the author's membership of LGBT Asylum, the Board was not able to take it into account in its decision of 4 December 2012 because, as indicated by the author himself and by the letter of the association, he only became a member in October 2013.

4.7 The State party takes note of the newspaper article from the *Daily Banglar Manush* of 24 March 2013, which was submitted by the author to the Refugee Appeals Board on 12 April 2013 after he had obtained it through friends of a friend.<sup>13</sup> According to the article, an elderly lady named Rokeya Begum had hanged herself on 22 March 2012 in the village of Rangarirbosh. During the investigation, it was allegedly discovered that two boys, one of them being the author, had had a homosexual relationship in July 2011, that they had been apprehended and brought to a member of the village council, and had spent the night with their hands tied behind their backs. The article also stated that the boys were banished from the village and that one of them had come back there two months later to see his sister and that on this occasion, he was captured and tortured, including through the removal of his genitals, following which he died. The article also reported that the author's family now led an isolated life because of his homosexuality and that his father had died from a heart attack on 2 March 2012. The Board assessed that it could not verify the authenticity of the newspaper article, considering the time of its appearance, the lack of clarity of its sources in Bangladesh and its procurement through the author's friends in Saudi Arabia. The Board also found that the article lacked credibility as to its content, considering the amount of specific details, which corresponded exactly to the author's statements on his grounds for seeking asylum. It appeared therefore to have been fabricated for the occasion, considering that false documents are common in Bangladesh, according to the information provided by the Ministry of Foreign Affairs. In that respect, the Board, despite the confirmation provided by the Bangladesh office of the United Nations Educational, Scientific and Cultural Organization that a newspaper of the relevant name did exist, did not find it

<sup>13</sup> The author has not produced a translated version of the document, which had to be arranged by the Board, and did not explain how he came into possession of the document.

necessary to have the authenticity of the news article verified. Against that background, the State party cannot give any evidential value to the document produced by the author.

4.8 The State party observes that the author fails to substantiate his reasons for considering that the submissions concerning his age entail a violation of article 7 of the Covenant. It submits that the Danish Immigration Service is the authority in charge of determining the age of asylum seekers, whenever necessary. The Section of Forensic Pathology examined the author and determined that he was 19 years old or more. On 4 July 2012, the Immigration Service decided to fix the author's date of birth as 21 December 1992. The author appealed against this decision to the Ministry of Justice, which upheld it on 9 March 2015. The Refugee Appeals Board also assessed positively that the author had the procedural capacity and the necessary maturity to undergo the asylum procedure. The State party also submits that in cases where the asylum seeker refers to his sexuality or gender identity, the Board assesses whether the person is in a particularly vulnerable situation, taking into account the relevant guidelines of the Office of the United Nations High Commissioner for Refugees (UNHCR).<sup>14</sup> The State party considers it strange that the author did not provide any information as to how he had obtained his purported birth certificate, which was issued on 18 February 2013, while his parents had passed away almost a year before that date and, according to his own statements, he had not had any contact with his family since he left Bangladesh.<sup>15</sup> In that connection, the State party adds that the author did not disclose the identity of the person who purportedly requested the issuance of the birth certificate and the basis on which it was issued.

4.9 The State party maintains that the author merely disagrees with the assessment of his credibility and of the background information made by the Refugee Appeals Board in his case. However, it considers that the author has failed to identify any irregularity in the decision-making process or in the assessment of the risk factors by the Board. The State party therefore considers that the author is trying to use the Committee as an appellate body to have the factual circumstances of his case reassessed. It further submits that the Committee must give considerable weight to the facts found by the Board, which is better placed to assess the factual circumstances of the author's case. The State party considers that there is no basis for questioning or setting aside the assessment made by the Board in the author's case and therefore submits that the author's return to Bangladesh will not constitute a breach of article 7 of the Covenant.

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

5.1 On 29 May 2015, the author submitted his comments on the State party's observations. He claims that he provided sufficient information to indicate that, as a homosexual, he would face the danger of treatment contrary to article 7 of the Covenant, if returned to Bangladesh. He claims that his communication should be held admissible as it has been sufficiently substantiated and all available domestic remedies have been exhausted, and that the request to lift the interim measures should be denied.

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<sup>14</sup> See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 2011) and the UNHCR guidelines on international protection No. 9 (claims to refugee status based on sexual orientation and/or gender identity within the context of article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees), 23 October 2012.

