



# 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. 2685/2015\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	R.M. and F.M. (represented by counsel, Ms. Jytte Lindgård)
<i>Alleged victims:</i>	The authors and their two minor children
<i>State party:</i>	Denmark
<i>Date of communication:</i>	19 November 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 25 November 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	24 July 2019
<i>Subject matter:</i>	Deportation to Afghanistan
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Right to life; risk of torture, cruel, inhuman or degrading treatment or punishment; non-refoulement
<i>Articles of the Covenant:</i>	6, 7, 17 and 23
<i>Article of the Optional Protocol:</i>	2

\* Adopted by the Committee at its 126th session (1–26 July 2019).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Christopher Arif Bulkan, Ahmed Amin Fathalla, Shuichi Furuya, Bamariam Koita, Duncan Laki Muhumuza, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja, Andreas Zimmermann and Gentian Zyberi.

\*\*\* Individual opinions by Committee members Shuichi Furuya, Photini Pazartzis, Yuval Shany and Andreas Zimmermann are annexed to the present Views.



1.1 The authors of the communication are R.M., born on 12 March 1989, and his wife, F.M., born on 23 April 1994. They are Afghan nationals and present the communication on their own behalf and on behalf of their two children: X, born on 23 February 2011, and Y, born on 23 May 2014. They claim that by forcibly deporting them to Afghanistan, Denmark would violate their rights under articles 6, 7, 17 and 23 of the Covenant. The authors are represented by counsel.

1.2 On 25 November 2015, pursuant to rule 92 of the Committee's rules of procedure, the Special Rapporteur on new communications and interim measures requested the State party to refrain from deporting the authors and their children to Afghanistan while their case was under consideration by the Committee. On 27 January 2017 and then on 9 April 2018, the Special Rapporteur decided to deny the State party's requests to lift interim measures.

### **The facts as presented by the authors**

2.1 The authors fled Afghanistan after having had sexual relations outside marriage, at F.M.'s residence when her family was absent;<sup>1</sup> F.M. subsequently fell pregnant. When she was 3-months pregnant, F.M. was formally engaged to one of her uncle's friends, who was older and with whom she had had no previous contact. After the authors' departure,<sup>2</sup> F.M.'s family threatened R.M.'s family. F.M.'s cousin killed R.M.'s brother<sup>3</sup> because he had helped the authors to escape. The authors stayed for about six months in Turkey, where their first son was born. They subsequently went to Greece, where they stayed for 14 months.

2.2 F.M. entered Denmark without valid travel documents on 23 April 2012, and R.M. on 11 December 2012.<sup>4</sup> Each applied for asylum on the day of arrival. F.M. declared that she feared being killed by her uncle or her fiancé because she had had sexual relations with R.M. and become pregnant. R.M. declared that he feared being subjected to blood revenge by his wife's uncle because he had had sexual relations with a young woman without being married to her and then helped her to escape from her family. He also feared for his life because his brother had been killed by F.M.'s family. The Danish Immigration Service nonetheless

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<sup>1</sup> F.M. declared before the Danish authorities that she had grown up with her father's brother, so she was living in her uncle's house. She met R.M. at the home of his aunt, who was living in the neighbouring house.

<sup>2</sup> The authors declared before the Danish authorities that, after leaving their homes, they went into hiding in another part of Kabul for 20 days, during which time they were married by a mullah, in the presence of R.M.'s parents, at the home of the agent who had organized their departure from Afghanistan. They subsequently left for Turkey.

<sup>3</sup> According to the report of the Danish Immigration Service on the asylum interview with R.M. on 18 February 2013, R.M. produced a document as evidence of his brother's death. According to the interpreter's translation of the copy of that document, on 12 July 2011, the son of M.Q. was killed and found in the Qasem Kham alley; three people had been arrested in that connection and convicted. The document was a record of the death of the relevant person. The interpreter stated that the document was dated 23 October 2012, was provided with three signatures as well as the signature of the issuer of the document, and was from the first police district. R.M. declared that the document was from the police in Kabul and that it was evidence of his brother's death. The interpreter was not, however, able to determine whether that was the case, having found the writing "illegible".

<sup>4</sup> The authors declared before the Danish authorities that R.M. stayed in Greece after F.M.'s departure.

rejected F.M.'s asylum application on 15 August 2012,<sup>5</sup> and R.M.'s application on 17 May 2013.<sup>6</sup>

2.3 By two decisions of 22 October 2013, the Refugee Appeals Board upheld the decisions made by the Immigration Service. It deemed the authors' explanations on certain points to be divergent, and implausible and fabricated for the occasion. In particular, it noted their divergent statements as to the timing of their sexual relations and, taking into account the relevant background information on Afghanistan, it considered it unlikely that the authors had sexual intercourse at F.M.'s house. In these circumstances, the Board held that the documents produced by R.M. on the circumstances of his brother's death had no evidentiary value.

2.4 On 1 September 2015, the authors sought to have their case reopened. They maintained their previous statements and explained that some of the errors regarding the dates were due to the fact that F.M. is illiterate. They also submitted that they had had contacted an Afghan attorney, who confirmed the high risk for them if they returned to Afghanistan.<sup>7</sup>

2.5 On 3 June 2016, the Refugee Appeals Board refused to reopen the case because the authors had not demonstrated a risk of degrading treatment or punishment if they were sent back to Afghanistan.

### The complaint

3.1 Denmark would violate the authors' rights under articles 6, 7, 17 and 23 of the Covenant by deporting them to Afghanistan, where they fear for their lives. F.M. fears being stoned to death for having had an extramarital sexual relationship.<sup>8</sup> The Afghan authorities would most likely not be able or willing to protect her.<sup>9</sup> In 2013, the United Nations Assistance Mission in Afghanistan (UNAMA) reported that the police detained individuals – almost exclusively women – for moral crimes.<sup>10</sup>

3.2 According to the same report, “[p]olice and legal officials often charged women with intent to commit *zina*<sup>11</sup> to justify their arrest and incarceration for social offenses (...). Article 130 of the constitution provides courts with the discretion to use sharia (Islamic law) (...).

<sup>5</sup> The Immigration Service deemed F.M.'s narrative as not credible. It took note of her statement that her uncle strictly controlled her whereabouts, and that she was not allowed to leave the house except to go to her neighbour's house to fetch water. Therefore, the Service considered it unlikely that she had had an affair with R.M. – who was a stranger to her – right after meeting him for the first time; it was also unlikely that she invited him to her home, initiated a sexual relationship with him, and had the opportunity to continue meeting with him after she became engaged to another man. The Service also noted that F.M.'s relationship with R.M., her pregnancy and her escape from Afghanistan were during the same period that she was engaged to another man, which was equally unlikely given the restrictions on her movements. It also emphasized that the authors stayed in Kabul for 20 days and were not approached by either F.M.'s uncle or her fiancé during that time.

