



## Convention on the Rights of Persons with Disabilities

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### Committee on the Rights of Persons with Disabilities

#### Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 58/2019\*, \*\*

<i>Communication submitted by:</i>	Z.H. (represented by counsel Rönnow Pessah, replaced by Linnea Midtsian)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Sweden
<i>Date of communication:</i>	15 April 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 64 and 70 of the Committee's rules of procedure, transmitted to the State party on 30 April 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	6 September 2021
<i>Subject matter:</i>	Deportation to Afghanistan; lack of access to adequate medical treatment
<i>Procedural issues:</i>	Substantiation of claims; admissibility <i>ratione materiae</i> ; admissibility <i>ratione loci</i> ; exhaustion of domestic remedies; examination of the same matter by another procedure of international settlement
<i>Substantive issues:</i>	Right to life; freedom from torture and cruel, inhuman or degrading treatment; discrimination on the ground of disability; equal recognition before the law; access to justice
<i>Articles of the Convention:</i>	10, 12, 13 and 15
<i>Articles of the Optional Protocol:</i>	1 and 2 (b), (c), (d) and (e)

1.1 The author of the communication is Z.H., a national of Afghanistan born in 1990. His application for asylum has been rejected by the State party. He claims that his deportation to Afghanistan would constitute a violation of his rights by the State party under articles 10 and 15 of the Convention. He also claims that he had no access to justice and was not treated with equal recognition before the law by the domestic authorities in the course of his asylum

\* Adopted by the Committee at its twenty-fifth session (16 August–14 September 2021).

\*\* The following members of the Committee participated in the consideration of the communication: Rosa Idalia Aldana Salguero, Danlami Umaru Basharu, Gerel Dondovdorj, Gertrude Oforiwa Fefoame, Vivian Fernández de Torrijos, Odelia Fitoussi, Mara Cristina Gabrielli, Amalia Eva Gamio Ríos, Samuel Njuguna Kabue, Rosemary Kayess, Kim Mi Yeon, Sir Robert Martin, Floyd Morris, Jonas Ruskus, Markus Schefer, Saowalak Thongkuay and Risnawati Utami.



procedure, contrary to articles 12 and 13 of the Convention. The Optional Protocol entered into force for the State party on 14 January 2009. The author is represented by counsel.

1.2 On 30 April 2019, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, issued a request for interim measures under article 4 of the Optional Protocol, requesting that the State party refrain from deporting the author to Afghanistan pending the examination of the communication by the Committee.

1.3 On 7 October 2019, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, denied the State party's request to examine the admissibility of the complaint separately from its merits under rule 70 (8) of its rules of procedure.

## **A. Summary of the information and arguments submitted by the parties**

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

2.1 The author applied for asylum in Sweden on 29 December 2008. In the course of this procedure, he informed the asylum authorities that he had been held responsible for the death of the son of a powerful man in his village. Fearing that that could lead to a vendetta, he had fled Afghanistan on an unspecified date. He claimed that upon his return to Afghanistan, he would risk being persecuted or killed as a result of past events and also on the grounds of his Hazara ethnicity and Shia Muslim religion, which expose him to a greater risk of ill-treatment.<sup>1</sup> His asylum claim was dismissed in all instances on the basis that his accounts were not found to be credible by the national authorities. However, the expulsion order against him was not enforced in due time and became statute-barred on 13 September 2015.

2.2 On 17 September 2015, the author submitted a renewed application for asylum, claiming that he had been diagnosed with post-traumatic stress disorder with psychotic features. It is noted in the relevant court documents that, according to the medical reports, he suffers from anxiety, tension, restlessness, sleep disturbances, delusions, hallucinations and suicidal thoughts. His condition was assessed to be life-threatening because of the risk of suicide that is claimed to have originated in the death threats the author had received in Afghanistan. On 7 April 2017, the Swedish Migration Agency considered that the circumstances in the author's case were exceptionally distressing and acknowledged that there were shortcomings in the care available to patients with mental health problems in the Afghan health system. Relying on the available country information, the Migration Agency nonetheless concluded that some sort of psychiatric treatment, and the medications prescribed for the author in Sweden, were available in Kabul and therefore, he would run no risks of death or other forms of ill-treatment if returned to Afghanistan.

2.3 In the appeals procedure, the author submitted new medical reports which indicate that he has suicidal thoughts and as a result, was once committed to a clinic for treatment in Sweden under the Compulsory Psychiatric Care Act. Furthermore, he was under medical observation because he was showing symptoms of schizophrenia.<sup>2</sup> On 27 October 2017, the Migration Court denied the author's appeal, holding that the paranoid schizophrenia diagnosis was not properly documented. Basing itself only on the diagnosis of post-traumatic stress disorder, and while acknowledging the existence of exceptionally distressing circumstances in his case, the Migration Court found that, if the author were to be returned to Afghanistan, he would have access to adequate medical treatment in Kabul. In this respect, the Migration Court also noted that, on the basis of the information in the file, it could not be established that the author would face a risk of violence en route to Kabul to get the necessary treatment. On 22 December 2017, the Migration Court of Appeal denied the author's request for leave to appeal.

