



# International Covenant on Civil and Political Rights

Distr.: General  
23 August 2021

Original: English

## Human Rights Committee

### Decision adopted by the Committee under the Optional Protocol, concerning communication No. 3246/2018\*, \*\*

|  |   |
|--|---|
| <i>Communication submitted by:</i>       | M.I. (represented by counsel, Erik Rosshagen)   |
| <i>Alleged victim:</i>                   | The author  |
| <i>State party:</i>                      | Sweden  |
| <i>Date of communication:</i>            | 18 September 2018 (initial submission)  |
| <i>Document references:</i>              | Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 24 September 2018 (not issued in document form) |
| <i>Date of adoption of decision :</i>    | 6 November 2020   |
| <i>Subject matter:</i>                   | Deportation to Afghanistan  |
| <i>Procedural issue:</i>                 | Lack of substantiation  |
| <i>Substantive issue:</i>                | Non-refoulement   |
| <i>Article of the Covenant:</i>          | 7   |
| <i>Article of the Optional Protocol:</i> | 2   |

1.1 The author is M.I., a national of Afghanistan born in 1997. While the author was born in Afghanistan, he<sup>1</sup> moved to the Islamic Republic of Iran with his family when he was 4 years old. He claims that the State party has violated his rights under article 7 of the Covenant. The Optional Protocol entered into force for the State party on 23 March 1976. The author is represented by counsel.

1.2 On 24 September 2018, pursuant to rule 94 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to remove the author to Afghanistan while the case was under examination. On the same day, the State party decided to suspend enforcement of the removal order.

\* 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 Schuichi, 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.

<sup>1</sup> The author identifies as a person “in between male and female”. Counsel refers to the author as “he/they” and “his/their”; the State party as “he”. For uniformity, the male personal pronoun is used throughout the present text.



**Facts as submitted by the author**

2.1 The author has unsuccessfully applied for asylum in Sweden. During the asylum procedure, he referred to his Hazara ethnicity, a conflict he had had with a man in the Islamic Republic of Iran, the general security situation in Afghanistan and his conversion to Christianity. The State party's authorities rejected his application and a removal order entered into force in August 2017. He was found in Austria in May 2018 and returned to Sweden, where he was detained. Two attempts to remove him have failed owing to his health<sup>2</sup> and "actions".

2.2 Following his return to Sweden, the author contacted a lawyer and an organization advocating the rights of lesbian, gay, bisexual, transgender and intersex persons. On 25 May 2018, he submitted an application that included information on impediments to the enforcement of the removal order, specifically his sexual orientation, gender identity and mental health. He had been afraid to invoke these circumstances earlier owing to the ill-treatment he had suffered in the Islamic Republic of Iran relating to his sexual orientation. In the application, he claimed that, according to information on his country of origin and owing to his sexual orientation, he would be subjected to ill-treatment and persecution in Afghanistan, which would justify the granting of international protection. Despite detailed submissions on his experiences living as a homosexual in the Islamic Republic of Iran, a past relationship with a boy there and his explanation of the timing of the submission, the Swedish Migration Agency rejected the application on 28 June 2018. In appealing to the Migration Court, the author stated that, after having had exchanges with an organization advocating on behalf of lesbian, gay, bisexual, transgender and intersex asylum seekers, he had expanded his thoughts about his gender identity and now identified as someone in between male and female rather than as a man. He also provided pictures depicting him expressing himself in gender non-conforming ways and details about his thoughts on his sexual orientation. On 20 July 2018, the Migration Court rejected the appeal, refusing to grant a new examination on the ground that he had not made a credible claim, without however providing detailed reasons for reaching that conclusion. The Migration Court of Appeal refused to grant leave to appeal on 14 August 2018. No interview was granted to the author so that he could elaborate on the circumstances invoked. The author has since become engaged to a man.<sup>3</sup> No new examination has been carried out of this fact nor of the ill-treatment that he would face because of the engagement between two people perceived as male.