<sup>6</sup> The Service cited many of the same reasons it gave for its decision on F.M.'s application. It found it unlikely that the authors could have met at F.M.'s home four times within a period of about three weeks without being noticed.

<sup>7</sup> The authors produced two documents in the original language, together with Danish and English translations, which they claim represent statements from an Afghan attorney and persons from the local Council of Elders. The imam from the mosque in the authors' village has allegedly also signed. In addition, a “representative for the area” has also allegedly confirmed that the authors face a high risk of being subjected to the Afghan Penal Code for adultery.

<sup>8</sup> Honour killings are common in Afghanistan; see *Thematic Report Afghanistan: Blood Feuds*, Country of Origin Research and Information (CORI), February 2014. There were 406 reported cases of honour killings and sexual assaults between 21 March 2011 and 21 April 2013, although the unreported number of cases was believed to be much higher (*2013 Country Reports on Human Rights Practices – Afghanistan*, United States Department of State, 27 February 2014, p. 39).

<sup>9</sup> Without further details, the authors submit that, in two decisions published in the Danish Board's annual report for 2014, the Board emphasized that the applicants for asylum concerned – allegedly in the same situation as the authors – could not receive any protection from the Afghan authorities. The authors found it odd that, in their case, the Board considered that F.M. would receive protection from the Afghan authorities.

<sup>10</sup> *2013 Country Report*, U.S. Department of State, p. 10.

<sup>11</sup> Term used in Afghan law for extramarital sexual relations.

Observers reported that legal officials used this article to charge women and men with ‘immorality’ or ‘running away from home’. Police often detained women for *zina* at the request of family members.”<sup>12</sup>

3.3 Another UNAMA report mentions that even though the Office of the Attorney General instructed Afghan prosecutors not to press charges against women for “running away” or “attempted *zina*” – acts not actually codified as crimes under Afghan law, as also confirmed by the Supreme Court – information provided to UNAMA by the Supreme Court for three provinces, including Kabul, showed that the authorities continued to imprison women and girls for “running away/attempted *zina*”, in violation of the Office’s Directive and Supreme Court instructions.<sup>13</sup> It is therefore likely that F.M. risks a criminal prosecution if returned to Afghanistan, being guilty of both *zina* and “running away”.

3.4 Article 427 of the Afghan Penal Code provides that a person who commits adultery should be sentenced to a long term of imprisonment, which, according to article 100, cannot be less than five years or more than 15 years. Aggravating circumstances include if the victim is under 18 years of age, is a married woman or a maiden. R.M. therefore risks being imprisoned for up to 15 years. He also fears being subjected to blood revenge because he had sexual intercourse with F.M. without being married to her and because he helped her to escape from her family. F.M.’s cousin has already killed his brother and R.M.’s family has fled to Pakistan after refusing to pay blood money and receiving threats from F.M.’s family.<sup>14</sup>

3.5 The Refugee Appeals Board erred by finding that the authors’ narrative was not credible. Particular weight should be given to the fact that F.M. gave birth to a child in February 2011, which means that the baby must have been conceived around May 2010, when the authors were still in Afghanistan. The authors admit differences in their explanations as to the timing of their sexual relations, but that there are no differences in the core content. Sexual intercourse outside of marriage is a criminal offence in Afghanistan and can result in long imprisonment for the woman. It is therefore of minor importance what number of days had elapsed between when the authors first met and when they had sexual intercourse, or the number of days between acts of intercourse.

3.6 The Board failed to give credence to the documents produced by the authors and translated into Danish, which showed that R.M.’s brother had been killed on account of the authors’ relationship. In *A.H. v. Denmark*, the Committee took note of A.H.’s allegations that neither the Immigration Service nor the Board had initiated any investigation as to the veracity and validity of the evidence produced in support of his detailed allegations.<sup>15</sup> The same applies to the authors’ case.

3.7 The authors’ case has been published in the Danish media, and both authors have appeared on television to tell their story.<sup>16</sup> This additional profiling, which is probably known in the Afghan media, will make it difficult for them to return to Afghanistan unnoticed.

3.8 F.M.’s mental health is poor; she has attempted suicide several times. Her mental state will only worsen if she returns to Afghanistan, and the family can thus be regarded as particularly vulnerable. The authors will not be able to obtain any help from Afghan authorities because of the extramarital relationship.

3.9 According to the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, women who are (a) victims or those at risk of sexual and gender-based violence, (b) victims or those at risk of harmful traditional practices, or (c) perceived as contravening social mores are likely to be in need of international refugee protection<sup>17</sup> F.M. belongs to two of those groups.

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<sup>12</sup> 2013 Country Report, pp. 11-12.

<sup>13</sup> UNAMA, *A Way to Go: An Update on Implementation of the Law on Elimination of Violence against Women in Afghanistan*, December 2013, p. 24.

<sup>14</sup> Blood money is to be paid after an honour killing to receive forgiveness.

<sup>15</sup> *A.H. v. Denmark* (CCPR/C/114/D/2370/2014), para. 8.7.

<sup>16</sup> No further information provided.

<sup>17</sup> The Guidelines also state that, between October 2011 and May 2013, the number of girls and women detained for “moral crimes” was reported to have risen by 50 per cent (p. 56).

3.10 The authors lastly admit small discrepancies in R.M.'s accounts before the Danish authorities, mainly because R.M. "lacks a mathematical understanding of time", and when speaking of calendar months, he does not use the calendar system used in Western countries. R.M. acknowledges his duty to substantiate the grounds for seeking asylum, but any reasonable doubt should benefit the person applying for asylum. Explanations should be completely non-credible in order to refuse asylum and the Immigration Service should not use the standard of "not being convinced."

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

4.1 In its submission of 15 July 2016, the State party declared that that the communication should be declared inadmissible. Should the Committee declare it admissible, articles 6, 7, 17 and 23 of the Covenant would not be violated if the authors and their two children are returned to Afghanistan.