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<sup>1</sup> The author notes that the claims he raised in his initial application for asylum are not the subject matter of his complaint before the Committee.

<sup>2</sup> The author also submitted as evidence to the court an expert opinion issued by the previous country director of the Swedish Committee for Afghanistan. This confirms the lack of access to adequate mental health care in Afghanistan.

2.4 On 19 February 2018, the author claimed that there were impediments to the enforcement of his deportation order. He submitted new medical reports as evidence to substantiate that he suffers not only from post-traumatic stress disorder but also from paranoid schizophrenia. He also referred to the worsening security situation in Afghanistan. On 11 June 2018, the Migration Agency found that the medical certificates he had submitted, including the author's diagnosis of paranoid schizophrenia, did not constitute new circumstances that would warrant a fresh examination of the case owing to the fact that his mental health had already been the subject of an examination in the previous set of procedures. The Migration Agency further noted that the deterioration in the author's mental health must be linked to the rejection of his asylum application rather than an indication of a serious mental health problem.

2.5 The author appealed this decision and claimed that the authorities had failed to assess whether adequate medical treatment would be available to him in Afghanistan for his paranoid schizophrenia. He also indicated, for the first time in the asylum procedures, that he had been a victim of sexual assault prior to his departure from Afghanistan. On 17 July 2018, the Migration Court dismissed the appeal. The Migration Court stressed that it can be the symptoms and not necessarily the diagnosis that are of relevance in the domestic authorities' assessment of the available medical treatment in Afghanistan. In view of the fact that the author's symptoms were brought before the authorities in the context of his post-traumatic stress disorder diagnosis and constituted part of the asylum authorities' consideration, the diagnosis of paranoid schizophrenia could not lead to a different assessment. Furthermore, even though the Migration Court did not question the fact that the author may have been a victim of sexual violence in the past, it concluded that there was nothing in the file to suggest that he would continue to face a risk of ill-treatment on this ground 10 years after the alleged incident. On 5 September 2018, the author's request for leave to appeal was denied.

2.6 The author submitted an application to the European Court of Human Rights, which, on 10 January 2019, sitting in a single-judge formation, rejected the author's request for interim measures and decided to declare the application inadmissible.<sup>3</sup>

2.7 In his submission to the Committee, the author provides up-to-date medical reports to prove that his health condition has not improved. The documents indicate that the author is unable to care for himself or run a household due to his paranoid schizophrenia. His condition is life-threatening because he is experiencing hallucinations and suicidal ideation. In fact, he already tried to take his own life on an unspecified date. His hallucinations are more frequent when he feels threatened, for example, when he sees Afghan persons and thinks that they might want to kill him. He also suffers from a sleep disorder. Although he has already been referred to the Crisis and Trauma Center in Sweden, patients without a residence permit cannot commence treatment.

### Complaint

3.1 The author claims that, by deporting him to Afghanistan, the State party would violate his rights under articles 10 and 15 of the Convention, as his removal would lead to a grave risk of suicide and to other risks to his life and health. He claims that the medical certificates submitted to the domestic authorities establish that he has been diagnosed with long-term mental illnesses, and he claims that the lack of proper medical treatment for his condition in Afghanistan would expose him to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or to a significant reduction in life expectancy.<sup>4</sup> In this respect, he relies on several country reports,<sup>5</sup> which indicate that people with mental health problems are stigmatized in Afghanistan, medical workers are not properly trained and there are only

<sup>3</sup> The decision states that: "Having regard to all the material in its possession and in so far as it had jurisdiction to examine the allegations made, the Court considered that the conditions of admissibility provided for in Articles 34 and 35 of the Convention were not fulfilled."

<sup>4</sup> The author refers to European Court of Human Rights, *Paposhvili v. Belgium*, Application No. 41738/10, Judgment of 13 December 2016, and *Aswat v. the United Kingdom*, Application No. 17299/12, Judgment of 16 April 2013.

<sup>5</sup> See, for example, World Health Organization (WHO), "Afghanistan Country Office 2019", updated in December 2018.

320 hospital beds available for the patients in a country of 34 million habitants. He adds that he left Afghanistan in 2008 and has no financial means or social support in his country of origin. In Sweden, however, he lives with a family that cares for him and provides him with continuous support.

3.2 The author also submits that his poor mental condition, despite his exact diagnosis, was given less weight by the authorities, as it was considered to be linked to the denial of his asylum claim. The author finds this practice problematic because it is inevitable that the rejection of asylum claims negatively affects asylum seekers; that should not be assessed to their detriment when their asylum claim relates precisely to their mental health problems. The author further argues that the asylum proceedings erroneously focused on the possible reasons for his condition rather than on the risks of harm associated with his disability and the absence of proper medical treatment. That approach resulted in an arbitrary assessment of his claims.