**Complaint**

3. The author submits that the State party has breached his rights under article 7 of the Covenant by deciding to remove him to Afghanistan without examining his sexual orientation and gender identity, despite detailed submissions including his thoughts on the matter and information on his past relationship with a boy and on his experiences as a gay person in the Islamic Republic of Iran, where he was at constant risk of grave punishment. He claims that the decisions by the State party's authorities are not detailed and do not identify any inconsistencies in his account. He states that, according to information on his country of origin, violence against lesbian, gay, bisexual, transgender and intersex persons in

---

<sup>2</sup> The author does not explain what health conditions precluded his removal. He does submit a note by his counsellor dated 16 July 2018, which mentions that it has emerged in his conversations with the counsellor that his mental health has deteriorated during recent months, that he has a transgender identity and that he is planning to commit suicide should he be removed. The note mentions that the author has stated that he was given a particular name in church but that he identifies as the female version of that name. It further mentions that he stated having previously had limited opportunities to talk about his transgender identity and sexuality, as this is associated with shame, exclusion and risk to one's life. It moreover mentions that he was raped after a friend discovered his relationship with a boy. The note states that, despite his detention, the author continues to explore his gender identity, having dared to speak with activists for the rights of lesbian, gay, bisexual, transgender and intersex persons about the female version of the name given to him by churchgoers. Finally, it states that "there is not a great risk of suicide as of today but a greatly increased risk upon a decision of deportation because of the patient's transgender identity".

<sup>3</sup> The author submits pictures of what he states is the engagement, as well as selfies and other pictures in which he wears religious clothing.

Afghanistan is pervasive. Homosexuality is considered un-Islamic and the author runs the risk of being killed by non-State actors because of his sexual orientation and gender identity. There is no State protection, as the Afghan police reportedly arrest and imprison people based on their real or perceived sexual orientation.<sup>4</sup> Considering the grave punishment and ill-treatment he would face in Afghanistan because he is gender non-conforming and gay and because of his mental health, the merits of his complaint should be examined. Furthermore, as his claim is not unfounded and very personal, such an examination should include an interview.

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

4.1 On 2 July 2019, the State party submitted its observations on admissibility and the merits. It does not contest that the author has exhausted the available domestic remedies. However, it submits that the communication is manifestly ill-founded.

4.2 On the merits, the State party acknowledges that legitimate concerns may be raised about the general human rights situation in Afghanistan, but observes that the general situation alone does not establish that the author's removal would be contrary to article 7 of the Covenant.

4.3 Additionally, according to the State party, the author has not shown that he would personally face a real risk of being subjected to treatment in breach of article 7 of the Covenant upon return to Afghanistan. In this regard, the State party submits, first, that its authorities explicitly applied domestic legislation reflecting the same principles as those in articles 6 (1) and 7 of the Covenant, in addition to considering other grounds for granting asylum.<sup>5</sup> The State party emphasizes that its authorities are well positioned to assess asylum seekers' claims and that both the Migration Agency and the Migration Court thoroughly examined the author's case. The author had an introductory and an extensive interview before the Migration Agency and a hearing before the Migration Court, all in the presence of counsel and an interpreter. Furthermore, he was invited, through his counsel, to make written submissions and thus had ample opportunity to explain his case. As the authorities had sufficient information to assess his case, and given their expertise in asylum, there is no reason to conclude that the domestic rulings were inadequate or arbitrary or amounted to a denial of justice. The State party concludes that considerable weight must be attached to the assessments of its authorities.

4.4 Second, referring to the asylum procedure, the State party observes that the author applied for asylum in Sweden on 25 July 2015. He claimed that a forced return to the Islamic Republic of Iran would put him at risk of treatment justifying the granting of protection on the ground of a threat against him from the relatives of a person who had died in a motorcycle accident in which he was involved. He also claimed that there was a threat against him in Afghanistan due to the general security situation and because he was Hazara. The State party notes that the author does not invoke these circumstances before the Committee. It observes that, other than his Afghan nationality, he has not plausibly demonstrated his claimed identity in the domestic proceedings. Furthermore, he has not contended before the Committee that the general security situation in Afghanistan or the situation of Hazaras is such that any returnee risks exposure to ill-treatment. As neither of these situations constitute grounds for protection, the Migration Agency rejected the asylum application and decided to remove the author to Afghanistan on 13 April 2016.

