International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2946/2017*, **

Communication submitted by:	F.M. (represented by counsel, Daniel Nørrung)
Alleged victim:	The author
State party:	Denmark
Date of communication:	1 February 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 3 February 2017 (not issued in document form)
Date of adoption of decision:	6 November 2020
Subject matter:	Deportation to Afghanistan
Procedural issue:	Level of substantiation of claims
Substantive issue:	Non-refoulement
Articles of the Covenant:	6–7
Article of the Optional Protocol:	2

1.1 The author of the communication is F.M., a national of Afghanistan.[1] His asylum application in Denmark was rejected and he risks being deported to Afghanistan. He claims that, by deporting him, Denmark would violate his rights under articles 6 and 7 of the Covenant. The author is represented by counsel.

1.2 On 3 February 2017, the Committee's Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, requested the State party not to remove the author while his case is under examination. On 6 February 2017, the State party's Refugee Appeals Board suspended the time limit for the author's departure from Denmark until further notice.

* Adopted by the Committee at its 130th session (12 October–6 November 2020).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christoph Heyns, Bamariam Koita, Marcia V.J. Kran, David H. Moore, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

[1] The author submits that he was born in 1998. An age determination test by the State party's authorities concluded on 26 November 2015 that he was most likely 19 years of age or older, but that "there is a certain, albeit less likely, that the lesser age can be 17". On 3 February 2016, the Danish Immigration Service ascertained that the author was born in 1996; this was later confirmed by the Ministry of Immigration, Integration and Housing.

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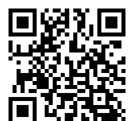

Facts as submitted by the author

2.1 The author's family fled Afghanistan to the Islamic Republic of Iran because of a conflict in which the father was kidnapped, tortured and shot, but survived. The author was born in the Islamic Republic of Iran. The family moved several times within the country and ultimately left it because of the father's fear that he would be harmed by the same people who had attacked him previously. The father has told the author little about his conflict in Afghanistan, except that he was afraid to return to Afghanistan and that there were people who were looking for him at the family's home in the Islamic Republic of Iran.

2.2 The author is unsure when he left the Islamic Republic of Iran with his family. They subsequently resided in Turkey for approximately 11 months. The author and his younger brother lost contact with the rest of the family when, due to lack of space, they had to board a separate boat while attempting to travel to Greece. They were arrested in Denmark, where his younger brother was granted asylum as a minor.

2.3 The author had a grandfather in Afghanistan, with whom he used to speak on the telephone once a year. The author is no longer aware of his grandfather's exact whereabouts or even of whether he is alive. He had a grandmother in the Islamic Republic of Iran, but when the authors and his family left the country, she said that she might return to Afghanistan. The author has had no contact with his grandmother and is unaware of her whereabouts. He has no other relatives or other network in Afghanistan. He has never been to Afghanistan and has not sufficiently mastered the language and traditions. For example, he is unable to distinguish between Iranian and Afghan customs.

2.4 On 17 July 2016, the author's asylum application was rejected by the Danish Immigration Service. On 5 January 2017, the Refugee Appeals Board confirmed that decision and the author was placed in pre-removal detention.

2.5 Meanwhile, on 31 December 2016, the author got a tattoo of a cross and a rose on his arm. He explained that he knows the cross to be a Christian symbol, that he sympathizes with Christianity and that he knows that it is about love, but that he has no further knowledge of it and has not converted to Christianity. When asked about his awareness of the risks of bearing a tattoo of a cross on his arm in Afghanistan, he explained that he could not comprehend the idea of going there, as he has never been there and thus did not consider such risks. In response to the question of whether he would have the tattoo removed if he were deported to Afghanistan, the author said that he could not and would not remove what was in his heart. He further explained that, in the Islamic Republic of Iran, he wore a cross around his neck as a talisman, which he used to hide from everyone but his closest friends. He had not told the State party's authorities about the cross or the tattoo earlier because he did not find them relevant to his case.

2.6 Based on this new information, the author requested a reopening of his asylum application on 13 January 2017. Four days later, the Refugee Appeals Board responded that the application would be processed within 10 to 12 months and that the procedure would not have suspensive effect on his removal.

