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Human Rights Committee

Communication No. 2243/2013

Views adopted by the Committee at its 112th session (7–31 October 2014)

<i>Submitted by:</i>	Muneer Ahmed Hussein (represented by counsel, Finn Roger Nielsen)
<i>Alleged victims:</i>	The author and his two children
<i>State party:</i>	Denmark
<i>Date of communication:</i>	7 May 2013 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 10 May 2013 (not issued in document form)
<i>Date of adoption of Views:</i>	24 October 2014
<i>Subject matter:</i>	Deportation of an Afghan national
<i>Substantive issues:</i>	Right to an effective remedy; expulsion of non-citizen; family life; rights of the child
<i>Procedural issues:</i>	Lack of substantiation
<i>Articles of the Covenant:</i>	2; 7; 13; 23, para. 1; and 24
<i>Articles of the Optional Protocol:</i>	2; 5, paras. 1, 2 (a) and (b), and 4

* Reissued for technical reasons on 8 December 2014.



Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights (112th session)

concerning

Communication No. 2243/2013* **

Submitted by: Muneer Ahmed Hussein (represented by counsel, Finn Roger Nielsen)

Alleged victims: The author and his two children

State party: Denmark

Date of communication: 7 May 2013 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 October 2014,

Having concluded its consideration of Communications Nos. 2243/2013, submitted to the Human Rights Committee by Muneer Ahmed Hussein, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 7 May 2013, is Muneer Ahmed Hussein, an Afghan national, born on 7 March 1986. He submits his communication on his own behalf and on behalf of his son and daughter, Danish citizens, born on 3 November 2008 and 4 September 2010, respectively. He claims that the State party's decision to expel him permanently from Denmark constitutes a breach of his rights under articles 2, 13, 23 and 24 of the Covenant on Civil and Political Rights and of his children's rights under article 23 and 24 of the Covenant. The author is represented by counsel.¹

* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Christine Chanet, Ahmad Amin Fathalla, Cornelis Flinterman, Yuji Iwasawa, Walter Kälin, Zonke Zanele Majodina, Gerard L. Neuman, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerujlall B. Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili, Margo Waterval and Andrei Paul Zlatescu.

** A joint opinion (dissenting) by Committee members Yuval Shany and Dheerujlall B. Seetulsingh is appended to the present Views.

¹ The Covenant and the Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 10 May 2013, the Committee, in accordance with rule 92 of its rules of procedure, acting through its Special Rapporteur for new communications and interim measures, requested the State party to refrain from deporting the author to Afghanistan while his communication was under consideration by the Committee.

Factual background²

2.1 The author was born in Afghanistan on 7 March 1986. After his mother and two sisters were killed in a rocket attack in 1992, or 1993, he left Afghanistan with his father and four siblings, and fled to a refugee camp in Pakistan. The author entered Denmark on 31 July 1999 to be reunited with his father, who had already entered the country before that time. On 5 October 1999, the author was given a residence permit, which was periodically renewed until 26 November 2004.

2.2 The author's father, stepmother and five brothers and sisters live in Denmark. The author married Ms. A, a Danish national, in 2006. The couple have a son, born on 3 November 2008, and a daughter, born on 4 September 2010, who live with their mother. At the time of submission of the communication, the author and Ms. A were divorced.

2.3 On 2 September 2002, the author was sentenced by the Copenhagen City Court to imprisonment for one year and six months, for robbery, theft, attempted fraud, criminal damage, unlawful possession of firearms (gas pistol) and driving without a driver's licence. In view of the author's age, one year of the sentence was suspended subject to a probation period of two years. The Court did not order the author's expulsion, with reference to section 26 of the Aliens Act, read in conjunction with article 8 of the European Convention on Human Rights.

2.4 On 1 March 2005, the author was found guilty by a jury verdict of the Eastern High Court of several robberies and attempted robberies. He received a concurrent sentence of imprisonment for five years and six months, which included the suspended part of the judgement delivered on 2 September 2002. The author was also ordered expelled from Denmark and served with a permanent re-entry ban. When determining the sentence, the High Court took into account that the author had previously been convicted of robbery. However, at the same time, the court took into account that the author was under the age of 18 at the time of commission of the criminal offences.

2.5 On 19 August 2005, the Supreme Court unanimously upheld the judgement of the Eastern High Court for the reasons stated by the High Court.

2.6 As a consequence of the expulsion decision, the author's residence permit lapsed. By letter of 23 January 2006, the author submitted an application for asylum, which was refused on 27 July 2006 by the Danish Immigration Service, pursuant to section 7 of the Aliens Act. On 27 October 2006, the Refugee Appeals Board upheld the decision of the Danish Immigration Service and decided that the author could be forcibly returned to Afghanistan if he did not leave voluntarily.

2.7 By letter of 30 June 2006, the Commissioner of the Copenhagen Police submitted a request from the author for the revocation of the court's expulsion decision to the Copenhagen City Court, pursuant to Article 50 of the Aliens Act. On 11 September 2007, the Copenhagen City Court ordered that the expulsion order pursuant to the Supreme Court's judgement of 19 August 2005 was not to be revoked. In its order, the City Court emphasized that, according to the information available, there was no basis for assuming

² The factual background has been established on the basis of the author's account, the State party's submission and court documents.

that the author risked being subjected to double punishment upon his return to Afghanistan. The court found that the information about the author's marriage, during his incarceration, to the woman with whom he had had a relationship since 2002 could not be considered as such a material change in his circumstances that the expulsion decision against him should be revoked. Finally, the court found that the sentence of imprisonment for five years and six months for robbery must be accorded such decisive weight that the proportionality test made under article 8 of the European Convention on Human Rights could not lead to revocation of the expulsion decision. By order of 22 January 2008, the Eastern High Court upheld the order of the Copenhagen City Court for the reasons stated by the City Court. The author appealed the decision to the Appeals Board of the Supreme Court, which, on 11 June 2008, rejected the appeal.