<sup>15</sup> The Board decision of 19 September 2014 indicates that the author's counsel stated that the author was not in possession of the original birth certificate. The birth certificate had been registered on 11 July 2008 because it was not until 2004 that a statute on birth certificates had been enacted in Bangladesh, making such certificates mandatory.

5.2 On the merits, the author claims that the State party erred in the assessment of his age and that it did not provide him with the assistance he was entitled to as a minor throughout the asylum procedure (such as the appointment of a legal guardian). The author further submits that the State party did not take into account the fact that he was a minor when assessing the facts and his credibility.<sup>16</sup>

5.3 The author considers that the same attention should be given to the fact that he is a young homosexual man who was ostracized from local society and from his family shortly before his arrival in Denmark. The vulnerability of his situation, which justifies his request for asylum, rests in his youth and the fact that homosexuality is a stigma in his society, family and religion. The Refugee Appeals Board failed to take into account the specific circumstances and vulnerability of the author. He also submits that the State party erred in the conclusion of 19 September 2014 that the newspaper article he had provided was fake: he states that he has a full authentic copy of the newspaper, which has existed since 2005 and is listed on the website of the Bangladesh Digital Media Database as a regional newspaper. The author therefore submits that the State party has not made a thorough evaluation of the facts and the documents in the decision-making process.

5.4 The author also submits that in its first decision, the Refugee Appeals Board did not consider whether being a homosexual would in itself constitute a risk of persecution if he returned to Bangladesh. Furthermore, in its second decision, the board suggested that the situation of homosexuals in Bangladesh had improved, despite the background information he had submitted to the contrary. He finally submits that the one inconsistent statement that the Board has found, whether it was actually him who was in a café, is likely the result of an error of interpretation and cannot be the basis for rejecting his statement.

5.5 The author also challenges the Board's conclusion that the situation of homosexuals has improved considerably in recent years in Bangladesh. In that connection, he submits that the United States of America Department of State report on human rights practices for 2013 and the United Kingdom Home Office country of origin information report of 2013 on Bangladesh do not give any basis for such a conclusion. The author further submits that even though section 377 of the Criminal Code is not enforced in practice, the act is still used by the police, together with section 54 of the Code of Criminal Procedure, to threaten and harass lesbian, gay, bisexual and transgender persons. The use of section 54 does not lead to criminal charges or prosecution but rather to abuses such as extortion and physical assaults, which the victims do not dare to report.<sup>17</sup> Finally, the author refers to the Committee's jurisprudence in *M.I. v. Sweden*, where it considered that the deportation to Bangladesh of the author, a homosexual person, would constitute a violation of article 7 of the Covenant.<sup>18</sup>

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

6.1 On 26 February 2016, the State party presented a further submission. It maintains that the author has failed to establish a *prima facie* case for the purpose of admissibility of his communication under article 7 of the Covenant, and that the communication should be held inadmissible.

6.2 Should the Committee find the communication admissible, the State party maintains that there are no substantial grounds for believing that the author's deportation to Bangladesh would constitute a violation of article 7 of the Covenant. The State party reiterates that there is no basis for doubting, let alone setting aside, the assessment made by

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<sup>16</sup> See UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, sects. 213-219.

<sup>17</sup> See United Kingdom Home Office country of origin information report of 2013.

<sup>18</sup> See communication No. 2149/2012, *M.I. v. Sweden*, Views adopted on 25 July 2013, para. 7.5.

the Refugee Appeals Board in its decisions of 4 December 2012 and 19 September 2014. It further draws attention to the jurisprudence of the Committee, according to which important weight should be given to the assessment conducted by the State party, unless it is found that the evaluation was “clearly arbitrary” or amounted to “a denial of justice”.<sup>19</sup> The State party considers that the author does not explain why the assessment would be arbitrary or otherwise amount to a manifest error or denial of justice in his case.<sup>20</sup> It also recalls that it is generally for the organs of the State party to examine the facts and evidence of the case in order to determine whether a risk exists. It further submits that even though the author has been found to be less than 18 years of age, the Board carried out the necessary assessments to conclude that the author had the procedural capacity and the necessary maturity to undergo an asylum procedure. The State party maintains that the Board took the author’s cultural difference, age, maturity and alleged sexual orientation into account.