2.7 The author argues that the decisions of the Refugee Appeals Board cannot be appealed in court and that, including in the light of the non-suspensive nature of his request for the asylum application to be reopened, he has thus exhausted all available domestic remedies.[2]

Complaint

3. The author claims that his removal to Afghanistan would expose him to a real risk of treatment contrary to articles 6[3] and 7 of the Covenant because he was born outside of Afghanistan and has never been there, as well as because of his young age, lack of familiarity with the languages and traditions of Afghanistan, lack of family or other social networks, his

[2] The author refers to the information provided by the Government of Denmark on the implementation of the concluding observations of the Committee on the Elimination of Racial Discrimination (CERD/C/DEN/CO/17/Add.1, para. 12).

[3] The claim of a violation of article 6 of the Covenant is absent from the initial submission, but the author introduces it in his comments on the State party's observations.

younger brother's legal residence in Denmark (extended to him as a minor), the fact that he does not have a firm belief in Islam, the tattoo of a cross on his arm and his sympathy for Christianity. Referring to the Committee's Views in *A.A.S. v. Denmark*, he argues that the State party's authorities did not accord sufficient weight to the cumulative effect of these circumstances.[4]

State party's observations on admissibility and the merits

4.1 In a note verbale dated 1 August 2017, the State party submitted its observations on admissibility and the merits. It submits that the communication is inadmissible as manifestly ill-founded and that the author's removal to Afghanistan would not constitute a violation of article 7 of the Covenant.

4.2 The author arrived in Denmark and applied for asylum on 7 September 2015. The Danish Immigration Service rejected his application on 17 July 2016. That decision was upheld by the Refugee Appeals Board on 5 January 2017. The Board accepted the author's account of what had happened to him but noted that he had never experienced any conflict in Afghanistan and that it was his own assumption that he would be pursued there due to his father's past conflict, which occurred before his birth. Likewise, it was his own assumption that the unknown individuals who had called on his family's home in the Islamic Republic of Iran were the same as those who had kidnapped his father. His invocation of socioeconomic circumstances, including the general situation in Afghanistan, the fact that he had never been there and lacked a social network, did not lead to a different assessment, as the Board observed that he is a young man in good health and fit for work and the circumstances raised fall outside the scope of the assessment.

4.3 The author's request of 13 January 2017 to have his case reopened, in which he referred to a rose and cross tattooed on his arm and his interest in Christianity, was rejected by the Refugee Appeals Board on 11 April 2017. The Board found that no new essential information had been presented and that his sympathy for Christianity and his tattoo could not lead to a different conclusion. The Board noted that he had stated in his screening interview with the Danish Immigration Service of 13 November 2015 that he was a Sunni Muslim, fasted during Ramadan, did not pray much and had no particular reason to pray or to abstain from praying. The Board also noted that he had not mentioned his tattoo, which he claims is of a Christian symbol, at the Board hearing and that he had raised his interest in Christianity only in his request for the case to be reopened. As he did not consider himself a Christian, the Board considered that the tattoo of what he claims is a cross did not by itself render it probable that he would be perceived as a Christian in Afghanistan.

4.4 The State party observes that, according to section 53 (a) of the Aliens (Consolidation) Act, rejections of asylum applications by the Danish Immigration Service are automatically appealed to the Refugee Appeals Board and that such appeals stay the execution of the decision. The Board is an independent, quasi-judicial body. Its chairperson and deputy chairperson are judges and the other members must be attorneys or serve in the Ministry of Immigration and Integration. Under section 53 (1) of the Aliens (Consolidation) Act, Board members are independent, cannot accept or seek directions from the appointing or nominating authorities and decisions to suspend or dismiss them, as with judges, are made by the Special Court of Indictment and Revision. The Board's decisions are final. Nevertheless, under the Constitution, aliens may appeal to ordinary courts, which can adjudicate matters relating to the limits of competence of public authorities. Judicial review of Board decisions is thus limited to points of law.

4.5 The State party observes that aliens are granted a residence permit under the Aliens (Consolidation) Act if they have refugee status under the Convention relating to the Status of Refugees or if they are at risk of being subjected to the death penalty or to torture or other cruel, inhuman or degrading treatment or punishment. The Act provides for the application without exceptions of the non-refoulement principle and a number of memorandums on the legal protection of asylum seekers under international law ensures that the authorities must decide in accordance with these obligations.

[4] CCPR/C/117/D/2464/2014.