2.8 On 24 July 2007, the author was released on parole and subsequently remanded in custody, pursuant to section 35(1)(i) of the Aliens Act, to ensure his presence until the expulsion could be enforced. On 6 February 2008, the author was released and accommodated at the Sandholm Centre, which functions as a departure centre for refused asylum seekers and persons expelled by court order. The author was ordered to report to the National Police at the Sandholm Centre once a week.

2.9 On 26 February 2008, the author reported to the National Police and stated that he did not want to cooperate in a voluntary departure from Denmark. The author was informed that the National Police would recommend to the Danish Immigration Service that a maintenance allowance scheme be set up pursuant to section 42a(10)(ii) (now section 42a(11)(ii)) of the Aliens Act.

2.10 On 14 April 2010, the District Court of Glostrup convicted the author of a criminal offence on the grounds that he and his two brothers had deprived a person of liberty, seriously assaulted him, threatened him and exercised duress against him using a loaded pistol and that, on another occasion, he and his brothers had threatened another person. The author was sentenced to imprisonment for four years and nine months. The sentence included the unserved balance of 670 days from the release on parole on 24 July 2007. On 26 August 2010, the Eastern High Court upheld the judgement delivered by the District Court of Glostrup.

2.11 On 28 October 2011, the National Police sent a request to the Afghan authorities for permission for the author to enter Afghanistan. On 14 January 2013, the National Police received acceptance from the Afghan authorities via the Danish embassy in Kabul, confirming that the author may be present at the Afghan border control for the purpose of identification, if identification on the basis of written documentation is not possible.

2.12 On 8 April 2013, the author was interviewed by the National Police on the matter of his return to Afghanistan, and he stated that he did not want to cooperate in a voluntary return to Afghanistan as he had a wife and children in Denmark. The author was subsequently informed that he would be presented to the border control authorities in Afghanistan as soon as possible. On the same day, the author was brought before the District Court of Hillerød and remanded in custody, pursuant to section 35(1)(i) of the Aliens Act, to ensure his presence until the expulsion decision could be enforced. The term of his custody on remand has been extended regularly, pursuant to section 35(1)(i) of the Aliens Act.

2.13 On 17 April 2013, the author's counsel was informed by telephone that the Afghan authorities had accepted that the author be presented to the Afghan border control authorities at Kabul International Airport for the purpose of final identification, and that the author would be brought back to Denmark if he could not be identified at such presentation. The author's counsel was also informed that the author's return to Afghanistan was

scheduled for 13 May 2013. On 1 May 2013, the author was personally informed that his return to Afghanistan was scheduled for 13 May 2013.³

The complaint

3.1 The author claims that the State party's decision to expel him permanently from Denmark constitutes a breach of his rights under articles 2, 23 and 24 of the Covenant. He emphasizes that inadequate consideration has been given to his right to a family life with his children and his family ties in Denmark. In that connection, the author also makes reference to the Convention on the Rights of the Child. In that context, he submits that since he was a minor when he committed the offences, the Court's decision to expel him permanently from Denmark is against the principle of the best interests of the child.⁴ He notes that the members of the jury were divided in their opinion: 13 jury members out of a total of 24 voted in favour of his deportation to Afghanistan. The author argues that a significant minority of jury members (11) found that although the crimes committed were serious, greater importance should have been given to the fact that the author was a minor at the time of the commission of the offences and that he had no ties with Afghanistan.

3.2 The author maintains that although the provisions on the rights of the child, as specified in the Convention on the Rights of the Child, cannot be considered as a direct legal instrument to be invoked for a decision by the Human Rights Committee, their content can nevertheless contribute to the interpretation and understanding of what constitutes a violation under article 24 of the International Covenant on Civil and Political Rights.⁵

3.3 The author submits that, despite the severe restrictions placed upon him since his release on 6 February 2008, he has managed to maintain a family life – although he could not live permanently with his family, nor provide economic support, which led to divorce in 2009. At the moment, the author has a good relationship with his children, and sees them regularly. His expulsion to Afghanistan and permanent entry ban for Denmark would therefore constitute a violation of his right to family life under article 23 of the Covenant. In this context, the author states that he only speaks Danish and all his relatives reside in Denmark.

3.4 The author submits that his children were born after the Supreme Court decision of 19 August 2005, which upheld the judgement of the Eastern High Court. He therefore maintains that the State party has violated his children's rights under articles 23 and 24 of the Covenant by maintaining the deportation order, which, pursuant to section 50 of the Aliens Act, cannot be reconsidered again, as they cannot be expected to follow him to Afghanistan. He explains that his children are Danish nationals, who do not speak Pashto nor have any ties with Afghanistan.

3.5 The author argues that the State party's legislation fails to provide remedies to adequately reconsider expulsion orders when a material change in the subject's

³ The author was not returned to Afghanistan as scheduled, owing to the interim measures requested by the Committee. He remains remanded in custody, pursuant to article 35(1)(i) of the Aliens Act, pending return.