4.2 On 10 December 2014, the Refugee Appeals Board refused to reopen proceedings because the authors had not provided any new information and because, on 22 October 2013, the Board had already made an overall assessment of the information provided, in conjunction with background information on Afghanistan. In its decision of 2013, the Board did not rule out the possibility of extramarital affairs in Afghanistan, but found it unlikely that the authors had had sexual intercourse at F.M.'s house several times and thus exposed themselves to an obvious risk of being subjected to serious sanctions from both their families and the authorities.

4.3 In its decision of 3 June 2016, the Refugee Appeals Board considered that no evidential value could be accorded to the documents produced by the authors because they appeared to have been fabricated for the occasion. It thus analysed the nature and the contents of those documents. It first observed that, according to the *Country of Origin Information for Use in the Asylum Determination Process* published by the Danish Immigration Service in May 2012, false documents were widely available in Afghanistan and there was a black market for such documents. The date of 23 July 2010 cited in the document for the authors' flight from home did not correspond to R.M.'s declaration that they had left Afghanistan on 13 September 2010; nor did it fully accord with R.M.'s statement that his brother was killed on 12 July 2011, that is, more than a year later. Moreover, the authors' statements on the sequence of events do not accord with the age of their first child; the child was born on 23 February 2011, and must therefore have been conceived around 23 May 2010. The sequence of events with respect to the moment when F.M. realized that she was pregnant, her forced engagement, her announcement of pregnancy to R.M., their journey from home and their departure, namely, all the grounds on which the request for asylum was based, do not accord with the statements made.

4.4 The Board also found it peculiar that the authors had not found any reason to verify their statements until almost two years after their applications for asylum had been refused by the Board. The Danish authorities have continually invited them to produce documentation. According to their own statements, the authors stayed in Greece for more than a year, during which they continued to have contact with R.M.'s family, and they allegedly asked R.M.'s father to obtain a document confirming that his brother had been killed. The Board therefore found no reason to request verification of the relevant documents. Lastly, the circumstance that the authors appeared on Danish television could not lead to a different assessment. The Board has dismissed the authors' statements on their grounds for asylum; therefore, there was no reason to assume that they risk persecution given that the information provided in the television programme cannot be deemed to be correct.

4.5 The authors have failed to establish a *prima facie* case for the purpose of admissibility, in the absence of substantial grounds for believing that they and their children are in danger of being deprived of their life or subjected to inhuman or degrading treatment if returned to Afghanistan. The communication is therefore manifestly unfounded.

4.6 Moreover, the authors are seeking to apply the obligations under articles 17 and 23 of the Covenant in an extraterritorial manner. This part is also incompatible *ratione loci* and *ratione materiae* with the provisions of the Covenant. Denmark cannot be held responsible for violations of articles 17 and 23 that another State party is expected to commit.

4.7 On the merits, the authors have not provided any new information that has not already been reviewed by the Refugee Appeals Board. The State party points to discrepancies in the authors' declarations before the Danish authorities as to the timing of their sexual intercourse,<sup>18</sup> as to the manner in which F.M. announced her pregnancy to R.M.,<sup>19</sup> as to their contact after they had had sexual intercourse for the second time,<sup>20</sup> as to the time elapsed since F.M.'s forced engagement until their escape,<sup>21</sup> as to the killing of R.M.'s brother,<sup>22</sup> and as to F.M.'s cousin.<sup>23</sup> As pointed out by the Refugee Appeals Board when it announced its decision not to reopen their case on 10 December 2014, when assessing the inconsistencies in the authors' statements, the Board had taken into account, on the one hand, the time elapsed since their departure from Afghanistan and the fact that they were illiterate and, on the other, the fact that the inconsistencies were substantial and concerned otherwise very simple grounds for asylum and a very short period of time, with a sequence of events that seems less probable.

4.8 In its assessment of the authors' secret relationship, the Refugee Appeals Board also took into account relevant background information. According to a report on the fact-finding mission of the Danish Immigration Service to Kabul from 25 February 2012 to 4 March 2012, published in May 2012, an independent research institute in Kabul emphasized that "almost all marriages in Afghanistan are arranged marriages (...), and that the culture in Afghanistan is such that it is almost impossible to have relations outside or before marriage. The family

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<sup>18</sup> When interviewed by the Danish Immigration Service on 7 June 2012, F.M. stated that they had had sexual intercourse for the first time at their fourth rendezvous. However, before the Refugee Appeals Board, on 22 October 2013, she stated that they had had sexual intercourse for the first time at their third rendezvous. Before the Immigration Service on 15 May 2012, F.M. declared that the two instances of sexual intercourse had been one month apart, whereas she stated on 7 June 2012 and on 22 October 2013 that they had been only one week apart. When interviewed by the Immigration Service on 4 February 2013, R.M. declared that they had had sexual intercourse for the first time at their second rendezvous. However, on 18 February 2013, he stated that they had had sexual intercourse for the first time at their fourth rendezvous, a statement he changed during the interview, saying that it had been at their third rendezvous.

<sup>19</sup> Before the Refugee Appeals Board on 22 October 2013, R.M. declared that F.M. had telephoned him to tell him she was pregnant, whereas he stated on 18 February 2013 that she had told him on the street, in front of her home.

<sup>20</sup> On 4 February 2013, R.M. declared that, after having had sexual intercourse for the first time, the authors had met another two or three times at F.M.'s home. On 18 February 2013, he first stated that they had remained in close contact after having had sexual intercourse for the first time and that they had seen each other when they had the time. R.M. changed that statement later at the same interview saying that, after having had sexual intercourse for the second time, they had only spoken on the telephone as they had both been scared. He maintained that statement at the hearing before the Refugee Appeals Board. By contrast, F.M. stated on 7 June 2012 that they had seen each other three or four times at the home of her paternal aunt (father's sister) after having had sexual intercourse for the second time. However, she changed that statement at the hearing before the Refugee Appeals Board, saying that they had kept a low profile and had only spoken over the telephone after the second time.

<sup>21</sup> On 18 February 2013, R.M. declared that they had fled four months after their first rendezvous, whereas F.M. declared on 15 May 2012 that she had been told that she had been promised to another man one month before their flight, and that the authors had had a relationship for four months by then. On 4 February 2013, R.M. declared that two weeks had elapsed between F.M.'s engagement and their flight.

<sup>22</sup> R.M. explained on 4 February 2013 that F.M.'s cousin and two or three other people had assaulted his brother, who had been stabbed with a knife by either F.M.'s cousin or one of the cousin's friends. However, on 18 February 2013, R.M. declared that his family had been contacted by four or five people altogether, including F.M.'s uncle and cousin. Before the Refugee Appeals Board, on 22 October 2013, R.M. stated that his brother had been stabbed with a knife by F.M.'s cousin and two of his friends. It further appears from the document produced by R.M. that his brother was killed on 12 July 2011. R.M. declared that the authors left Afghanistan in the spring of 2010. If the killing of R.M.'s brother was related to the authors' premarital relationship and their escape, it seems peculiar that it took more than one year after their flight before his brother was killed.