4.6 The State party notes that, in practice, the Refugee Appeals Board assigns counsel free of charge in all cases and forwards to counsel the case file well before the hearing. In practice, before a hearing, asylum seekers always meet with their counsel, who submit briefs in the vast majority of cases. Proceedings before the Board are attended by the asylum seeker, his or her counsel, an interpreter and a Danish Immigration Service representative. The asylum seeker makes a statement and may produce additional evidence. Questions are posed to the asylum seeker, following which counsel and the Danish Immigration Service representative can make oral arguments. The asylum seeker may make a final statement. The Board normally renders its decision immediately after the hearing. Decisions are based on individual and specific assessments made in the light of all relevant evidence, including information on the asylum seeker's country of origin.

4.7 The State party observes that asylum seekers are told that it is their duty to provide detailed information and about the importance of doing so. The Refugee Appeals Board bases its assessment on an overall appreciation of the asylum seeker's statements and demeanour during the hearing, as well as on other information, including on the country of origin. The Board has a comprehensive collection of such information and continually updates it based on a variety of sources. It normally accepts the asylum seeker's statements as fact if they are coherent and consistent, and seeks clarifications of inconsistencies, changing statements, expansions or omissions. Inconsistent statements about crucial elements may weaken an asylum seeker's credibility; in such cases, the Board will consider, inter alia, the asylum seeker's explanations as well as his or her situation, including cultural differences, age and health. In certain situations, greater emphasis may need to be placed on objective circumstances due to the asylum seeker's age or mental health status.

4.8 The State party observes that the communication submitted by the author provides no basis for setting aside the assessment made by the Refugee Appeals Board. The State party argues that the author has not established that his removal to Afghanistan would constitute a breach of his rights under article 7 of the Covenant. The State party refers to the high threshold set by the Committee for providing substantial grounds for establishing that a real risk of irreparable harm exists.[5] The State party also refers to the standard of the Committee's review according to which considerable weight should be given to the assessment conducted by the State party, and it is generally for the States parties' organs to evaluate facts and evidence in a particular case, unless it is found that such evaluation was clearly arbitrary or amounted to a denial of justice.[6] The State party asserts that, in the present case, the author has not met this standard, as, beyond voicing his disagreement with the assessment made, he has failed to identify any irregularity in the decision-making process or any risk factors not properly considered. The State party submits that the author attempts to use the Committee as an appellate body to have his case reassessed, even though it was already assessed at two instances in Denmark and he had the opportunity to present his views orally and in writing with the assistance of legal counsel, resulting in a comprehensive and thorough assessment by the Refugee Appeals Board.

4.9 The State party observes that the communication contains no new information on the author's situation in Afghanistan. It notes that the general situation in Afghanistan is not such as to justify granting asylum.[7] With reference to the findings of the Refugee Appeals Board, the State party observes that the author has not rendered probable a specific and individual

[5] *A.A.I. and A.H.A. v. Denmark* (CCPR/C/116/D/2402/2014), para. 6.5; and *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

[6] *A.S.M. and R.A.H. v. Denmark* (CCPR/C/117/D/2378/2014), paras. 8.3 and 8.6; *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.2; *N v. Denmark* (CCPR/C/114/D/2426/2014), para. 6.6; *K v. Denmark* (CCPR/C/114/D/2393/2014), paras. 7.4–7.5; *Mr. X and Ms. X v. Denmark* (CCPR/C/112/D/2186/2012), para. 7.5; and *Z v. Denmark* (CCPR/C/114/D/2329/2014), para. 7.4.

[7] The State party refers to the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 30 August 2018 (document HCR/EG/AFG/18/02); and *M.A. v. Denmark* (CCPR/C/119/D/2240/2013), para. 7.7. See also the judgments of the European Court of Human Rights in *A.G.R. v. the Netherlands* (application No. 13442/08), para. 59; *M.R.A. and Others v. the Netherlands* (application No. 46856/07), para. 112; *S.S. v. the Netherlands* (application No. 39575/06), para. 66; and *A.W.Q. and D.H. v. the Netherlands* (application No. 25077/06), para. 71.

risk of persecution or abuse in Afghanistan. His lack of knowledge of Afghan society and traditions and the absence of a family or other social network there do not independently justify granting asylum either. The author is a young unmarried man of working age without health problems and, given his statements on his grandparents, it cannot be considered a fact that he has no family in Afghanistan. He has never experienced any conflicts in Afghanistan and appears to be a low-profile individual. It is his own assumption that he will be pursued there because of his father's past conflict.