3.3 Furthermore, relying on articles 12 and 13 of the Convention, the author argues that his claims were assessed only against the information that he suffers from post-traumatic stress disorder. Although he later provided evidence to the authorities substantiating his diagnosis of paranoid schizophrenia, they did not consider it necessary to conduct a fresh examination of his claims, namely whether appropriate treatment would be available for his condition in the light of his new diagnosis. He further alleges that the State authorities failed to take adequate steps to adjust the asylum procedures to his special needs, which are the result of his condition. He claims that the authorities' failure to do so prevented him from the effective enjoyment of his right to equal recognition before the law.

3.4 Regarding the issue of whether his case should be considered to have been examined by another procedure of international investigation or settlement, the author notes that his application was not examined on the merits by the European Court of Human Rights. In this regard, he refers to the decision of the Committee against Torture in *I.K. v. Norway*,<sup>6</sup> in which the Committee did not find itself precluded from examining a communication that had previously been declared inadmissible by the European Court. The author submits that the Committee on the Rights of Persons with Disabilities should follow the same approach in the present case.

#### **State party's observations on admissibility**

4.1 In a note verbale dated 2 November 2018, the State party submitted its observations on the admissibility of the communication.

4.2 The State party holds that the communication should be declared inadmissible as it is incompatible *ratione materiae* with the provisions of the Convention. The State party argues that its responsibility under the Convention for acts or omissions contrary to the Convention on another State's territory is to be considered an exception to the main rule that a State party's responsibility for Convention obligations is limited to its territory, thus requiring certain exceptional circumstances. It notes that, although treatment contrary to articles 10 and 15 of the Convention in another State could give rise to such exceptional circumstances, acts or omissions contrary to other articles cannot.

4.3 The State party questions whether articles 10 and 15 of the Convention, invoked by the author, encompass the principle of non-refoulement. In considering whether this is the case, it invites the Committee to take into account the fact that claims relating to the non-refoulement principle can already be lodged with several international human rights bodies. If the Committee takes the view that articles 10 and 15 of the Convention include an obligation of non-refoulement, the State party considers that this obligation should apply only to claims relating to an alleged risk of torture.

4.4 In addition, the State party is of the view that the communication should be declared inadmissible because it has been examined by another international body. While the State party acknowledges that the European Court of Human Rights failed to explicitly identify the grounds for declaring the author's application inadmissible, it notes that there was nothing in

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<sup>6</sup> CAT/C/63/D/678/2015.

the application the author submitted to the European Court to suggest that he failed to fulfil the criteria provided for in article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). The State party further argues that the author seems to have complied with the European Court's six-month requirement. In addition, there was nothing in the file to suggest that the inadmissibly grounds provided for in article 35 (2) (a) and (b) of that Convention were not fulfilled. The State party therefore concludes that the author's application must have been declared inadmissible by the European Court on the grounds of incompatibility with the provisions of the Convention, lack of substantiation or the author's failure to meet the significant disadvantage requirement. The State party submits that the examination of any of these issues requires a consideration on the merits of the application. Accordingly, the State party considers that the author's case should be considered to have been examined on the substance, for the purposes of article 2 (c) of the Optional Protocol, and should be declared inadmissible.

4.5 Regarding the alleged violation of articles 12 and 13 of the Convention, the State party notes that on 30 November 2016, the Migration Agency interviewed the author in the presence of his counsel. He then was invited to submit written observations on the minutes of his interview. Furthermore, the author was able to submit medical certificates and other documentation in support of his claims. It follows that he had ample opportunity to explain the circumstances of his case, both orally and in writing, before the asylum authorities. Thus, the State party considers that the author failed to sufficiently substantiate his claim that the asylum procedure suffered from deficiencies, in breach of articles 12 and 13 of the Convention.

4.6 Regarding the author's claim, submitted partly under articles 12 and 13 and partly under articles 10 and 15 of the Convention, that his most recent diagnosis (paranoid schizophrenia) was not properly assessed by the national authorities, the State party notes that the author first submitted several medical reports which state that he suffers from post-traumatic stress disorder with symptoms such as anxiety, tension, sleep disturbances, delusions, hallucinations and suicidal thoughts. Thereafter, when the author appealed to the Migration Court, he submitted additional medical certificates which indicate that there are reasons to believe that he suffers from paranoid schizophrenia. The State party underlines that the Migration Court, in its decision of 27 October 2017, duly considered all this information, but held that the diagnosis of paranoid schizophrenia was not sufficiently substantiated. Subsequently, the author submitted further medical documents that listed his symptoms as follows: depressive episodes, anxiety, tension, sleep disturbances, delusions, hallucinations and suicidal thoughts. Since these health issues had already constituted part of the examination of the author's asylum claim in the initial procedure, the authorities did not consider the information regarding the author's new diagnosis to be a new circumstance. The State party therefore considers that the migration authorities had extensive information before them regarding the author's health condition, irrespective of his most recent diagnosis, which allowed them to carry out a well-informed, transparent and reasonable assessment of the author's claims. On the basis of the aforementioned circumstances, the State party considers that the author's allegations fail to rise to the minimum level of substantiation required for the purposes of admissibility and should be declared inadmissible under article 2 (e) of the Optional Protocol.