4.5 On appeal before the Migration Court, the author added to the initial grounds that he had become interested in Christianity, had been attending church activities, had been baptised and that he would live as a Christian and wear a cross in Afghanistan. The Migration Court noted that his interest in Christianity appeared to have increased significantly in connection with and after the first-instance decision, raising doubts about the credibility of his conversion. His explanation that he had withheld this information so as to protect his privacy was

<sup>4</sup> The author refers to the following: Office of the United Nations High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan* (30 August 2018), p. 89; and European Asylum Support Office, *Country Guidance: Afghanistan – Guidance Note and Common Analysis* (June 2018), p. 58.

<sup>5</sup> The State party refers to the Aliens Act, chap. 4, sects. 1–2, and chap. 12, sects. 1–3 and 18–19.

contradicted by his claim of openly wearing a cross for a year. The Migration Court found his account of his conversion and thoughts about Islam and Christianity to be vague, noting his inability to elaborate on his conviction behind the alleged conversion. The Migration Court concluded that he had not plausibly demonstrated that his conversion was based on a genuine, personal and religious conviction and, on 15 June 2017, rejected the appeal. The removal decision became final when the Migration Court of Appeal refused to grant leave to appeal on 25 August 2017. Subsequently, the author travelled to Austria to apply for asylum, but was sent back to Sweden on 16 May 2018 pursuant to the Dublin III Regulation.<sup>6</sup>

4.6 Third, regarding the author's claimed need for protection due to his sexual orientation, the State party notes that the author has claimed to identify as a homosexual and that information about his sexual orientation has spread on the Internet, along with his name and photograph. The author has also claimed that he had a romantic relationship with a boy in the Islamic Republic of Iran and had been subjected to traumatizing events there related to his sexual orientation that negatively affected his mental health. Explaining why he had not invoked these circumstances earlier, he stated that, since arriving in Sweden, he has perceived that homosexuality is associated with shame and has thus not dared to tell anyone. However, he had encountered a spirit of solidarity with respect to his sexual orientation and gender identity in the detention centre.

4.7 The State party observes that the Migration Agency, in its decision of 28 June 2018, noted that the author had invoked his sexual orientation and gender identity only after the removal order had become non-appealable and only one day before his planned removal,<sup>7</sup> in an application to the Migration Agency for a residence permit pursuant to chapter 12, section 18 of the Aliens Act and a re-examination pursuant to chapter 12, section 19 of the same Act citing impediments to the enforcement of the removal order.<sup>8</sup> The Migration Agency found that this lateness, similarly to that of his conversion claim, negatively affected his credibility, and did not consider his explanation for the lateness satisfactory. It found that he had been living in Sweden for three years and had been attending a Swedish school, meaning that it could hardly have escaped him that the situation of homosexuals in Sweden is different from that in Afghanistan. His stated shame was implausible also because of his ability to invoke his conversion despite the stigma and shame associated with it. As for his claim of having been subjected to traumatic events in the Islamic Republic of Iran concerning his sexual orientation and their effect on his mental health, the Migration Agency found that he had stated to be in good health during the asylum proceedings, had provided no documentary evidence of mental health issues and was informed early in the process about the importance of invoking all possible grounds for protection. As he had not mentioned his sexual orientation until his detention and in the absence of an acceptable explanation, the Migration Agency did not consider his account credible, and concluded that no impediments to the enforcement of the removal order had emerged. It therefore decided not to grant a residence permit nor a re-examination.

4.8 On appeal before the Migration Court, the author added to the aforementioned grounds that he no longer identified as a man, claiming that his non-conforming gender identity was an impediment to the enforcement of the removal order. The Migration Court found that he could have invoked his sexual orientation and gender identity earlier, and that the tardy invocation constituted strong grounds for doubting the veracity of the claim. The Court additionally considered that his claimed gender identity was an escalation of previously invoked asylum grounds and was insufficiently substantiated. It rejected the appeal on 20

---

<sup>6</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

<sup>7</sup> It is indicated in the file that the author's removal was scheduled for 26 June 2018.

<sup>8</sup> The State party comments that the matter of a residence permit can only be examined if new circumstances are submitted that can be assumed to constitute a lasting impediment to the enforcement of the removal, i.e. a risk of being sentenced to the death penalty or of being subjected to torture or persecution. No new circumstances have been invoked in prior proceedings that would warrant a new examination. A new examination requires that the new circumstances could not have been invoked previously or that a "valid excuse" is provided.