4.10 As for his interest in Christianity, his tattoo and the necklace with a cross, the author did not raise these circumstances before his reopening request, even though he had been informed of the importance of disclosing all relevant information and should have disclosed this information prior to the Board hearing on 5 January 2017. Moreover, he was asked about his religious affiliation on several occasions during the procedure and replied that he was a Sunni Muslim, albeit not a firm believer. The State party considers his explanation of the late invocation, according to which he did not consider these circumstances relevant to his case, unconvincing. The State party considers it peculiar that he decided to get a tattoo of what he claims to be a cross only a few days before the Refugee Appeals Board's hearing and did not inform his counsel or the Board, even though he states that this interest in Christianity and the tattooed symbol are very important to him. The State party concludes that his claimed interest in Christianity appears fabricated. The tattoo does not independently render it probable that he will be perceived as a Christian in Afghanistan; the author does not consider himself as such and, according to information on the country, even if it becomes known that someone has relied on conversion for his or her asylum claim, this does not mean that he or she will face risks, as Afghans have great understanding for compatriots who try everything to obtain residence in Europe.[8]

4.11 The State party observes that the author's reference to the Committee's Views in *A.A.S. v. Denmark* and his submission that the authorities did not grant sufficient weight to the cumulative effect of his individual circumstances cannot lead to a different assessment, as the Refugee Appeals Board made an overall assessment based on the author's statements and information on the country. The State party maintains that the Board's assessment does not lead to the conclusion that the author risks persecution or abuse justifying the granting of asylum.

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

5.1 On 15 January 2019, the author provided comments on the State party's observations and he reiterates his initial arguments (see paras. 2.1–2.3 above).

5.2 The author argues that, in the proceedings before the Danish Immigration Service, no counsel or independent third party is required to assist the asylum seeker. He reiterates that the decisions of the Refugee Appeals Board cannot be appealed before ordinary courts under Danish law despite the crucial matters being dealt with. He argues that the Board is not a court, because its meetings are not public, witnesses are allowed only in exceptional, unpredictable circumstances and one of the members is appointed by, and is usually an employee of, the ministry acting as superior administrative authority to the Danish Immigration Service, which makes the first decision, thus undermining the Board's neutrality.

5.3 The author asserts that the facts of his case give rise to a risk of treatment contrary to articles 6 and 7 of the Covenant upon removal to Afghanistan. He argues, first, that the State party accepts his account of what has happened to him. Second, the State party did not grant him the benefit of the doubt regarding his father's conflict and it is unknown whether the

[8] The attention of the Committee was drawn to a report by the Norwegian Country of Origin Information Centre, Landinfo, on the situation of Christians and converts in Afghanistan published on 4 September 2013 (in Norwegian). The State party also notes that it is stated in paragraph 36 of the 28 April 2004 UNHCR guidelines on international protection concerning religion-based refugee claims under article 1A(2) of the Convention relating to the Status of Refugees and/or its 1967 Protocol (document HCR/GIP/04/06) that "so-called 'self-serving' activities do not create a well-founded fear of persecution on a Convention ground in the claimant's country of origin, if the opportunistic nature of such activities will be apparent to all, including the authorities there, and serious adverse consequences would not result if the person were returned".

father's persecutors may strive to persecute the author too. Third, the cumulative effect of his young age and the fact that he does not strongly practise Islam, that his language will disclose that he has never been to Afghanistan and that he has no known place to go to and find protection in Afghanistan, amounts to a risk of irreparable harm upon removal thereto. Fourth, his tattoo of a cross aggravates this risk. The author was unaware of the relevance of the tattoo for his asylum claim and thus disagrees with the State party's observation on its "peculiar" timing. The author has stated in the asylum proceedings that his practice of Islam since his arrival in Denmark has been very limited and that, while he does not claim to have converted to Christianity, his sympathy for it as demonstrated by the tattoo, together with his lack of familiarity with Afghan norms, creates a high risk of suspicion of conversion if removed from a European country.

State party's additional observations

6. On 8 February 2019, the State party observed that the author's comments do not alter its prior submissions. It maintains that the communication should be declared inadmissible as manifestly ill-founded and reiterates that the author's removal to Afghanistan would not violate article 7 of the Covenant.