<sup>23</sup> On 18 February 2013, R.M. declared that F.M.'s cousin had told F.M.'s uncle when he saw the authors together. However, R.M. changed that statement, saying that F.M.'s cousin had told her uncle only after the authors had fled. By contrast, F.M. has stated that her cousin saw them talk to each other twice.

of a young girl will mobilize a network around her to protect her and to ensure that she will not be able to enter any relationship.” While not ruling out that affairs outside marriage – albeit very rarely – were possible in Afghanistan, the Board found it unlikely that the authors would have been able to have sexual intercourse at F.M.’s home several times, thus exposing themselves to an obvious risk of being caught and subjected to serious sanctions by both their families and the authorities. When interviewed on 18 February 2013, R.M. declared that they would both have been killed if they had been caught when he visited F.M. It seems unlikely that the authors would run that risk, considering in particular the fact that neither of them knew when F.M.’s family would return home. Neighbours could have discovered that R.M. was visiting F.M. at her home while the rest of her family was away. R.M. further stated that they had both regretted their first act of sexual intercourse, for which reason it seems unlikely that they would have do it again. Both authors declared that they kept a low profile after having had sexual intercourse for the second time because they were scared and worried.

4.9 According to the *Country Marriage Pack – Afghanistan*, published by the Refugee Documentation Centre (Ireland) in April 2015, even though, in principle, there is freedom to choose one’s own spouse, marriages in Afghanistan are typically entered into following an agreement between two families. The parties have typically never met before the wedding, and would never refuse an arranged marriage, as they would not oppose the wishes of their families. For that reason also it seems unlikely that the authors had even initiated a relationship, much less initiated a sexual relationship, considering the general perception of marriage as an agreement between two families or groups that has nothing to do with the persons’ concerned own desires.

4.10 The State party further points to inconsistencies in the authors’ statements as to their departure from Afghanistan and the birth of their son. According to the authors, they lived in Istanbul for about six months and then in a room in a house in Athens for about a year, and their agent paid the rent all this time. It is hardly credible that one or more human traffickers paid the authors’ rent – and probably also food – for one and a half years altogether. Moreover, it seems peculiar that neither author has been able to provide any details of the areas in which they lived in Istanbul and Athens. R.M. declared to the Danish police on 18 December 2012 and to the Immigration Service on 18 February 2013 that the Greek police had taken the authors to a refugee camp where they had been registered, fingerprinted and photographed. However, there are no Eurodac hits for the authors in Greece. It also seems peculiar that, when interviewed by the Immigration Service on 23 April 2013, R.M. was unable to state the time of birth of his son. He was even unable to state the time of year, or whether it had been hot or cold. However, he was able to state with certainty that the family had first attempted to leave Turkey for Greece when their son was 20 days old.

4.11 The Refugee Appeals Board could not regard F.M.’s statement on the risk of prosecution or her statement on her relationship with the male author as facts. According to the *Afghanistan 2015 Human Rights Report*, published by the United States Department of State on 13 April 2016, which was available when the Board refused to reopen the authors’ asylum on 3 June 2016, “in 2012 the Attorney General’s Office ordered a halt to the prosecution of women for “running away,” which is not a crime under the law.” However, as the Board could not consider the authors’ statements on their situation to be facts, including the statement on F.M.’s escape from her family, the State party finds it irrelevant to comment any further on this matter.

4.12 The documents produced by the authors were translated at the request of the Refugee Appeals Board, for which reason the Board was familiar with their contents. The Board found that no particular importance could be attached to the document produced by R.M. on the circumstances of his brother’s death. The document appears to confirm that R.M.’s brother was wounded on 12 July 2011 and subsequently died. It also appears that three people were arrested in connection with the incident. The document appears to have been issued on 24 October 2012. The Board found it odd that R.M.’s brother was killed more than a year after the authors’ departure from Afghanistan. Moreover, it also seemed odd that the document was only issued more than a year after R.M.’s brother was killed. According to R.M., his family was in Pakistan at that time.

4.13 The other document, which appears to be a statement from the council of elders in the authors’ village and was produced only in connection with the communication to the

Committee, cannot not be accorded any evidential value either. The Board emphasized the timing of the production of the document and its contents, noting also that the date of the authors' flight from home given in the document as 23 July 2010 does not accord with the information provided by R.M., that they escaped from Afghanistan on 13 September 2010.

4.14 When deciding whether to request verification of the authenticity of documents produced by an asylum seeker, the Refugee Appeals Board makes an overall assessment of, inter alia, the nature and contents of documents in conjunction with the prospect of whether such verification could lead to a different assessment of the evidence, the timing and circumstances of the production of the documents, and of the credibility of the asylum seeker's statement in the light of the general background information available on conditions in the country. The Board is under no obligation to request verification of authenticity in all cases in which an asylum seeker presents documents strengthening the grounds for asylum. In *J.K. and Others v. Sweden*, the European Court of Human Rights did not question the fact that the Swedish authorities had not requested verification of the authenticity of the documents produced. False documents are widely available in Afghanistan, indeed there is a black market for them.<sup>24</sup> On the basis of the information available in the case and the nature and contents of the documents produced, the Refugee Appeals Board found no reason to request a verification.

4.15 Allegations on F.M.'s mental health have not been substantiated. It is also of no relevance to the assessment of whether the authors risk persecution falling within section 7 of the Aliens Act should they return to Afghanistan. The authors' case is moreover not comparable to that of *A.H. v. Denmark* as the circumstances are considerably different.

4.16 The fact that the authors had appeared on Danish television and had repeated the stories that the Board had not considered to be facts could not lead to a different assessment of the matter, given that the Board had dismissed the authors' statements on their grounds for asylum. There is no reason to assume that the authors risk persecution, as the information provided on the television programme cannot be deemed to be correct. Moreover, according to their own statements, the authors have not experienced any problems with the Afghan authorities, and therefore appear to be considered low-profile individuals in all respects by them.