⁴ See Convention on the Rights of the Child, art. 3, para. 1.

⁵ The author recalls the Committee's Views adopted on 22 July 2010 in the case of *Mohamed El-Hichou v. Denmark*, communication No. 1554/2007. He also refers to the judgement dated 11 July 2002 of the European Court of Human Rights in the case of *Amrollahi v. Denmark*, application no. 56811/00, in which a violation of article 8 of the European Convention on Human Rights was found, since the expulsion of the applicant to Iran would have been disproportionate to the aims pursued, in view of the de facto impossibility for the applicant and his family to continue their family life outside Denmark.

circumstances occurs since, pursuant to section 50 of the Aliens Act, an expelled alien is entitled to only one judicial review of the question of expulsion. The author therefore alleges a violation of article 13 of the Covenant because of the impossibility to have the expulsion decision reconsidered again, in view of his current personal circumstances.

3.6 The author submits that the State party's attempts to execute the expulsion decision by presenting him to the Afghan authorities at border control at Kabul International Airport constitute a violation of the Tripartite Memorandum of Understanding concluded on 18 October 2004 between the Islamic Transitional State of Afghanistan, the Government of Denmark and the United Nations High Commissioner for Refugees (UNHCR).

3.7 The author suspects that there might be an agreement between Denmark and Afghanistan, which may not have been made public and which allegedly came into effect in December 2012, whereby the Afghan authorities would accept repatriations in circumstances that do not meet international standards.

3.8 The author maintains that if he is presented at Afghan border control for the purpose of identification, he would not have access to counsel, and would thus be deprived of an important safeguard against acts of torture or ill-treatment, in breach of article 7 of the Covenant.

The State party's request to review the interim measures

4.1 On 18 July 2013, the author sought additional interim measures, asking the Committee to request the State party to release him from detention. On 30 July 2013, the Special Rapporteur on new communications and interim measures denied the request for additional interim measures.

4.2 In its submission dated 8 October 2013, the State party indicated that the return scheduled for 13 May 2013 was cancelled further to the Committee's request to refrain from returning the author to Afghanistan while his case was under consideration by the Committee.

4.3 The State party invites the Committee to review its request for interim measures. The State party indicates that, although the author would possibly suffer personal inconvenience should he be returned to Afghanistan, there are no special or compelling circumstances in the case that would cause him to suffer irreparable damage. The State party notes that the author is not claiming that his safety or life would be in jeopardy if he is returned to Afghanistan. Furthermore, he would not be barred from re-admission to Denmark, should the Committee rule in his favour. The State party refers to the case of *Stewart v. Canada*⁶ and notes that it has, on a previous occasion, re-admitted a person to Denmark as the consequence of a decision adopted by the Committee against Torture.⁷

4.4 On 10 October 2013, the author asks the Committee to maintain its request for interim measures. On 24 October 2013, the author provides detailed information on his family life and visits to and from his children and ex-wife, which confirms that a real family life exists to the extent possible for someone in detention. While serving his prison sentence, the author had regular leaves from prison (up to 48 hours at a time) to visit his ex-wife and children, who also regularly visited him in prison. Since being in detention pending his return to Afghanistan, the author has not been allowed to leave the centre, but his ex-wife and children visit him at least once a week.

⁶ Communication No. 538/1993, *Stewart v. Canada*, Views adopted on 18 March 1994, para. 7.7.

⁷ See Committee against Torture, communication No. 464/2011, *K.H. v. Denmark*, decision adopted on 23 November 2012.

4.5 On 25 October 2013, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the State party's request to lift the interim measures.

The State party's observations on admissibility and merits

5.1 On 9 October 2013, the State party submitted its observations on the admissibility and merits of the communication. It rejects the author's claims as insufficiently substantiated and considers that he has failed to establish a prima facie case for the purpose of admissibility of his communication under articles 2, 13, 23 and 24 of the Covenant. The communication should therefore be declared inadmissible.

5.2 The State party also submits that the author has not sufficiently established that his return to Afghanistan would be contrary to articles 2, 13, 23 and 24 of the Covenant.

Expulsion decision

5.3 Regarding the author's claims that the expulsion decision is contrary to articles 2, 23 and 24, first of all, the State party observes that the Covenant does not, per se, guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of maintaining public order, States have the power to expel an alien convicted of criminal offences. However, that power must be exercised subject to international treaty obligations, including those arising from the Covenant.

5.4 The State party maintains that, according to the Committee's case law, deportation of family members cannot be regarded as either unlawful or arbitrary under articles 17 and 23 when the deportation order is made under law in furtherance of a legitimate State interest and when due consideration is given in the deportation proceedings to the deportee's family connections. In this regard, the State party refers to the Committee's Views in *Stewart v. Canada*.⁸

5.5 The State party also quotes the relevant domestic legislation, namely, sections 49(1), 23(1)(i), 22(1)(iv) and 32(2)(iv) of the Aliens Act, which expressly state that an alien who has been lawfully resident in Denmark for more than three years may be permanently expelled if convicted of certain specific criminal offences. The State party thus notes that the expulsion decision is clearly based upon the law. Furthermore, in the State party's view, the expulsion decision is necessary in the public interest to protect public safety from further criminal activity by the author and thus in furtherance of a legitimate State interest.