July 2018. The Migration Court of Appeal decided not to grant leave to appeal on 14 August 2018.

4.9 The author applied for a residence permit or a re-examination on three more occasions, claiming that information on his sexual orientation had spread on the Internet and had reached people in Afghanistan who had in turn threatened him on social media. He also claimed to be engaged to a man and that this information had been noted in Afghanistan. The Migration Agency rejected his applications on 30 July, 14 August and 29 August 2018, finding that said grounds were modifications of previously invoked circumstances rather than new ones, that nothing indicated that the information concerned had spread to people constituting a real and current threat to him in Afghanistan and that no details had been provided about who these people were or to substantiate that they would search for him in Afghanistan. The Migration Court rejected the author's appeal against the final decision on 13 September 2018.

4.10 The State party contends that the author has escalated his asylum account before every domestic instance, including at very late stages. As for his alleged conversion, the non-invocation of this ground before the Committee strongly indicates that he has not converted out of a personal and genuine religious conviction. The State party argues that the author's statements about his sexual orientation and gender identity are similarly doubtful. On the pictures submitted, the State party observes that most images were taken with filters available to anyone with a smartphone and that they are not sufficient to substantiate his claims. The State party concludes that the author's account is not such as to lead to a conclusion that he would run a foreseeable, real and personal risk of treatment contrary to the Covenant.

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

5.1 On 10 September 2019, the author provided his comments on the State party's observations. He contests that the communication is manifestly ill-founded, because it contains detailed information and pictures concerning his sexual orientation, gender identity and religion. He reiterates that he has been wrongly deprived of a new examination and interview in relation to these grounds. The scope of the initial submission was limited to his sexual orientation and gender identity, but the information submitted to the domestic authorities on his conversion still stands. He submits a certificate indicating membership in the Vällersvik Church and that he is an active member. On the timing of the invocation of his sexual orientation, he states that, in conformity with the practice of the Swedish border police, he was not notified of when he would be removed.

5.2 The author notes that, in *F.G. v. Sweden*, the European Court of Human Rights found that States were obliged to carry out a risk assessment of their own motion if they were "made aware of facts relating to a specific individual that could expose him [or her] to a risk of ill-treatment in breach of [the right to life and the prohibition of torture] upon returning to the country in question" and that this applied in particular to situations "where the national authorities have been made aware of the fact that the asylum seeker may plausibly be a member of a group systemically exposed to practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned."<sup>9</sup> The author argues, therefore, that the domestic authorities must assess the risk of persecution when new facts arise and that such facts cannot be rejected simply because they are invoked late. Furthermore, no single document can prove a person's genuine identification as a lesbian, gay, bisexual or transgender person, or as Christian, and therefore the author can only substantiate his claims through an interview. Moreover, Swedish legislation concerning new examinations sets a very low standard of proof for granting a new examination, requiring only that "it could be assumed" from the claim that the asylum seeker needs protection. The author argues that the information submitted to the domestic authorities is more than enough to meet this standard and that the domestic authorities have therefore not conducted an adequate investigation.

5.3 The author reiterates that individuals who have converted to Christianity and lesbian, gay, bisexual, transgender and intersex persons in Afghanistan are extremely vulnerable and

<sup>9</sup> European Court of Human Rights, *F.G. v. Sweden*, Application No. 43611/11, Judgment, 23 March 2016, para. 127.

at risk of being killed by both State and non-State actors, and that the State party should consequently be particularly careful before removing him.

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

6.1 On 5 December 2019, the State party provided additional observations, submitting that the author's comments contain no new submissions and do not change its position. The State party adds that, even if it has not addressed some aspects of the author's submissions, this should not be interpreted as acceptance of the assertions made therein. It observes that, despite hardly mentioning his alleged conversion in the initial submission, the author now claims that the information submitted to the domestic authorities still stands, but he does so without arguing why the domestic authorities' assessment in this regard was inadequate or violated his rights under the Covenant.