6.3 The State party further contests the author’s reference to the views of the Committee in *M.I. v. Sweden*, as this case differs from the present case on essential points. In *M.I. v. Sweden*, the author’s sexual orientation and her allegations of rape by Bangladeshi policemen while in detention were not challenged by the State party and the authorities of the State party had considered it a fact that the author had been subjected to abuse in her country of origin. In the present case, the State party’s authorities carried out a thorough assessment of the author’s statements and of the documents provided by the author (see the decisions of the Refugee Appeals Board of 4 December 2012 and 19 September 2014) and the Board rejected crucial elements of the author’s statements as being non-credible and fabricated for the occasion. Accordingly, the Board could not accept as a fact the author’s statement of his grounds for asylum. In the attached addendum, the State party’s Ministry of Foreign Affairs confirms that the *Daily Banglar Manush* appears on the information portal of the Government of Bangladesh and operates as a local newspaper primarily based on first-hand sources. However, in its decision of 19 September 2014, the Board considered only whether the newspaper article produced was deemed to be fabricated for the occasion and not whether the relevant newspaper existed. The State party considers that the publication of the article in the *Daily Banglar Manush* must be considered a fact, but that the publication would not expose the author to such a level of persecution or abuse that would justify granting him asylum, because of the limited circulation of the referred newspaper.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

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

7.3 The Committee further recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b) of the Optional Protocol, insofar as such remedies appear to be effective in the given case and

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<sup>19</sup> See communication No. 2272/2013, *P.T. v. Denmark*, Views adopted on 1 April 2015, para. 7.3.

<sup>20</sup> See, for example, communications No. 2393/2014, *K. v. Denmark*, Views adopted on 16 July 2015, paras. 7.4 and 7.5, and No. 2426/2014, *N. v. Denmark*, decision of inadmissibility adopted on 23 July 2015, para. 6.6.

are de facto available to the author.<sup>21</sup> The Committee takes note of the author's submission that he has exhausted all available domestic remedies as the decisions of the Refugee Appeals Board cannot be appealed. The Committee also notes that the State party has not contested the author's submission in that regard.

7.4 The Committee also notes that the State party considers that the author's claim under article 7 should be held inadmissible for lack of substantiation. Nonetheless, the Committee considers that the author has provided sufficient details and documentary evidence for the purpose of admissibility. As no other obstacles to admissibility exist, the Committee declares the communication admissible and proceeds to its examination on the merits.

#### *Consideration of the merits*

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that his return to Bangladesh would expose him to a risk of torture and persecution on account of his homosexuality. In that connection, the Committee notes that, according to the author, he maintained a homosexual relationship with a friend from July 2010 to July 2011, and that they were caught at a rice field and brought to a village council, where they were beaten and tortured. The Committee also notes that the author was expelled from his family and village and threatened with death if he ever returned, and that when the author's partner returned to the village to visit his sister, he was tortured and consequently died. The Committee further notes that according to the reports submitted by the author, (a) Bangladeshi law forbids homosexual acts and lesbian, gay, bisexual and transgender individuals lack protection from the authorities; (b) the police use the law to discriminate and exercise violence against homosexuals; (c) and the law serves as a constant threat even if it is not systematically applied.

8.3 The Committee further notes the author's submission that in the decision process, the State party's authorities did not give due weight to the evidence he had provided. In particular, the Committee notes that when the author presented a birth certificate indicating that he was born on 21 December 1994, and was therefore 17 when he arrived in Denmark, the State party questioned the credibility of the author, but did not take any further measures to verify the information provided as to his actual age. The Committee also notes that when the author provided a copy of an article published in the newspaper the *Daily Banglar Manush*, which made reference to the events that occurred after his homosexual relationship was discovered, the State party first questioned the existence of the referred newspaper and then the genuineness of the article. In the author's view, the State party did not carry out a thorough evaluation of the facts and documents he submitted. He argues that in its first decision, the Refugee Appeals Board did not assess whether being homosexual would constitute a risk of persecution and that in its second decision, it suggested that the situation of homosexuals had improved in Bangladesh, despite the background information provided to the contrary.

8.4 The Committee also notes the State party's assessment that the information provided by the author did not enable it to conclude that, even if he were homosexual, he would be at risk of persecution upon his return to Bangladesh; that section 337 of Penal Code 1860 which criminalizes homosexual acts is not applied in practice; and that the situation of homosexuals has improved considerably in recent years.

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<sup>21</sup> See, for example, communication No. 2097/2011, *Timmer v. Netherlands*, Views adopted on 24 July 2014, para. 6.3.