4.17 In conclusion, the Refugee Appeals Board took into account all relevant information and the general background information on conditions in Afghanistan. The Committee's established jurisprudence is that due weight should be given to the assessment conducted by the State party, and it is generally up to States parties to review and evaluate facts and evidence, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice. The present communication has not brought to light any new specific details as to the authors' situation. The authors have failed to identify any irregularity in the decision-making process or any risk factors that the Board failed to take properly into account. They are trying to use the Committee as an appellate body to have the factual circumstances advocated in support of their claim for asylum reassessed by the Committee, which, however, must give considerable weight to the findings made by the Refugee Appeals Board, which is better placed to assess the factual circumstances in the authors' case. There is no basis for doubting, let alone setting aside, the assessments made by the Board, according to which the authors have failed to establish that there are substantial grounds for believing that they would risk the death penalty or be in danger of being subjected to inhuman or degrading treatment or punishment if returned to Afghanistan.

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

5.1 In their comments of 17 November 2016, the authors maintain that their return to Afghanistan would breach articles 6 and 7 of the Covenant, and that they "have no further comments on possible violations under articles 17 and 23 of the Covenant."

5.2 The State party appears to base its assessment of credibility on an inappropriately high standard of proof in asylum proceedings. The Refugee Appeals Board used the "probable"

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<sup>24</sup> Danish Immigration Service, *Country of Origin Information for Use in the Asylum Determination Process*, May 2012, p. 50 et seq.



standard, whereas the correct standard is the one of “reasonably possible”, as used in the relevant international guidance by the Office of the United Nations High Commissioner for Refugees (UNHCR).<sup>25</sup>

5.3 As to the admissibility of the authors’ communication, there is a personal and real risk of harm that arises from both an individualized assessment of the authors’ situation and of relevant background information. The authors have consistently expressed their fear of extremely grave harm at the hands of F.M.’s family or the Afghan authorities, and background information supports the very serious consequences of the authors’ sexual relationship and flight. Thus, irreparable harm to the authors is a necessary and foreseeable consequence of their deportation to Afghanistan.

5.4 On the merits, the State party points to a number of minor inconsistencies that do not depart from the core of the authors’ asylum claim. Relevant international jurisprudence supports a finding of credibility notwithstanding minor inconsistencies in the asylum seeker’s account. In *E.U.R. v. Denmark*, the Committee found a violation of article 7, considering, inter alia, that the inconsistencies in the dates themselves were insufficient to vitiate the whole credibility of the claim and that the inconsistencies were not central to the general claim made by the author.<sup>26</sup> In that case, like the case of R.M., the author was also not familiar with the Gregorian calendar. F.M. is illiterate and has never received any schooling.

5.5 The European Court of Human Rights also highlighted in *A.A. v. France* that slight chronological differences did not amount to a significant discrepancy affecting general credibility.<sup>27</sup> The present communication is analogous to that case, given the slight chronological differences between the authors’ accounts. In *R.C. v. Sweden*, the Court held that, contrary to the opinion of the Swedish authorities, the basic story of the applicant was consistent and credible, although there were some uncertainties about the credibility of his escape.<sup>28</sup> Such jurisprudence supports the finding that the authors’ central asylum claim is, in fact, credible.

5.6 Any inconsistencies in the authors’ accounts should be understood in the context of the entire claim and with regard to their individual circumstances. In the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, UNHCR points out that “the applicant’s statements cannot (...) be considered in the abstract, and must be viewed in the context of the relevant background situation.”<sup>29</sup> The background situation includes a broad range of subjects, including the personal background of the applicant, his or her age, nationality, ethnic origin, gender, sexual orientation and/or gender identity, education, social status, religion, and cultural background.<sup>30</sup> At the material time, F.M. was an illiterate 16 year-old orphan, raised by her uncle; she never attended school in any form and rarely left the house. R.M. attended school for eight years, but lacks a mathematical understanding of time and was not familiar with the Gregorian calendar at the time of his asylum application. Their inconsistencies are quite natural for an asylum seeker in their situation.

5.7 The inconsistencies in the authors’ statements should also be considered in the light of the three-year period between the events and the decision of the Refugee Appeals Board. According to UNHCR, applicants might not be able to remember all factual details or to recount them accurately or may confuse them because of the time lapse or the intensity of the events, The inability to remember or provide all dates or minor details, or minor inconsistencies, insubstantial vagueness or incorrect statements that are not material in their statements may be taken into account in the final assessment on credibility, but should not be used as decisive factors.<sup>31</sup> The authors’ inconsistencies are not central to the core of their

<sup>25</sup> See UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, paras. 11 and 17; and UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011.

<sup>26</sup> *E.U.R. v. Denmark* (CCPR/C/117/D/2469/2014), paras. 9.7–9.9.

<sup>27</sup> *A.A. v. France*, application No. 18039/11, 15 January 2015.

<sup>28</sup> *R.C. v. Sweden*, application No. 41827/07, 9 March 2010.

<sup>29</sup> UNHCR, *Handbook and Guidelines*, para. 42.

<sup>30</sup> UNHCR, *Beyond Proof: Credibility Assessment in EU Asylum Systems*, May 2013, p. 36.

<sup>31</sup> UNHCR, Note on Burden and Standard of Proof in Refugee Claims, para. 9.

asylum claim and are reasonable, given their individual backgrounds and the time between the events in question and the asylum procedure in Denmark.

5.8 The State party notes that a number of elements of the authors' account are "unlikely". In *J.K. and Others v. Sweden*, the European Court of Human Rights upheld the principle of benefit of the doubt in the context of credibility assessments. The State party incorrectly asserts that the authors had sex "several times" at F.M.'s home because the authors only claimed to have had sex twice during the relevant period. Background information suggests that extramarital relationships are possible in Afghanistan. The fact that many women and girls are accused of engaging in sexual activities indicates that they are actually possible, at least to some extent.<sup>32</sup>

5.9 The State party notes that the authors were unable to provide "any details" of where they lived in Istanbul or Athens. This is incorrect. R.M. declared before the Refugee Appeals Board on 22 October 2013 that they stayed in the Aksara area of Istanbul and on Akharnoon Street in Athens, close to Victoria Park. F.M.'s lack of specificity about their situation in Turkey and Greece is consistent with her profile as an illiterate young woman fleeing Afghanistan. The State party also notes that it seems "peculiar" that R.M. could not state the time of his son's birth. R.M. declared in his final interview with the Danish authorities that he could not remember his son's date of birth because it was a particularly stressful time. This is consistent with R.M.'s identity as a poorly educated person unfamiliar with the Gregorian calendar fleeing Afghanistan.