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

5.1 On 16 September 2019, the author submitted that the Committee's views in *O.O.J. et al. v. Sweden*<sup>7</sup> do not support the State party's observation of the general rule that a State party's responsibility for Convention obligations is limited to its territory. The Committee considered in that case that the removal by a State party of an individual to a jurisdiction where he or she would risk facing violations of the Convention may, under certain circumstances, engage the responsibility of the removing State under the Convention, which has no territorial restriction clause.<sup>8</sup>

<sup>7</sup> CRPD/C/18/D/28/2015.

<sup>8</sup> *Ibid.*, para. 10.3.

5.2 The author argues that articles 10 and 15 of the Convention should be interpreted in such a way that they encompass non-refoulement cases in view of the fact that persons with disabilities constitute a particularly vulnerable group. In this connection, he submits that the principle of non-refoulement under the Convention should be construed not only in the light of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but also article 7 of the International Covenant on Civil and Political Rights<sup>9</sup> and article 3 of the European Convention on Human Rights,<sup>10</sup> as the wording of the latter provisions, similar to that of article 15 of the Convention, provides protection not only against torture but also against cruel, inhuman or degrading treatment or punishment.

5.3 With regard to the claims raised under articles 12 and 13 of the Convention, the author notes that fair trial rights in expulsion cases are an integral part of the principle of non-refoulement. Considering that the Committee has yet to decide on cases similar to the present case, it may well be that these rights will be considered to be part of the protection guaranteed under articles 10 and 15 of the Convention. In that case, the author has no objection to the Committee examining his arguments only under articles 10 and 15 of the Convention.

5.4 In addition, the author contests the State party's position that the European Court of Human Rights had examined his case on the merits. He submits that that conclusion is based on mere speculation.

5.5 Responding to the State party's position that his claims are insufficiently substantiated, the author maintains that the asylum proceedings were not adapted to his disabilities and the fact that he was able to present his case does not mean that he was able to present it to the best of his ability. He further contests the State party's statement that the national authorities were able to make a well-informed decision solely on the basis of his symptoms, which ignored his diagnosis of paranoid schizophrenia. The author submits that treatments are dependent on the diagnosis, even if the symptoms are the same. Therefore, his additional diagnosis should have been of key importance in the assessment of his asylum claim and the failure to take it into account amounts to a violation of his rights under the Convention.

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

6.1 In a note verbale dated 13 March 2020, the State party submitted its observations on the merits. Moreover, in addition to the grounds for inadmissibility invoked in its observations dated 2 November 2018, the State party holds that the complaint relating to articles 12 and 13 of the Convention should be declared inadmissible due to non-exhaustion of domestic remedies.

6.2 The State party provides information on the pertinent domestic legislation and notes that a residence permit may be issued under chapter 5, section 6, of the Aliens Act in cases where an overall assessment of the person's situation reveals such exceptionally distressing circumstances that he or she should be allowed to stay in the State party. In making this assessment, particular attention is to be paid to the person's state of health, their adaptation to the State party and the situation in their country of origin. One ground for a residence permit in these circumstances is that the person in question has a life-threatening somatic or mental illness or suffers from a particularly serious disability. The State party notes that, in order to grant a residence permit on grounds of mental ill health, a medical examination must support the view that the individual's mental health condition is sufficiently severe that it could be regarded as life-threatening. Regarding a claim of suicide risk, the starting point is that each individual is primarily responsible for his or her own life and actions. In some cases, however, serious self-destructive acts or statements of intent to carry out such acts by a seriously and non-temporarily mentally disturbed person have led to residence permits being granted. In such cases, the Migration Agency has assessed the extent to which these self-destructive acts or statements of intent to carry out such acts have been made because of severe mental ill-health, as recognized in a psychiatric examination.

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<sup>9</sup> The author refers to *C. v. Australia* (CCPR/C/76/D/900/1999).

<sup>10</sup> The author refers to European Court of Human Rights, *D. v. the United Kingdom*, Application No. 30240/96, Judgment of 2 May 1997, and *N. v. the United Kingdom*, Application No. 26565/05, Judgment of 27 May 2008.

6.3 The State party refers to *Z. v. Australia*,<sup>11</sup> in which the Human Rights Committee established that the author's medical condition was not of such an exceptional nature as to trigger the State party's non-refoulement obligations under article 7 of the International Covenant on Civil and Political Rights. The State party also refers to the judgment in *Paposhvili v. Belgium*, in which the European Court of Human Rights found that in similar cases, only very exceptional circumstances may raise an issue under article 3 of the European Convention on Human Rights.<sup>12</sup> The State party invites the Committee to follow the same standard in the course of its review in the present case, and underlines that the Convention on the Rights of Persons with Disabilities cannot place an obligation on States parties to alleviate disparities in the level of treatment available in the sending State compared to that of the receiving State, which would place an excessive burden on States parties.