5.6 The State party emphasizes the fact that the Supreme Court judgement of 19 August 2005 upheld the judgement of the Eastern High Court, which convicted the author of violating the Criminal Code, as he had been complicit, over a period of about three months, in three completed robberies and two counts of attempted robbery, four of those robberies being committed against cash transit vans, with total proceeds just under DKr 1.2 million. The State party adds that, despite the fact that the author was only 17 years old at the time of the crime, he was sentenced to five years and six months' imprisonment. The sentence was concurrent with the suspended part of the sentence of imprisonment for one year and six months imposed on the author on 2 September 2002 for robbery, theft, attempted fraud, criminal damage, unlawful possession of firearms and driving without a driver's licence. The State party further notes that, "in its expulsion decision, the High Court attached importance to the fact that the author's previous and present criminal activities were so serious that, considering his relatively short stay in Denmark, it must be considered necessary, in order to prevent further criminal offences and to protect society, to expel him,

⁸ See Communication No. 538/1993, *Stewart v. Canada* (note 6 above).

subject to a permanent re-entry ban, in spite of his youth, ties with persons living in this country and limited ties with his country of origin. The High Court observed that the proportionality test to be made under Article 8 of the European Convention on Human Rights could not lead to any other result”.

5.7 On 14 April 2010, the District Court of Glostrup convicted the author of additional serious violations of the Criminal Code, on the grounds that he and his two brothers had deprived a person of his liberty, seriously assaulted him, threatened him and exercised duress against him using a loaded pistol, and that, on another occasion, he and his brothers had threatened another person. The author was sentenced to imprisonment for four years and nine months, which included the unserved balance of 670 days owing to his release on parole on 24 July 2007. The author was also ordered to pay Dkr 20,000 as compensation for non-pecuniary damage to the first victim. That sentence was upheld by the judgement of the Eastern High Court on 28 August 2010.

5.8 The State party maintains that the offences committed by the author are extremely serious and, altogether, the author has exhibited extensive criminal conduct during his stay in Denmark.

5.9 In assessing whether due consideration has been given to the author’s family in the expulsion proceedings, the State party attaches crucial importance to the fact that neither the author nor his former spouse have had any form of justified expectation of being able to have a family life in Denmark since the expulsion decision was rendered in 2005. The author married in 2006, and the author’s children were born on 3 November 2008 and 4 September 2010, respectively. Those dates fall after the date (19 August 2005) of the Supreme Court decision that upheld and rendered the expulsion decision final. Moreover, the author’s children were born after both the District Court and the High Court had reviewed his case, under section 50 of the Aliens Act, as to whether the expulsion decision should stand. According to the information available, the author has never lived together with his children.

5.10 Regarding the merits, the State party notes that the author relies on the jurisprudence of the European Court of Human Rights in the case of *Amrollahi v. Denmark*.⁹ However, the State party considers that there is a decisive difference as the applicant in that case had commenced a relationship in 1992 with a woman, they had their first child in October 1996, and they married in September 1997, one week before his conviction. The State party refers to the jurisprudence of the European Court of Human Rights in the case of *El Boujaïdi v. France*,¹⁰ in which the Court stated that the question of whether the applicant had a private and family life within the meaning of article 8 of the European Convention on Human Rights must be determined in the light of the situation when the exclusion order became final. Thus, in that case, the applicant could not plead his relationship with a woman and the fact that he was the father of her child, since those circumstances came into being long after the date of the final expulsion order. The State party considers that, in the present case, the author’s former spouse knew about the offence and sentence at the time when she entered into the family relationship, and consequently neither the author nor her could have had any justified expectation of being able to have and continue a family life in Denmark. The State party finds that the Committee’s views in *El-Hichou v. Denmark*,¹¹ to which the author also refers in his communication, could not lead to any other result because that case concerned

⁹ European Court of Human Rights, *Amrollahi v. Denmark*, application No. 56811/00, judgment of 11 July 2002.

¹⁰ European Court of Human Rights, *El Boujaïdi v. France*, application No. 25613/94, judgment of 26 September 1997.

¹¹ Communication No. 1554/2007, *El-Hichou v. Denmark*, Views adopted on 22 July 2010.

a minor who had been refused family reunification, and because the Committee's reasoning in its assessment of the case was very specific. The State party maintains that due consideration has been given to the author's family in the expulsion proceedings.

5.11 The State party further draws the Committee's attention to the fact that the author states in his communication that he was "originally able to speak Pashto, but unable to read and write the language, but he is now unable to speak other languages than Danish". However, according to the opinion, dated 17 July 2004, of the Danish Immigration Service for the purpose of assessing the expulsion decision by the Eastern High Court, the author had stated that he spoke Pashto. He repeated this before the Copenhagen City Court, when it heard his request for revocation of the expulsion decision in September 2007. Thus, the State party considers that there are no language barriers to the author's ability to reintegrate in Afghan society.

5.12 Regarding the author's claim that inadequate consideration had been given in the expulsion decision to his age at the time of the offence, the State party refers to the fact that it follows from section 26(1)(ii) of the Aliens Act that the age of the alien is one of the criteria taken into account in an expulsion decision. Furthermore, it is expressly stated in the Eastern High Court judgement of 1 March 2005 that the jurors had taken this criterion into account as they attached importance to the fact that the defendant's previous and present activities were so serious that, considering his relatively short stay in Denmark, it was considered necessary, in order to prevent further criminal offences and to protect society, to expel him from the country subject to a permanent re-entry ban, despite his youth, ties with persons living in the country and limited ties with his country of origin.