5.10 The State party also seems to suggest that F.M.'s fear of persecution for running away from home is not well-founded. Several sources provide information that clearly demonstrates, however, that prosecution continues.<sup>33</sup> There also exists a real risk of an "honour killing" being carried out against F.M. by her family.<sup>34</sup> Therefore, there is a range of relevant background information that demonstrate extremely grave consequences for women, like F.M., fleeing arranged marriages and suspicion of moral crimes (such as extramarital affairs). Background information also supports a real risk for R.M.: the UNHCR *Eligibility Guidelines on Afghanistan* provide that "men who are perceived to be acting contrary to prevailing customs may also be at risk of ill-treatment, particularly in situations of accusations of adultery and sexual relations outside of marriage." To conclude, this background information supports the authors' claims of a well-founded fear of persecution arising from their extramarital affair and flight from Afghanistan.

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

6.1 On 17 May 2017, the State party submitted that the authors' observations did not provide any new information on their situation. It also informs the Committee that the authors had a third child on 14 July 2016.

6.2 With regard to the authors' allegation that the Refugee Appeals Board appears to base its credibility assessment on an inappropriately high standard of proof, it follows from section 40 of the Aliens Act that an alien must provide such information as is required for deciding whether that person falls within section 7 of the Act. It is thus incumbent upon an asylum seeker to render it probable that the conditions for granting asylum are satisfied. At the examination of an application for asylum, the asylum seeker is informed of his or her duty to provide information, and of the importance of providing all relevant information. The

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<sup>32</sup> The authors refer to the 2013 *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, and also to the United States Department of State, *2015 Country Reports on Human Rights Practices – Afghanistan*, which states that, out of 92 honour killings in a three-month period in 2015, half were triggered by sex outside marriage (p. 35).

<sup>33</sup> See CEDAW/C/AFG/CO/1-2, para. 24; Kenneth Katzman, *Afghanistan: Post-Taliban Governance, Security, and U.S. Policy*, Congressional Research Service, 22 December 2015, p. 15; United Kingdom Home Office, *Country Information and Guidance – Afghanistan: Women fearing gender-based harm/violence*, February 2016, para. 8.5.2; A/HRC/29/27/Add.3, para. 23; A/HRC/25/41, para. 45; and *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 19 April 2016, p. 59.

<sup>34</sup> The authors invoke the report 2015 of the United States Department of State.

Refugee Appeals Board is free to assess evidence; such an assessment is therefore not governed by special rules of evidence.

6.3 The Board seeks to determine which submissions can be regarded as facts. If they appear coherent and consistent, the Board will normally regard the statements as facts. When the asylum seeker's statements are characterized throughout the proceedings by inconsistencies, changing statements, expansions or omissions, the Board will attempt to clarify the reasons. In many cases, the asylum seeker's statements will become more detailed and accurate in the course of the proceedings. There may be various reasons for this, such as developments in the proceedings and the asylum seeker's particular situation, which the Board will include in its assessment of the asylum seeker's credibility.

6.4 However, inconsistent statements made by the asylum seeker about crucial parts of his or her grounds for seeking asylum may weaken the asylum seeker's credibility. One of the circumstances that the Board will take into account is the asylum seeker's explanation for the inconsistencies. It will take into account the asylum seeker's particular situation, such as cultural differences, age and health. Particular consideration is shown to asylum seekers who are illiterate.

6.5 It follows from paragraphs 206 to 219 of the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* that, in certain situations, it may be necessary, owing to the asylum seeker's age or mental state, to place greater emphasis on objective circumstances than on the statements made by the asylum seeker during the proceedings. The Refugee Appeals Board will assess the asylum seeker's procedural capacity and generally be less demanding when it comes to the burden of proof in cases of child asylum seekers or asylum seekers with a mental disorder or impairment. Lastly, the Board will always assess the extent to which the principle of the benefit of the doubt should be applied if it is in doubt about the asylum seeker's credibility.

6.6 The Refugee Appeals Board took into account the particular situation of the authors, including the circumstance that F.M. is illiterate. R.M., however, attended school for eight years and private English lessons for eight months. The information given in the authors' observations of 17 November 2016 that R.M. is "poorly educated" is therefore incorrect. Also, the cases cited by the authors are not comparable with the authors' case.

#### **Authors' additional observations**

7.1 On 11 August 2017, the authors contested the State party's assessment that they are trying to use the Committee as an appellate body. In several cases, the State party has not respected the Committee's recommendations.

7.2 R.M. had a very good job in Afghanistan, working with his father at their own company, which employed several workers. He enjoyed a good standard of living, so had no reason to leave Afghanistan if not for the conflict he invokes. The authors could have had "a significantly better life" in Afghanistan than they have in Denmark, where they are asylum seekers. This circumstance should also be included in the assessment of their credibility by the Committee. The Committee may also assess the factual circumstances of this case, not only the Refugee Appeals Board, as declared by the State party.

7.3 Even if R.M. went to school for eight years, there were several periods of time when he did not attend because of the war. Furthermore, his eight-month English course involved one and a half hours twice a week.

7.4 It is impossible for the authors to return to Afghanistan. R.M.'s aunt lives next to F.M.'s uncle, so the families will be alerted if the authors return. The authors now have three children, so it would be difficult for them to settle elsewhere in Afghanistan where they do not have family. Their story has also been exposed through press coverage and television; their application for asylum in Denmark is public knowledge, which would also make it difficult for them to return to Afghanistan.

## Issues and proceedings before the Committee

### *Consideration of admissibility*

8.1 Before considering any claims contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether it is admissible under the Optional Protocol.

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

8.3 The Committee notes the authors' claim that they have exhausted all effective domestic remedies available to them. In the absence of any objection by the State party in that connection, the Committee considers that it is not precluded from examining the communication under article 5 (2) (b) of the Optional Protocol.

8.4 The Committee takes note of the authors' claim that the State party, by forcibly returning the authors and their children to Afghanistan, would violate their rights under articles 6, 7, 17 and 23 of the Covenant.

8.5 The Committee first notes that the authors have alleged a violation of articles 17 and 23 of the Covenant but have not provided any information on or evidence or explanation of how their rights under these articles would be violated by the State party through their removal to Afghanistan. The Committee therefore concludes that this part of the communication is insufficiently substantiated, and declares it inadmissible pursuant to article 2 of the Optional Protocol.

8.6 The Committee notes the State party's challenge to the admissibility of the communication on the grounds that the authors' claim under articles 6 and 7 of the Covenant is unsubstantiated. It considers, however, that, for the purpose of admissibility, the authors have adequately explained the reasons for which they fear that their forcible return to Afghanistan would result in a risk of treatment contrary to articles 6 and 7 of the Covenant. The Committee therefore declares the communication admissible insofar as it raises issues under articles 6 and 7, and proceeds to the consideration of the merits.