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 97 of its rules of procedure, whether the claim 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 notes the author's claim that he has exhausted all effective domestic remedies available to him and that the decisions of the Refugee Appeals Board are not appealable in court. In the absence of any objection by the State party in that regard, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

7.4 The Committee also notes the author's claim that the State party's authorities accorded insufficient weight to the cumulative effect of the circumstances arising from the fact that he was born outside of Afghanistan and has never been there, is young, lacks familiarity with the languages and traditions of Afghanistan, has no family or other social networks in that country, his younger brother is legally resident in Denmark as a minor, does not have a firm belief in Islam, has a tattoo of a cross on his arm and feels sympathy for Christianity. The Committee notes that this assertion shows the author's disagreement with the assessment by the competent domestic authorities but does not substantiate that any particular errors were made. The Committee notes the State party's submission that it considered all of the author's circumstances and found that he has never experienced any conflicts in Afghanistan, appears to be a low-profile individual and is a young, unmarried man of working age without health problems. The Committee further notes that, according to the information available on file, the author's native language is Dari and he reads, writes, speaks and understands it.

7.5 While the State party's authorities accepted the author's account of his past experiences, the Committee notes that the author does not explain on what basis the State party's authorities should have accepted his assertion of the alleged risk posed by unidentified people responsible for the torturing and shooting of his father in Afghanistan, an incident that occurred before the author's birth. The Committee also notes that the author does not show that it was unreasonable on the part of the authorities to conclude that it was his own assumption that he would be pursued in connection with this conflict and that the unknown people who came to the family's home in the Islamic Republic of Iran were the same as those who had attacked his father.

7.6 On his tattoo and his sympathy for Christianity, the Committee notes that the author identifies himself as a Sunni Muslim and that, even if he admitted that his practice was not

"strong", he nevertheless practises Islam and has never converted to Christianity. The Committee also notes that the author, while claiming the existence of a risk of being perceived as a Christian convert in Afghanistan, has not commented on the State party's reference to country information indicating that Afghans have great understanding for compatriots who try everything to obtain residence in Europe.

7.7 The Committee recalls paragraph 12 of its general comment No. 31 (2004), in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant. The Committee has also indicated that the risk must be personal and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.[9] In making such assessment, all relevant facts and circumstances must be taken into consideration, including the general human rights situation in the author's country of origin.[10] The Committee recalls its jurisprudence according to which considerable weight should be given to the assessment conducted by the State party and reiterates that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in a particular case in order to determine whether such a risk exists, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[11]

7.8 In the light of the foregoing, the Committee observes that the author has failed to identify any such irregularity in the decision-making process of the Danish immigration authorities in the framework of his asylum proceedings and has failed to sufficiently substantiate why the decisions of these authorities were clearly arbitrary, manifestly erroneous or amounted to a denial of justice. Regarding the author's reference to the Committee's views in *A.A.S. v. Denmark*, the Committee notes that, in spite of some apparent similarities, that case fundamentally differs from the case at hand given the specific context in Somalia at that time and the distinct individual circumstances of its author, which, taken together, rendered him particularly vulnerable, and therefore considers it irrelevant in the present circumstances.

7.9 Without prejudice to the continuing responsibility of the State party to take into account the situation in the country to which the author would be deported and not underestimating the concerns that may legitimately be expressed with respect to the general human rights situation in Afghanistan, the Committee considers that, in the light of all the available information regarding the author's personal circumstances, his claims under articles 6 and 7 of the Covenant are insufficiently substantiated for the purposes of admissibility and are therefore inadmissible under article 2 of the Optional Protocol.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 of the Optional Protocol;

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

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[9] See, for example, *X v. Denmark*, para. 9.2; *V.R. and N.R. v. Denmark* (CCPR/C/117/D/2745/2016), para. 4.4; *J.I. v. Sweden* (CCPR/C/128/D/3032/2017), para. 7.3; and *A.E. v. Sweden* (CCPR/C/128/D/3300/2019), para. 9.3.

[10] Ibid.

[11] *V.R. and N.R. v. Denmark* (CCPR/C/117/D/2745/2016), para. 4.4; *F.B.L. v. Costa Rica* (CCPR/C/109/D/1612/2007), para. 4.2; *Fernández Murcia v. Spain* (CCPR/C/92/D/1528/2006), para. 4.3; and *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 9.3.