6.4 In the present case, the State party argues that its migration authorities did assess whether medical care and medicines would be available for the complainant in Afghanistan. Therefore his health status, as described in the medical records that were submitted, was taken into consideration by the authorities. However, they found that the information before them did not demonstrate that the author's medical condition was of such an exceptional nature that his expulsion would run counter to the State party's human rights obligations. The State party submits that there is no reason to conclude that the domestic decisions were inadequate or that the outcome of the proceedings was in any way arbitrary or amounted to a denial of justice. In addition, the State party notes that the European Court of Human Rights has, on several occasions, stated that suicide threats by rejected asylum seekers should not prevent States from enforcing the expulsion order, provided that measures have been taken to eliminate such risks. The State party submits that it is confident that the expulsion order in the present case will be enforced in a manner that minimizes the suffering of the author, taking into account his mental condition. Furthermore, it considers that the author failed to sufficiently substantiate his position that he would be unable to reintegrate in his country of origin and make use of the social support system in Afghanistan after having lived for more than 10 years abroad.

6.5 In addition, the State party notes that it does not wish to underestimate the author's mental health problems and the concerns that may legitimately be expressed in relation to the shortcomings of the available health-care infrastructure in Afghanistan. However, in view of the above, it concludes that the author has not shown that his medical condition is of such an exceptional nature that his removal to Afghanistan would violate his rights under articles 10 or 15 of the Convention.

6.6 Regarding the author's claims under article 12 of the Convention, the State party notes that the author has not specified in what way the domestic asylum proceedings should have been adjusted in order to take into account his medical condition. Nor has the complainant clarified in what way the domestic authorities' assessments may have been affected by the lack of such adaptations. The State party reiterates that the author was appointed a public counsel who assisted him throughout the proceedings. He was able to submit written observations and participated in oral interviews. In addition, the complainant was able to submit medical reports. The State party therefore finds that the author was able to present his case in a satisfactory manner.

6.7 The State party further notes that the author's claim under article 13 of the Convention that the migration authorities, in their assessment, ignored the fact that he had been diagnosed

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<sup>11</sup> CCPR/C/111/D/2049/2011, para. 9.5. The State party notes that, in that case, the author suffered from chronic heart disease, which had required several bypass operations and might require another operation in the future. He had also been considered to be at a high risk of suicide and suffered from a major depressive disorder characterized by pervasive sadness, insomnia, anorexia and weight loss.

<sup>12</sup> The author notes that, according to this judgment, "very exceptional circumstances" should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy (para. 183).

with paranoid schizophrenia does not raise a separate issue and should be examined, if admissible, under article 15 of the Convention.

**Author's comments on the State party's submission, including its observations on the merits**

7.1 In his submission dated 7 May 2020, the author indicates that his situation has not changed and, in the absence of a residence permit, he still does not have access to the trauma treatment prescribed by his doctor in Sweden.

7.2 As regards the State party's objection to the admissibility of the complaint on the grounds of non-exhaustion of domestic remedies, the author contends that there is no legal avenue for him to exhaust domestic remedies regarding his claims under articles 12 and 13 of the Convention other than to claim impediments to the enforcement of his expulsion order and to submit appeals against the first instance decisions. Accordingly, the author argues that he has exhausted all available domestic remedies.

7.3 Regarding the merits of the complaint, the author reiterates that the migration authorities refused to assess the risks associated with his medical condition resulting from his diagnosis of paranoid schizophrenia and instead, relied on their previous assessment that was carried out on the basis of his diagnosis of post-traumatic stress disorder. Relying on the decisions of the European Court of Human Rights in *Paposhvili v. Belgium* and *F.G. v. Sweden*,<sup>13</sup> the author claims that he brought forward evidence showing that there are substantial grounds for believing that he would be exposed to a real risk of being subjected to ill-treatment if he were to be returned to Afghanistan, and it was for the authorities to verify whether he would have access to adequate medical care. Although the authorities considered the available country information, their conclusion seems arbitrary because nothing in that country information suggests that medical treatment would be available to the author in his extremely vulnerable situation. Furthermore, the State party did not make reference to any country information relating to medical treatment available for paranoid schizophrenia in Afghanistan. The author deems that the State party failed to discharge the reversed burden of proof. The author adds that, in addition to the risk of suicide, he faces risks of inhuman and degrading treatment owing to his disability, which is further exacerbated by the fact that he has no social network in his country of origin. He refers to the judgment in the case of *Savran v. Denmark*, in which the European Court of Human Rights found that the expulsion to Turkey of the applicant, who suffered from paranoid schizophrenia, without the Danish authorities having obtained individual assurances, violated article 3 of the European Convention on Human Rights.<sup>14</sup> On the basis of the aforementioned, the author concludes that his rights under articles 10, 12, 13 and 15 of the Convention have been violated by the State party.