### *Consideration of the merits*

9.1 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.

9.2 The Committee notes the authors' claim that deporting them and their children to Afghanistan would expose them to a risk of irreparable harm, in violation of articles 6 and 7 of the Covenant. The Committee also notes the authors' argument that F.M. would face criminal prosecution for extramarital sexual relations and running away from home, and that R.M. would face criminal prosecution for adultery and would be subject to blood revenge from his wife's family. It further notes the authors' submission that their case has been publicized by the Danish media and is also probably known to the Afghan media. The Committee also notes the State party's admission based on different reports that affairs outside marriage do occur in Afghanistan, albeit very rarely, and that marriages in Afghanistan are typically arranged following an agreement between two families.

9.3 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 referred 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 (para. 12). The Committee also indicated that the risk must be personal<sup>35</sup> and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists was

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<sup>35</sup> See *K. v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.3, *P.T. v. Denmark* (CCPR/C/113/D/2272/2013), para. 7.2, and *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

high.<sup>36</sup> Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.<sup>37</sup>

9.4 The Committee recalls that it is generally up to the organs of the State party to examine the facts and evidence of the case in question in order to determine whether such a risk exists,<sup>38</sup> unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>39</sup>

9.5 The Committee notes the finding of the Refugee Appeals Board that the authors failed to establish that there are substantial grounds for believing that, as a result of their extramarital relation, they would risk the death penalty or be in danger of being subjected to inhuman or degrading treatment or punishment if returned to Afghanistan, and that they lacked credibility. In that respect, the Committee notes that the Board found inconsistencies in the authors' statements with regard to the timing of their sexual intercourse, their regular contact, F.M.'s escape and the killing of R.M.'s brother by F.M.'s family.

9.6 Nonetheless, the test for the Committee remains to establish whether, regardless of the veracity of an asylum seeker's statements, there are substantial grounds for believing that the circumstances invoked may have serious adverse consequences in the country of origin such as to create a real risk of irreparable harm, as contemplated by articles 6 and 7 of the Covenant. Therefore, even when it is found that an asylum seeker's story is inconsistent on some points, the authorities should proceed to assess whether, in the circumstances of the case, the asylum seeker's behaviour and activities in connection with or to justify his or her declarations could have serious adverse consequences in the country of origin such as to put him or her at risk of irreparable harm.<sup>40</sup>

9.7 In the present case, the Committee observes that it is uncontested that the authors had an extramarital sexual relationship, and that what is contested is mainly the circumstances in which such relationship evolved. The Danish authorities have also not contested that the authors' first child was conceived in Afghanistan or that the authors were not married at that time. Also, Danish authorities rejected the authors' evidence in respect of the killing of R.M.'s brother as being fabricated for the occasion, without, however, verifying the facts, but rather relying solely on the general observation that false documents are widely available in Afghanistan and that there is a black market for them. The Committee notes that the Board based its reasoning on the inconsistencies in the authors' statements, concluding that they had failed to render probable a risk of persecution or abuse by family members or third persons.

9.8 The Committee recalls that States parties should give sufficient weight to the real and personal risk that a person might face if deported, and considers that it was incumbent upon the State party to undertake an individualized assessment of the risk that the authors and their children would face in Afghanistan rather than focus on certain inconsistencies in their statements. The Committee notes, in particular, that the Board did not assess whether the authors' extramarital relationship could have serious adverse consequences in the country of origin so as to put them at risk of irreparable harm. In the light of the above, the Committee considers that the State party failed to adequately assess the authors' real, personal and foreseeable risk of returning to Afghanistan. It therefore finds that the State party failed to take into due consideration the consequences of the authors' personal situation in their country of origin.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the authors' removal to Afghanistan would, if implemented, violate their rights under articles 6 and 7 of the Covenant.

<sup>36</sup> See *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

<sup>37</sup> *Ibid.* See also *X v. Denmark*, para. 9.2.

<sup>38</sup> See *Pillai et al. v. Canada* (CCPR/C/101/D/1763/2008), para. 11.4, and *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3.

<sup>39</sup> For example, *K. v. Denmark*, para. 7.4.

<sup>40</sup> See, *mutatis mutandis*, *S.A.H. v. Denmark* (CCPR/C/121/D/2419/2014), para. 11.8, and *F.G. v. Sweden*, para. 156.

11. In accordance with article 2 (1) of the Covenant establishing 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 authors' case, 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 authors while their request for asylum is being reconsidered.

12. 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 in the case that a violation has been established, 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 present Views and disseminate them widely in the official languages of the State party.

## Annex I

### Individual opinion of Shuichi Furuya (dissenting)

1. I am unable to concur with the Committee's conclusion that the authors' removal to Afghanistan would, if implemented, violate their rights under articles 6 and 7 of the Covenant.
2. The main ground of the conclusion is that the State party, relying only on certain inconsistencies in the authors' statements, failed to evaluate the real risk of irreparable harm to which they may be exposed (para. 9.8). In my view, however, this conclusion overlooks the essential structure of the procedure for verifying refugee status. The evaluation of the likelihood that an asylum seeker may face persecution in the country of origin has two stages: the first stage is to confirm the factual circumstances of the asylum seeker and to specify the potential grounds for persecution; the second is to evaluate whether and to what extent those facts would create a real risk of persecution in the light of the situation in the country in question. In this respect, examining the veracity of the statements and documents that an asylum seeker has provided for explaining his or her circumstances is an indispensable prerequisite for proceeding to the risk evaluation.
3. In the present case, therefore, it is not correct to state that the Danish authorities failed to undertake an individualized assessment of the risk that the authors would face in Afghanistan. Rather, from the observations made by the State party, it is clear that the authorities examined the factual circumstances of the authors by sincerely hearing the statements they made and verifying the documents they submitted in order to undertake a risk assessment. Nevertheless, the examination led the authorities to the finding that the authors' statements and documents were doubtful in a lot of crucial points. In the event that the credibility of factual circumstance is not sufficiently assured, it is reasonable that the authorities do not – or that they are unable to – proceed to the second stage: the assessment of a possible risk of irreparable harm that the authors may face.
4. As the Committee concludes in paragraph 9.4, it is generally up to the organs of the State party to examine the facts and evidence of the case in question in order to determine whether such a risk exists, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial justice. The Committee should therefore verify whether the evaluation by the Danish authorities of the credibility of the authors' statements and documents was made adequately, so that it may not be deemed as clearly arbitrary or amounting to manifest error.
5. According to the Committee's jurisprudence, it is incumbent on the authors to establish whether there was such arbitrariness or manifest error in the assessment by the Danish authorities. In the present case, the authorities heard the authors' statements several times and examined the relevant documents, and then cast doubt on the crucial facts relevant to the possible risk of persecution, such as the timing of the authors' sexual intercourse (para. 2.2, footnote 5, and para. 4.8), their departure from Afghanistan, their stay in Turkey and Greece and the birth of their son (para. 4.10) and the killing of R.M.'s brother (para. 2.1, footnote 3, and para. 4.12). Accordingly, the authors must have demonstrated to the Committee that the authorities' finding casting doubt on the credibility of their statements and documents had been erroneous. In my view, however, the authors did not respond to the uncertainties above with persuasive evidence, and therefore failed to convince the Committee that their statements and documents were sufficiently credible to assume that the assessment by the authorities had been so erroneous as to be deemed clearly arbitrary.
6. For the reason above, I have to conclude that the authors' allegation concerning the violation of articles 6 and 7 is insufficiently substantiated for the purpose of admissibility, and thus this part of the communication is also inadmissible under article 2 of the Optional Protocol.