Possibility of revocation of the expulsion decision

5.13 With regard to the author's claims under article 13 of the Covenant that it is impossible to alter an expulsion decision if it has already been reviewed once under section 50 of the Aliens Act, the State party notes that, by letter of 3 April 2007, the Commissioner of Copenhagen Police submitted a request from the author for revocation of the expulsion decision to the Copenhagen City Court, pursuant to section 50 of the Aliens Act. The Court dismissed the request on 11 September 2007. This was upheld by an order of the Eastern High Court on 22 May 2008. The return of the author to Afghanistan could not be implemented until 13 May 2013. Consequently, five years elapsed from the time of the High Court review under section 50 of the Aliens Act until the return could be implemented.

5.14 The State party argues that section 50(1) of the Aliens Act concerns the right of an alien expelled by judgement for a criminal offence to have the expulsion decision of a court reviewed again with reference to material change in the alien's circumstances. The provision ensures that an expelled alien has the right to have a judicial review of the importance of circumstances which may have arisen after the expulsion decision was made and which, if they had existed at the time of the expulsion decision, might have led to another result. The purpose of the condition specifying that a request cannot be made earlier than six months before the date of the expected enforcement of the expulsion is to ensure that material changes in the relevant circumstances that might arise in the period before the expected enforcement of the expulsion can be taken into account at the judicial review under section 50 of the Aliens Act. The State party clarifies that the date of the expected enforcement of the expulsion would normally be the date of release on parole.

5.15 The State party refers to the Supreme Court decision of 30 May 2011 in case No. 194/2009,¹² which concerned a review, under section 50a of the Aliens Act, and asserts that "(...) it appears from the Supreme Court decision that, in cases where several years have passed since the review under section 50 of the Aliens Act, as in the present case, the alien will be entitled to have the (...) expulsion decision reviewed again pursuant to section 50 of the Aliens Act". The State party indicates that the author has not requested a second review.

5.16 The State party maintains that the proposed return of the author to his country of origin is the result of careful consideration of all factors concerned, in accordance with full and fair procedures, under article 13 of the Covenant, in which the author was represented by counsel. The nature of the offences committed by the author in the present case are very serious, and his family life was not established until after his former spouse knew about the offences and the expulsion decision. Furthermore, the author committed further offences in the period after the expulsion decision. Against that background, the State party submits that the Danish rules are in compliance with Denmark's international obligations, including article 13 of the Covenant.

Enforcement of the expulsion decision

5.17 Regarding enforcement of the expulsion decision, the State party argues that section 30(1) of the Aliens Act, states that an alien who is not entitled to stay in Denmark must leave the country. If the alien does not leave Denmark voluntarily, the police must make arrangements for his/her departure, as set out in section 30(2) of the Aliens Act.

5.18 The State party confirms that the Tripartite Memorandum of Understanding concluded on 18 October 2004 between Afghanistan, the Government of Denmark and UNHCR concerning the return to Afghanistan of Afghan nationals without lawful residence in Denmark is still in force. The Memorandum of Understanding requires that the Afghan nationals be identified prior to return. The details of the cooperation between the Danish and Afghan authorities regarding the identification of and the procedure for identifying Afghan nationals have been laid down jointly by the relevant authorities in Afghanistan and Denmark. If identification cannot be made on the basis of written documentation, identification can be made by presentation to the authorities at border control. In this case, the staff from the Identity Checking Unit (IDCU) of the Afghan Ministry of Interior will meet the relevant alien and the escorting officers at border control at Kabul International Airport for the purpose of identification. If the relevant alien is not identified as an Afghan national, the alien will return to Denmark with the escorting Danish officers.

5.19 The State party notes that the IDCU has confirmed that the author may be presented at border control for the purposes of identification, if identification on the basis of written documentation is not possible. On 15 January 2013, the IDCU informed the Danish embassy that the author had not yet been confirmed as being an Afghan national.

5.20 Finally, the State party notes that the author is currently remanded in custody to ensure his presence until the expulsion can be enforced, and it requests the Committee to consider the communication as soon as possible.

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

6.1 In his comments, dated 10 and 24 October 2013, the author emphasizes that, pursuant to the test under section 50 of the Aliens Act, an alien likely to be expelled is entitled to only one judicial review of the expulsion order. The author disputes the State

¹² See Danish Weekly Law Reports 2011, p. 2358 ff.

party's interpretation of the Danish Supreme Court ruling in case No. 194/2009. The author claims that, under section 50 of the Aliens Act, there is "only one opportunity to review a case on its merits, but a *request* regarding the review under section 50 in the Aliens Act can be done several times, if it earlier on has been dismissed due to the fact that the time conditions ha[ve] not been met to let the case undergo a review on its merit[s]".

6.2 The author notes that the State party has not addressed the claims submitted on behalf of his children. He reiterates that they are victims of a violation of articles 23 and 24 of the Covenant, and argues that the deportation would inflict irreparable damage not only on him, but also on his children and their family life. In addition, the author considers that the security risks in Afghanistan are currently high and that the Afghan authorities would not be in a position to guarantee his safety. He claims that there is a significant risk of irreparable damage that might have far-reaching consequences for his children.

6.3 On 6 January 2014, the author provided further comments on the State party's observations and reiterates his claims. He notes that he has still not been confirmed as an Afghan citizen and that this increases the risk of statelessness.