**State party's additional observations**

8. In a note verbale dated 22 December 2020, the State party submitted additional observations, in which it reiterated its position that the Convention should not be applied to non-refoulement cases, especially because there are other mechanisms that can be invoked by petitioners in similar situations. Furthermore, it contests the author's position that the authorities failed to properly consider the principles as established by the European Court of Human Rights in *Paposhvili v. Belgium*. Moreover, it notes that, contrary to what the author argues, the judgment in the case of *F.G. v. Sweden* should not be considered relevant in the present case.

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<sup>13</sup> European Court of Human Rights, *F.G. v. Sweden*, Application No. 43611/11, Judgment of 23 March 2016.

<sup>14</sup> European Court of Human Rights, *Savran v. Denmark*, Application No. 57467/15, Judgment of 1 October 2019.



## B. Issues and proceedings before the Committee

### Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

9.2 The Committee must ascertain, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee, and that it has not been, nor is it being, examined under another procedure of international investigation or settlement. The Committee notes that the author submitted a complaint to the European Court of Human Rights based on the same facts presented to the Committee. By decision of 10 January 2019, the European Court found that his complaint did not meet the admissibility criteria set out in articles 34 and 35 of the Convention. The Committee recalls that, when the European Court bases a declaration of inadmissibility not solely on procedural grounds but also on reasons that include a certain consideration of the merits of a case, “the same matter” should be deemed to have been examined within the meaning of article 2 (c) of the Optional Protocol. However, the Committee considers that, based on the succinct nature of the decision rendered by the European Court and, in particular, the absence of any argument or clarification to justify a rejection of the application based on the merits, the Committee is not in a position to determine with certainty that the case presented by the author has already been the subject of an examination, however limited, on the merits. The Committee thus finds that article 2 (c) of the Optional Protocol does not constitute a barrier to the admissibility of the present communication.<sup>15</sup>

9.3 The Committee notes the State party’s submission that the communication should be declared inadmissible *ratione materiae* and *ratione loci* under article 1 of the Optional Protocol or as being insufficiently substantiated under article 2 (e) of the Optional Protocol, and that the part of the communication relating to the author’s claims under articles 12 and 13 of the Convention should also be declared inadmissible because domestic remedies were not exhausted.

9.4 The Committee refers to its jurisprudence in *O.O.J. v. Sweden*, in which it noted that the removal by a State party of an individual to a jurisdiction where he or she would risk facing violations of the Convention may, under certain circumstances, engage the responsibility of the removing State under the Convention (para. 10.3). The Committee considers that the principle of non-refoulement imposes a duty on a State party to refrain from removing a person from its territory when there is a real risk that the person would be subjected to serious violations of Convention rights amounting to a risk of irreparable harm, including but not limited to those enshrined in articles 10 and 15 of the Convention.<sup>16</sup> The Committee therefore considers that the principle of extraterritorial effect would not prevent it from examining the present communication under article 1 of the Optional Protocol. In this connection, the Committee notes the author’s claims that his removal to Afghanistan would lead to a grave risk to his life and health, as he would be unable to access necessary and life-saving medical care in that country. The Committee considers that the author has sufficiently substantiated these claims raised under articles 10 and 15 of the Convention for the purposes of admissibility.

9.5 The Committee notes the author’s claims under articles 12 and 13 of the Convention. It considers that the part of the communication alleging that in the course of the asylum procedures the authorities failed to accommodate the author’s special needs stemming from his medical condition, has not been sufficiently substantiated for the purposes of admissibility. In this connection, the Committee deems that the author failed to identify the adjustments he needed and in particular, he failed to show that he had requested the adoption of such measures from the migration authorities. He further failed to explain in concrete terms in what way he had been impaired in presenting his case before the migration authorities. The Committee therefore finds this claim inadmissible under article 2 (e) of the Optional Protocol.

<sup>15</sup> See, e.g., *V.F.C. v. Spain* (CRPD/C/21/D/34/2015), para. 7.2.

<sup>16</sup> Human Rights Committee, general comment No. 31 (2004), para. 12.

Regarding the author's allegation that his asylum application was assessed only against the information that he suffers from post-traumatic stress disorder, the Committee considers that this claim is closely linked to those presented under articles 10 and 15 of the Convention, and will examine it under those articles.

9.6 In the absence of any other challenges to the admissibility of the communication, the Committee declares the communication admissible, insofar as it concerns the author's claims under articles 10 and 15 of the Convention, and proceeds with its consideration of the merits.

### Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of its rules of procedure.