## Annex II

### **Joint opinion of Photini Pazartzis, Yuval Shany and Andreas Zimmermann (dissenting)**

1. We regret that we are unable to join the majority on the Committee in finding that, in deciding to deport the authors to Afghanistan, Denmark would, if it implemented the decision, violate its obligations under articles 6 and 7 of the Covenant.
2. In paragraph 9.4, the Committee recalls that it is generally up to the organs of the State party to examine the facts and evidence of the case in question in order to determine whether such a risk exists, unless it can be established that the assessment was clearly arbitrary or amounted to a manifest error or denial of justice. Despite this, the majority of Committee members rejected the factual conclusion of the Danish Immigration Service and the Refugee Appeals Board that the authors had failed to establish grounds for asylum because their allegations about the risk of severe sanction from both their families and the authorities lacked credibility due to significant and numerous inconsistencies in their statements (para. 4.3).
3. The majority's position is based on the failure of the State party to explore whether the authors' extramarital relationship could have serious adverse consequences in the country of origin so as to put them at risk of irreparable harm (para. 9.8). According to the majority, it was incumbent upon the State party to undertake an individualized assessment of the risk that the authors and their children would face in Afghanistan, rather than focus on certain inconsistencies in their statements (para. 9.8).
4. We disagree with the analysis offered by the majority. All of the allegations raised by the authors were thoroughly considered by the Danish Immigration Service and the Refugee Appeals Board and rejected as lacking in credibility because of serious inconsistencies in the authors' statements, which rendered their version of events less probable (para. 4.7). Moreover, the documents produced appeared fabricated and did not accord with the authors' statements (para. 4.3); for example, the authors provided a number of inconsistent versions of when their extramarital affair began (footnote 20), the circumstances in which F.M. told R.M. about her pregnancy (footnote 21), the frequency of their meetings during the affair (footnote 22) and the time of their escape from home (footnote 23). The Danish authorities also expressed doubts about whether the version of events provided by the authors relating to an extramarital affair taking place at F.M.'s home and her aunt's home was plausible given the prevailing social customs in Afghanistan and whether the killing of R.M.'s brother, even if occurred, was related to the extramarital affairs, given the time gap between the couple's elopement and the murder.
5. Such inconsistencies and improbabilities were deemed by the Danish authorities, who – unlike the Committee – gained a first-hand impression of the authors, as substantial in nature, resulting in the rejection of their grounds of asylum. We do not find in the record before us any reason to regard the conclusions of the Danish Immigration Service and the Refugee Appeals Board on the credibility of the authors and their implications for the risk assessment they undertaken to be clearly arbitrary, manifestly erroneous or a denial of justice. As a result, we are of the view that the majority of Committee members failed to properly apply the standard of review it set out to apply, and did not follow the long-held position according to which the Committee does not serve as a fourth instance competent to re-evaluate findings of fact.<sup>1</sup>
6. In past cases in which the decision of State organs to deport an individual was found by the Committee to run contrary to the Covenant, the Committee attempted to base its position on inadequacies in the domestic decision-making process, such as a failure to properly take into account the evidence available or the specific rights of the author under

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<sup>1</sup> For example, *Arenz et al. v. Germany* (CCPR/C/80/D/1138/2002), para. 8.6.



the Covenant,<sup>2</sup> serious procedural flaws in the conduct of the domestic review proceedings<sup>3</sup> or the inability of the State party to provide a reasonable justification for its decision.<sup>4</sup>

7. In the present case, the majority of the Committee points to two possible procedural flaws in the asylum proceedings in Denmark: the failure to consider the risk implications of the extramarital affair, and the dismissal by the State party of the document alleging the killing of F.M.'s brother due to the prevalence in Afghanistan of forged official documents (para. 9.7). We disagree with this aspect of the majority's analysis as well.

8. The multiple inconsistencies in the authors' version of events have led the State party to find as factually unsubstantiated the allegation that the authors escaped from their families (para. 4.11). It also noted that "running away" is no longer a prosecutable crime under Afghanistan law (para. 4.11). In these circumstances, the authors have to demonstrate – which they have not – that married couples like them actually face in Afghanistan a real risk of persecution for pre-marriage sexual relations, and to establish that the specific details of their personal history would be well known in Afghanistan and likely to attract the attention of the authorities or society at large.

9. In the same vein, we cannot conclude that the position of the State party, according to which – in the particular circumstances of the case – independent verification of the document attesting to the brother's death was not warranted, is unreasonable. We note in this regard that the authors did not explain how such a verification could have cured the very serious credibility problems attaching to their claims relating to the circumstances under which they left Afghanistan and the circumstances surrounding the murder.

10. In light of these factors, we do not consider it well-established that the proceedings suffered from a procedural defect that should lead us to doubt the outcome of the asylum process or its fairness.

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<sup>2</sup> For example, *Hamida v. Canada* (CCPR/C/98/D/1544/2007), paras. 8.4-8.6.

<sup>3</sup> E.g., *X. v. Republic of Korea* (CCPR/C/110/D/1908/2009), para. 11.5.

<sup>4</sup> E.g., *Byahuranga v. Denmark* (CCPR/C/82/D/1222/2003), paras. 11.3-11.4.