6.4 In view of the his present circumstances, the author maintains that the decision of the Eastern High Court to uphold the expulsion order and the application of a permanent re-entry ban should be considered as arbitrary, unreasonable or disproportionate, and therefore contrary to articles 2, 23 and 24 of the Covenant, keeping in mind the relevant provisions of the Convention of the Rights of the Child.

6.5 As to his and his ex-wife's expectation of being able to have a family life in Denmark since the expulsion decision in 2005, the author does not agree that "this is an important or decisive criteri[on] in the assessment [of] this case".

6.6 The author notes that the case of *Stewart v. Canada* is different from the present case, in which subsequent circumstances should give rise to a re-assessment of the deportation order, especially in view of the time elapsed. The author also argues that he keeps in close contact with his father, stepmother and five siblings and has a strong family life with his children and ex-wife, despite him being in prison or facing significant restrictions. He reiterates that he is prevented from presenting relevant information about his current circumstances, which was not considered during the review under section 50 of the Aliens Act, in particular the fact that he is not registered as an Afghan national and about his close relation with his two children.

6.7 If the Committee does not *prima facie* find that the lack of a legal remedy itself constitutes a violation of article 13 of the Covenant, and that, thereby, articles 2, 23 and 24 are violated, the author requests the Committee not to confine itself to 'procedural arbitrariness' as in the case of *Stewart v. Canada*, but rather to carry out a detailed assessment/balancing of the proportionality of the entry ban. The author recalls that in the case of *Amrollahi v. Denmark*, the European Court of Human Rights considered it decisive that the applicants' wife and children could not be expected to go to Iran, and concluded that the expulsion of the applicant to that country would have been disproportionate to the aims pursued. In the present context, the author claims that although he has committed serious crimes several times, he cannot be considered a serious threat to national security or public order.

State party's additional comments

7.1 On 14 February 2014, and with reference to the author's further submission of 6 January 2014, the State party provided additional comments in relation to the author's claim on behalf of his children.

7.2 The State party considers that its earlier observations as to the author's rights are also applicable to the rights of his children. In that regard, the State party stresses the fact that the children were born after both the District Court and the High Court had reviewed his case, under section 50 of the Aliens Act, as to whether the expulsion should stand. The author may have had leave to see his children but, according to the information available, he has never lived together with them at any time.

7.3 The State party notes that in his comments of 6 January 2014, the author summarizes that his case concerns: (1) whether section 50 of the Danish Aliens Act complies with Denmark's international obligations, including under article 13 of the Covenant; and (2) whether the original judgement and expulsion decision, including the permanent re-entry ban, are in accordance with articles 2, 23 and 24 of the Covenant, considering his present circumstances.

7.4 As for the author's claims that it is not possible, under section 50 of the Aliens Act, to have a new legal assessment of changed personal circumstances, the State party maintains that this provision ensures that an expelled alien has the right to have a judicial review of circumstances which may have arisen after the expulsion decision was made and which, if they had existed at the time of the expulsion decision, might have led to another result. The State party reiterates that, as a principal rule, the right to such judicial review is restricted to one single review. However, a prime requisite for limiting the right to a judicial review to one single review is that the date of the review should close to the date of release so as to ensure that the review covers circumstances that are relevant at the date of the proposed return. Hence the time limit for submitting a request for review being set at six months, at the earliest, and two months, at the latest, prior to the date of the expected enforcement of the expulsion order. If the alien has been prevented from submitting the request in a time manner because of illness or for other reasons not attributable to the alien, the court may decide to disregard the time limit. It is up to the courts to ensure that the set time limits are observed. If it is uncertain whether the return of the alien can be enforced within the next six months, the courts should reject the case.

7.5 While acknowledging that the clear main rule is that an alien can only have his case reviewed once, under section 50 of the Aliens Act, in view of the requisites for limiting the access to review and the decision of the Supreme Court of 30 May 2011, the State party maintains that in cases where several years have passed since the review under section 50, as in the present case, the alien will be entitled to have the matter of revocation of an expulsion decision reviewed again pursuant to that same provision. The State party indicates that, according to the information available, the author has not requested a second review.

7.6 Against that background, the State party maintains that the Danish rules are in compliance with its international obligations, including under article 13 of the Covenant.

7.7 With regard to the author's request to the Committee to consider whether the Eastern High Court decision of 22 January 2008 complies with articles 2, 23 and 24 of the Covenant, when considering his present circumstances, the State party observes that, according to case law from the European Court of Human Rights, the question as to whether the applicant had a private and family life within the meaning of article 8 of the European Convention on Human Rights must be determined by the Court in the light of the position at the time when the impugned measure was adopted.¹³ When the complaint relates to a subsequent decision refusing to lift the original decision, the Court will take the date of

¹³ European Court of Human Rights, *Boujlifa v. France*, application No. 25404/94, judgment of 21 October 1997, para. 36.

the latest judgement as being the relevant one in deciding whether a family life exists. However, when assessing whether legal interference is “necessary in a democratic society”, the Court does not attach decisive effect to a situation created at the time when the applicant was excluded from the territory of the state.¹⁴

7.8 The State party notes that in the present case, the Eastern High Court order of 22 January 2008 upheld the Copenhagen City Court order that the expulsion, pursuant to the Supreme Court judgement of 19 August 2005, was not to be revoked.