10.2 The Committee recalls that article 10 of the Convention stipulates that States parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others. The Committee also recalls that under article 15 of the Convention, State parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

10.3 The Committee notes that, in its general comment No. 31 (2004), the Human Rights Committee refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where 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 International Covenant on Civil and Political Rights (para. 12). It also notes that the Human Rights Committee has indicated in its jurisprudence that the risk must be personal<sup>17</sup> and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists. Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.<sup>18</sup> The Human Rights Committee has emphasized in its jurisprudence that considerable weight should be given to the assessment conducted by the State, and that it is generally for the organs of States to review or evaluate the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the evaluation was clearly arbitrary or amounted to a manifest error or denial of justice.<sup>19</sup>

10.4 The Committee further recalls its decision in *N.L. v. Sweden*,<sup>20</sup> in which it found a violation of article 15 of the Convention on account of the State party's failure to assess whether the author would be able to access medical care in Iraq corresponding to her diagnosis, even though she submitted several medical certificates before domestic authorities in which her health condition was assessed as severe and life-threatening without the treatment she was receiving in the State party. The Committee notes that in that decision, reference was made to the relevant jurisprudence of the Human Rights Committee,<sup>21</sup> the Committee against Torture<sup>22</sup> and the European Court of Human Rights.<sup>23</sup> The Committee notes that the general principles established in those decisions were reiterated in *N.L. v. Sweden* (paras 7.3–7.5) and remain relevant in the assessment of the present case.

10.5 In the present case, the Committee notes the author's claims that, by deporting him to Afghanistan, the State party would violate his rights under articles 10 and 15 of the

<sup>17</sup> *X v. Denmark* (CCPR/C/110/D/2007/2010), para. 9.2.

<sup>18</sup> *Ibid.* and *X v. Sweden* (CCPR/C/103/D/1833/2008), para. 5.18.

<sup>19</sup> See, e.g., *K. v. Denmark* (CCPR/C/114/D/2393/2014), para. 7.4, and *Z.H. v. Australia* (CCPR/C/107/D/1957/2010), para. 9.3

<sup>20</sup> CRPD/C/23/D/60/2019.

<sup>21</sup> *Abdillafir Abubakar Ali et al. v. Denmark* (CCPR/C/116/D/2409/2014), para. 7.8.

<sup>22</sup> *Harun v. Switzerland* (CAT/C/65/D/758/2016), paras. 9.7–9.11.

<sup>23</sup> European Court of Human Rights, *Paposhvili v. Belgium*, paras. 173–174. See also European Court of Human Rights, *Savran v. Denmark*, in which the Court held that removing the applicant to Turkey without the receipt by the Danish authorities of sufficient and individual assurances on his care in Turkey would violate article 3 of the European Convention on Human Rights.

Convention, as his removal would lead to a grave risk of suicide, as well as other serious risks to his life and health. It notes his information that he has been diagnosed with severe depression with psychotic features and that he has been committed to a clinic for treatment under the Compulsory Psychiatric Care Act, after experiencing hallucinations and suicidal thoughts and attempts. The Committee is also mindful of the author's argument that, while he submitted several medical certificates in his asylum procedures confirming that he has also been diagnosed with paranoid schizophrenia, the authorities did not consider it necessary to conduct a new examination of his claim to ascertain whether appropriate treatment would be available for his condition in the light of the new diagnosis. The Committee further observes the author's allegation that in the medical certificates, his health condition has been described as life-threatening without treatment and yet his diagnosis was given less weight by the authorities, as this was considered to originate in the denial of his asylum claim.

10.6 On the other hand, the Committee takes note of the State party's argument that its domestic authorities have conducted a thorough examination of the author's claims and that there is no reason to conclude that the domestic decisions were inadequate or that the outcome of the proceedings was in any way arbitrary or amounted to a denial of justice. It notes the State party's submission that the migration authorities had extensive information before them regarding the author's health condition irrespective of his most recent diagnosis, which allowed them to carry out a well-informed, transparent and reasonable assessment of the author's claims.

10.7 The Committee must therefore determine in the present case, taking into account the factors set out above, whether there are substantial grounds for believing that the author would face a real risk of irreparable harm as contemplated in articles 10 and article 15 of the Convention if he were to be removed to Afghanistan, such as being exposed to a serious, rapid and irreversible decline in his health resulting in intense suffering or to a significant reduction in life expectancy.<sup>24</sup> The Committee notes that it is undisputed between the parties that the author has been diagnosed with post-traumatic stress disorder and that he was being treated for this condition, which was assessed to be life-threatening due to the risk of suicide. The Committee further notes that it appears from the Migration Court's decision of 17 July 2018 that the author's diagnosis of paranoid schizophrenia was not questioned at the domestic level, but was considered not to constitute new circumstances for the purposes of a new examination of the author's asylum application.

10.8 The Committee notes that the parties disagree as to whether the domestic authorities' assessment met the applicable human rights standards in relation to the author's claim that he would not be able to have access to adequate medical treatment in Afghanistan. The Committee is mindful of the author's arguments that a new assessment would have been required by the domestic authorities in the light of his diagnosis of paranoid schizophrenia and that in any event, the relevant country information does not support the position of the authorities that mental health treatment would be available to him, even for his post-traumatic stress disorder. In this regard, the Committee takes note of the Migration Court's position that the author's symptoms and functional impairment, which constituted part of the Migration Court's assessment in the initial proceedings, were largely the same as those described in the medical certificates that confirmed the author's diagnosis of paranoid schizophrenia. The Committee recalls that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>25</sup> In view of the fact that there has been an assessment by the asylum authorities of the risks of harm associated with the author's mental health condition, the Committee cannot conclude that the refusal of the State party's authorities to conduct a separate risk analysis in a new set of proceedings, based on the author's new diagnosis, rendered the rejection of the author's asylum application arbitrary or amounted to a manifest error or denial of justice.