6.2 The State party further observes that, unlike in the *F.G. v. Sweden* case invoked by the author, the Swedish authorities in the present case did consider the grounds invoked after the initial proceedings as new circumstances. However, the authorities did not consider that these circumstances could be assumed to constitute a lasting impediment to the author's removal and therefore did not carry out a new examination. The present case therefore clearly differs from *F.G. v. Sweden*.

6.3 The State party notes that, in *M.K.N. v. Sweden*, the European Court of Human Rights found that the applicant had not given a reasonable explanation for why he had invoked his homosexual relationship only on appeal against the removal order, more than a year after his arrival in Sweden.<sup>10</sup> Given the circumstances of the case, the Court considered the claimed homosexual relationship not to be credible.<sup>11</sup>

6.4 The State party reiterates that the author had been living in Sweden for at least three years and had been attending a Swedish school before he raised his sexual orientation as a ground for receiving protection. He stated having been aware of the attitudes held towards the lesbian, gay, bisexual, transgender and intersex community in Sweden since the spring of 2016 and that he had been open about his sexual orientation while living in Sweden, but only mentioned his sexual orientation while in pre-removal detention, thus raising serious doubts about his credibility.

### **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 communication 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 that the State party does not contest that the author has exhausted all available domestic remedies. Therefore, the Committee considers that it is not precluded under article 5 (2) (b) of the Optional Protocol from examining the communication.

7.4 The Committee notes the State party's argument that the communication is manifestly ill-founded and that a risk of treatment contrary to article 7 of the Covenant results neither from the general human rights situation in Afghanistan nor from the author's account, which is not such as to lead to a conclusion that he would run a foreseeable, real and personal risk. The Committee also notes that the author asserts that the communication is not manifestly ill-founded because it contains detailed information and pictures concerning his sexual orientation, gender identity and religion. He argues that, given the low standard of proof under Swedish law, the evidence submitted and the nature of his claims, he should have been

---

<sup>10</sup> European Court of Human Rights, *M.K.N. v. Sweden*, Application No. 72413/10, Judgment, 27 June 2013, paras. 11 and 43.

<sup>11</sup> *Ibid.*, para. 43.

granted a new examination, including an interview. Insofar as he invokes his claimed conversion, the Committee finds that the author does not demonstrate that the State party's authorities erred in finding that he had not shown a genuine, personal and religious conviction, given that his account was deemed vague and that his explanation of the late invocation was not accepted, as he had been wearing a cross openly for a year.

7.5 The Committee notes that the Swedish migration authorities did not accept the author's explanation of being afraid to invoke his claimed sexual orientation, based on the absence of proof that he suffered mental health issues, the length of his residence in Sweden and the fact that he attended school there. In particular, the Committee notes that, according to the State party, the author admitted that he was aware of the attitudes held towards the lesbian, gay, bisexual, transgender and intersex community in Sweden since the spring of 2016, i.e. two years before he raised the issue of his sexual orientation and gender identity, and that he had been open about his sexual orientation while living in Sweden. In these circumstances, the Committee finds that the author has not shown that the assessment of the domestic authorities, in particular their finding that his claims concerning his sexual orientation and gender identity were not credible, was unreasonable. Moreover, while the author has submitted a note dated 16 July 2018 prepared by his counsellor concerning his mental health, the Committee notes that he does not argue that he submitted the note to the domestic authorities or that the domestic authorities failed to consider it.

7.6 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 occurrence of irreparable harm, such as that under 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.<sup>12</sup> In making this assessment, all relevant facts and circumstances must be taken into consideration, including the general human rights situation in the author's country of origin.<sup>13</sup> The Committee recalls its jurisprudence according to which considerable weight should be given to the assessment conducted by the State party, and it 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.<sup>14</sup>

7.7 Overall, the Committee considers that the author has not sufficiently substantiated that the evaluations made by the Swedish authorities were clearly arbitrary or amounted to a manifest error or denial of justice. Therefore, 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 the available information regarding the author's personal circumstances, his claims under article 7 of the Covenant are insufficiently substantiated 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.

---

<sup>12</sup> See, for example, *X v. Denmark* (CCPR/C/110/D/2007/2010), 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.

<sup>13</sup> *Ibid.*

<sup>14</sup> *V.R. and N.R. v. Denmark*, 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.