7.9 The State party reiterates that the applicant did not have any children at the time of the Eastern High Court order of 22 January 2008. The applicant’s vital family link and relationship with his children was formed after the expulsion order was final, thus, in the State party’s view, that relationship should not be given decisive weight in the Committee’s assessment of the compliance of the Eastern High Court order with articles 2, 23 and 24 of the Covenant.

7.10 Finally, the State party explains that, according to practice, a two-year visitor’s visa may be issued, in exceptional cases, to aliens who have been expelled with a permanent re-entry ban, if there is a pressing need for the applicant’s presence in Denmark,¹⁵ and thereafter, where exceptional reasons render it appropriate.¹⁶

7.11 The State party concludes that the communication should be rejected by the Committee as inadmissible for insufficient substantiation. Should the Committee find the Communication admissible, the return of the author to Afghanistan should not be considered a violation of the author’s rights under article 2, 13, 23 and 24 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee has ascertained, in accordance with article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 With regard to the exhaustion of domestic remedies, the Committee notes that the State party has neither invoked article 5, paragraph 2 (b), of the Optional Protocol, nor demonstrated the availability of a second review of the expulsion order, under section 50 of the Aliens Act, in the present case that would have allowed it to reconsider the expulsion order in the light of the author’s changed family situation.

8.4 With respect to the author’s claim that he would not have access to counsel if he were presented at border control in Afghanistan for the purpose of identification and, therefore, he would be deprived of an important safeguard against acts of torture or ill-treatment, the Committee considers that the author does not provide any information as to why he would be subject to treatment contrary to article 7 of the Covenant. The Committee

¹⁴ European Court of Human Rights, *Dalia v. France*, application No. 26102/94, judgment of 19 February 1998, paras. 45 and 54.

¹⁵ For instance, if the applicant has to give evidence as a witness in legal proceedings in which the court deems the applicant’s presence to be of material importance to the completion of the proceedings, or in case of acute, serious illness of a spouse or child living in Denmark.

¹⁶ For instance, in case of serious illness or death of a family member living in Denmark.

considers that the author has not sufficiently substantiated his claim and consequently finds that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.5 As to the author's claim under article 2 of the Covenant in relation to the expulsion decision, the Committee recalls its jurisprudence, which indicates that the provisions of article 2 of the Convention lay down general obligations for State parties and they cannot give rise, when invoked separately, to a claim in a communication under the Optional Protocol.¹⁷ The Committee therefore considers that the author's claims in that regard are incompatible with article 2 of the Covenant, and inadmissible under article 3 of the Optional Protocol.

8.6 The Committee notes that the State party has objected to the admissibility of the communication, arguing that it is insufficiently substantiated for the purposes of admissibility. The Committee considers that the author has sufficiently substantiated his claim, for the purposes of admissibility, and that the facts of the communication raise issues under articles 13, 23 and 24 of the Covenant that should be considered on their merits.

8.7 The Committee notes that the State party has not raised any other objections to admissibility and proceeds to the consideration of the merits.

Consideration of the merits

9.1 The Human Rights 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, paragraph 1, of the Optional Protocol.

9.2 As to the author's claims under article 23, the Committee observes that to separate the author from his children and the rest of his family in Denmark may give rise to issues under article 23, paragraph 1, of the Covenant. The Committee reiterates its jurisprudence that there may be cases in which a State party's refusal to allow one member of the family to remain in its territory would involve interference in that person's family life. However, the mere fact that one member of the family is entitled to remain in the territory of a State party does not necessarily mean that requiring other members of the family to leave involves such interference.¹⁸

9.3 In the present case, the Committee considers that the decision of the State party to deport the father of two small children from a divorced family, coupled with a permanent re-entry ban, is "interference" with the family, at least in circumstances where, as in the present case, substantial changes in family life would follow. In that regard, the Committee observes that although the author's family life has been subjected to significant restrictions during his incarceration and subsequent custody in remand pending deportation, he has been able to maintain a close relationship with his family through regular visits to and from his children and ex-wife.

9.4 The issue thus arises as to whether or not such interference is arbitrary and contrary to article 23, paragraph 1, of the Covenant. The Committee observes that the decision to expel the author was upheld by the Eastern High Court on 22 January 2008, but could not be implemented until 13 May 2013, that is, five years later, during which the author's children were born. The Committee recalls that even interference by the law should be in

¹⁷ See Communications No. 2202/2012, *Castañeda v. Mexico*, decision adopted on 29 August 2013, para. 6.8; No. 1834/2008, *A.P. v. Ukraine*, decision adopted on 23 July 2012, para. 8.5; and No. 1887/2009, *Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

¹⁸ Communications No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004; No. 930/2000, *Winata v. Australia*, Views adopted on 26 July 2001, para. 7.1; No. 1011/2011, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.7.

accordance with the provisions, aims and objectives of the Covenant and should be reasonable in the particular circumstances.¹⁹ In that regard, the Committee reiterates that, in cases where one member of a family must leave the territory of a State party, while the other members would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life can be objectively justified must be considered, on the one hand, in the light of the significance of the State party's reasons for the removal of the person concerned and, on the other hand, the degree of hardship that the family and its members would suffer as a consequence of such removal.²⁰

9.5 The Committee notes that the State party justifies the author's removal from the country by the fact that he has been repeatedly convicted of several serious offences which can lead, in the case of aliens who have been lawfully residing in Denmark, to expulsion. The State party is furthermore of the view that "the expulsion decision is necessary in the public interest and to protect [public] safety from further criminal activity by the author and [is] thus in furtherance of a legitimate State interest". The Committee takes note of the author's argument that his children cannot be expected to follow him to Afghanistan, as they are Danish nationals who do not speak Pashto, have no ties with the country and have been living with their mother since the divorce. The Committee also notes that if the author were to be deported to Afghanistan – a country that he left at the age of five – the nature and quality of his family relationships could not be adequately maintained through regular visits, due to the permanent re-entry ban imposed on him.