10.9 The Committee recalls the jurisprudence of the Committee against Torture and the European Court of Human Rights according to which the burden of proof is upon the author of the communication, who must adduce evidence capable of demonstrating that there are

<sup>24</sup> *N.L. v. Sweden*, para. 7.5.

<sup>25</sup> *Bacher v. Austria* (CRPD/C/19/D/26/2014), para. 9.7.

substantial grounds for believing that he or she would be exposed to a real risk of ill-treatment if removed.<sup>26</sup> Nevertheless, it is not a matter of requiring clear proof, as a certain degree of speculation is inherent in the preventive purpose of the principle of non-refoulement.<sup>27</sup> In the Committee's opinion, in the present case, the author has discharged that burden of proof. However, the domestic authorities failed to dispel any doubts about the risks he would face upon his return to Afghanistan. In this respect, the Committee notes that the domestic authorities assessed the author's ill-health and suicidal ideation to be primarily linked to his disappointment at his asylum process, which seems to have unreasonably weakened the author's claims associated with his diagnosis. The Committee observes that the migration authorities held that the medical care necessary to prevent the author from suffering a violation of his rights under article 15 would be available to him upon return to Afghanistan. The basis for this assessment were reports on the general situation of access to health care in Afghanistan, which, however, reveal the limited availability of psychiatric care and access to medication. Additional reliable sources of information on the situation of health care in Afghanistan consulted by the Committee report a lack of trained professionals (psychiatrists, social workers and psychologists), infrastructure and awareness about mental health issues with very limited resources covering a population of more than 30 million people.<sup>28</sup> The Committee notes that the domestic authorities have, to a large extent, acknowledged these deficiencies, which casts serious doubts on the availability of the health care needed by the author in order to prevent violations of his rights under article 15, as specified in paragraph 10.7 above. Under these circumstances, the State party's authorities were under an obligation to consider the extent to which the author will actually have access to the required care in Afghanistan<sup>29</sup> and, if serious doubts persist, to obtain individual and sufficient assurances from that State.<sup>30</sup> The Committee considers that the State party's assertion that the author's expulsion will be enforced in such a manner so as to minimize his suffering cannot suffice in this regard. Therefore, the Committee is of the view that individual assurances would have been particularly important in the circumstances of the present case given that the author left Afghanistan at a very young age 13 years ago, and reports indicate that returnees may face particular challenges in accessing health-care services.<sup>31</sup>

10.10 In such circumstances, the Committee considers that there remain serious doubts as to whether the author would indeed have access to adequate medical treatment to prevent a violation of his rights under article 15 of the Convention in Afghanistan. It is therefore unable to conclude that the domestic authorities' assessment has not been arbitrary as regards the existence of a real risk of irreparable harm for the author in his country of origin.

10.11 In the light of the above considerations, the Committee is of the view that the author's removal to Afghanistan would, if implemented, violate his rights under article 15 of the Convention.

10.12 In the light of these findings, the Committee considers it not necessary to separately consider the author's claims under article 10 of the Convention.

## C. Conclusion and recommendations

11. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 15 of the Convention. The Committee therefore makes the following recommendations to the State party:

<sup>26</sup> Committee against Torture, general comment No. 4 (2017), para. 38; and European Court of Human Rights, *Paposhvili v. Belgium* (para. 186).

<sup>27</sup> European Court of Human Rights, *Paposhvili v. Belgium*, para. 186.

<sup>28</sup> WHO, "Afghanistan Country Office 2019", updated in December 2018; and European Asylum Support Office, *Afghanistan: Key socio-economic indicators – Focus on Kabul City, Mazar-e Sharif and Herat City, Country of Origin Information Report*, August 2020, p. 56.

<sup>29</sup> European Court of Human Rights, *Paposhvili v. Belgium*, para. 190.

<sup>30</sup> European Court of Human Rights, *Savran v. Denmark*, para. 48; and *Tarakhel v. Switzerland*, Application No. 29217/12, Judgment of 4 November 2014, para. 120.

<sup>31</sup> European Asylum Support Office, *Afghanistan: Key socio-economic indicators*, p. 57.

- (a) Concerning the author, the State party is under an obligation:
  - (i) To provide him with an effective remedy, including compensation for any legal costs incurred in filing the present communication;
  - (ii) To review the author's case, taking into account the State party's obligations under the Convention and the Committee's present Views;
  - (iii) To publish the present Views and circulate them widely in accessible formats so that they are available to all sectors of the population.

(b) In general, the State party is under an obligation to take measures to prevent similar violations in the future. In that regard, the Committee requires the State party to ensure that the rights of persons with disabilities, on an equal basis with others, are properly considered in the context of asylum decisions.

12. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit to the Committee, within six months, a written response, including information on any action taken in the light of the present Views and recommendations of the Committee.

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