8.5 The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, 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 article 7 of the Covenant. The Committee has also indicated that the risk must be personal<sup>22</sup> and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.<sup>23</sup> Thus, all relevant facts and circumstances must be considered, including the general situation of human rights in the author's country of origin.<sup>24</sup>

8.6 The Committee further recalls its jurisprudence that important weight should be given to the assessment conducted by the State party, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice,<sup>25</sup> and that it is generally for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.<sup>26</sup>

8.7 In the present communication, the Committee notes that the State party considered that the author was older than 18, while the Section of Forensic Pathology had concluded that "a certain probability existed" that the author might be as young as 17. It also notes the State party's arguments that the author's age has been properly assessed by the Danish Immigration Service and upheld by the Ministry of Justice; that the Refugee Appeals Board assessed the author's procedural capacity even if he was over 18, and that the author's vulnerability was properly assessed in accordance with the relevant UNHCR guidelines. It notes that the State party did not question the authenticity of the birth certificate that the author provided, but questioned the way in which it was obtained. The Committee notes that, in this context, the State party did not consider that the author could be a minor; it did not provide him with any of the assistance he was entitled to as a minor during the asylum procedure; and it did not take into account the fact that the author could be a minor likely to face a personal risk when assessing whether his return to Bangladesh would constitute a violation of article 7 of the Covenant. The Committee considers that this practice amounts to a procedural defect in the examination of the author's request for asylum.

8.8 The Committee further notes that the Danish Immigration Service and the Refugee Appeals Board concluded that the author's homosexuality was suspicious and that he had not demonstrated that his alleged homosexuality would put him at risk in case of return to Bangladesh. The Committee also notes that, to reach this conclusion, the State party focused on the assessment of the credibility of the author throughout the procedure, without further evaluating the statements before it. The Committee in particular notes that in its decision of 4 December 2012, the Board did not explain on which grounds it had disregarded the author's self-identification as homosexual and his allegations of a real risk of persecution or abuse if he was returned to Bangladesh. Furthermore, since the

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<sup>22</sup> See communications No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.2, and No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6. See also Committee against Torture, communications No. 282/2005, *S.P.A. v. Canada*, decision adopted on 7 November 2006; No. 333/2007, *T.I. v. Canada*, decision adopted on 15 November 2010; and No. 344/2008, *A.M.A. v. Switzerland*, decision adopted on 12 November 2010.

<sup>23</sup> See *X v. Denmark*, para. 9.2, and communication No. 1833/2008, *X v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid. and see, inter alia, communication No. 541/1993, *Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2.

<sup>26</sup> See communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4, and No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

Immigration Service and the Board found the author's homosexuality suspicious, they did not take into account the author's allegations that (a) he and his partner were tortured and expelled from their village upon discovery of their homosexual relationship; (b) he was told that he would be killed if he tried to come back to the village and his family; (c) his partner was tortured and consequently died when he tried to return to their village for a visit; and (d) no protection could be expected from the national authorities against this form of repression of homosexuality, which is widely practised in Bangladesh. In the same way, the State party did not take into account the information provided by the author, according to which homosexuality is stigmatized in Bangladesh and remains criminalized by section 377 of the Criminal Code, which in itself constitutes an obstacle to the investigation and sanction of acts of persecution against lesbian, gay, bisexual and transgender persons. In addition, the Committee notes that the author is Muslim, and that at the date of the present decision, such people in Bangladesh are frequently the victims of threats of violence, particularly after homophobic public comments by Islamic leaders. In view of the above, the Committee considers that, when assessing the risk faced by the author, the State party failed to take adequately into account his version of the events he faced in Bangladesh, the documents he provided and the available background information about the risks faced by lesbian, gay, bisexual and transgender people in Bangladesh, thereby arbitrarily dismissing the author's claims.<sup>27</sup> In such circumstances, the Committee considers that the author's deportation to Bangladesh would amount to a violation of article 7 of the Covenant.

9. The Committee, acting under article 5 (4), of the Optional Protocol, is of the view that deportation to Bangladesh would, if implemented, violate the author's rights under article 7 of the Covenant.

10. In accordance with article 2 (1) of the Covenant, which establishes that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to proceed to a review of the author's claim, taking into account the State party's obligations under the Covenant and the Committee's present Views. The State party is also requested to refrain from expelling the author while his request for asylum is being reconsidered.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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<sup>27</sup> See the notion of arbitrariness in the Committee's general comment No. 35 (2014) on liberty and security of person, para. 12.