9.6 The Committee notes that the communication was submitted on behalf of the author as well as his children, who were born after the decision to expel the author became final. It also notes that the State party has not reviewed those new circumstances and, in particular, never examined to what extent the deportation of the author was compatible with the right of his children to such measures of protection as required by their status as minors (art. 24 of the Covenant). The Committee further notes that the material before it does not allow it to conclude, in the present case, that due consideration was given by the State party to the right of the family to protection by society and the State nor to the right of children to special protection. Under those circumstances, the Committee is of the view that removing the author and separating his children from their father, without reviewing those new personal circumstances, would amount to a violation of article 23, paragraph 1, read in conjunction with article 24 of the Covenant.

9.7 In the light of the above finding of a violation of article 23, paragraph 1, read in conjunction with article 24 of the Covenant, the Committee will not consider whether the circumstances of the case constitute a separate violation of article 13, for the same facts.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to Afghanistan would violate his and his children's rights under article 23, paragraph 1, read in conjunction with article 24 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide the author with an effective remedy by proceeding to a review of the decision to expel him with a permanent re-entry ban, taking into account the State party's obligations under the Covenant. The State party is also under an obligation to take steps to prevent similar violations in the future.

¹⁹ Human Rights Committee, general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation, para. 4.

²⁰ See Communications No. 1222/2003, *Byahuranga v. Denmark*; and No. 1011/2001, *Madafferi v. Australia*, para. 9.8.

12. By becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant. In addition, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee 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 where it has been determined that a violation has occurred. The Committee therefore requests the State party to provide, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views, to have them translated into the official language of the State party, and to ensure that they are widely disseminated.

Appendix

[Original: English]

Joint opinion of Committee members Yuval Shany and Dheerujall B. Seetulsingh (dissenting)

1. We do not agree with the majority's conclusion that the communication is admissible, since we believe that the author failed to exhaust legal remedies before approaching the Committee. Although the majority is correct in noting that the State party has not formally invoked article 5, paragraph 2(b), of the Optional Protocol, it is up to the Committee to ascertain that the author has exhausted all available domestic remedies, even if the State party has not explicitly raised the matter on its own.

2. In the circumstances of the present case, the State party has taken, in effect, the view that section 50 of the Aliens Act constitutes an effective remedy, since it allows the author to request an additional review of his expulsion decision, where several years have passed since the previous review under the same section. It also asserted that the author may raise, in the context of such a request for additional review, a claim of material change in his personal circumstances. In formulating this legal position, the State party relied on the purpose of section 50, which seeks to facilitate consideration of the deported individual's circumstances shortly before the deportation, as well as on a decision by the Danish Supreme Court in another case (case No. 194/2009 of 30 May 2011), which alluded to the possibility of holding new section 50 hearings before deportation, in circumstances where a decision to suspend a deportation is lifted. In such hearings, the Supreme Court suggested that the contemporary personal circumstances of the individual whose deportation is sought may be considered.

3. Since the author challenged the State party's interpretation of section 50, and has refrained from seeking an additional review of his case pursuant to it, the Committee is faced with conflicting claims about the effectiveness of a domestic remedy. In such a situation, it has long been the position of the Committee that "mere doubts about the effectiveness of local remedies or the prospect of financial costs involved did not absolve an author from pursuing such remedies".^a This implies that whenever a State party invites the author of a communication to invoke a certain legal remedy, the Committee would expect the author to establish its ineffectiveness in order to justify his/her failure to exhaust it. In the present case, we regard the State party's interpretation of section 50 to be plausible in the light of its specific purpose and given the support afforded to this interpretation by the Supreme Court judgement of 30 May 2011. At the same time, we find the author's reasons for not even attempting to try to initiate section 50 proceedings, despite being invited to do so by the State party, to be unclear and unconvincing. As a result, we would have held that the author failed to show that he had exhausted all available and effective local remedies, as required under article 5, paragraph 2 (b) of the Optional Protocol.

4. Ultimately, the majority held that "removing the author and separating his children from their father without reviewing these new personal circumstances would amount to a violation of article 23, paragraph 1, read in conjunction with article 24 of the Covenant" (para. 9.6), and instructed the State party to "provide the author with an effective remedy by proceeding to a review of the decision to expel him with a permanent re-entry ban, taking

^a Human Rights Committee, communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, para. 6.4.

into account the State party's obligations under the Covenant" (para. 11). While we agree with the first holding by the majority — that is, that the author's new personal circumstances must be re-examined prior to his deportation — we do not agree with the implied conclusion found in the second holding (in the remedial paragraph), namely that the State party has not yet provided the author with an effective remedy. For the reasons stated above, we believe that by inviting the author to submit a section 50 application, the State party has provided him with an effective remedy to review the expulsion decision. As a result, the State party has already complied in our opinion with the Committee's Views, and we fear that by siding with the author in questioning the availability of proceedings under section 50 of the Aliens Act — the main legal framework under Danish law for reviewing expulsion orders — the majority has, regrettably, only complicated the ability of the State party to comply with its obligations under the Covenant.
