



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under the Optional Protocol, concerning communication No. 2601/2015\*, \*\*

<i>Submitted by:</i>	M.S. aka M.H.H.A.D. (represented by counsel, Daniel Nørrung)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Denmark
<i>Date of communication:</i>	30 March 2015 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 29 April 2015 (not issued in a document form)
<i>Date of adoption of Views:</i>	27 July 2017
<i>Subject matter:</i>	Deportation from Denmark to Iraq
<i>Procedural issue:</i>	Level of substantiation of claims
<i>Substantive issues:</i>	Risk to life, and of torture or ill-treatment upon forced removal to country of origin
<i>Articles of the Covenant:</i>	6, 7, 13 and 14
<i>Articles of the Optional Protocol:</i>	2, 3 and 5 (2) (a) and (b)

1.1 The author of the communication is M.S., aka M.H.H.A.D., a citizen of Iraq born on 1 July 1944. The author is subject to deportation to Iraq following the rejection of his application for asylum by the Danish Refugee Appeals Board on 1 March 2004 and on 4 April 2014. He claims that his deportation would amount to a violation by Denmark of his rights under articles 6, 7, 13 and 14 of the Covenant. He requested that interim measures be granted to prevent his deportation. The Optional Protocol entered into force for Denmark on 23 March 1976. The author is represented by counsel, Helge Nørrung.<sup>1</sup>

1.2 On 29 April 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from deporting

\* Adopted by the Committee at its 120th session (3-28 July 2017).

\*\* The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Bamariam Koita, Marcia V.J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

<sup>1</sup> On 1 January 2016, Daniel Nørrung informed the Committee that he had replaced Helge Nørrung, following his retirement, as legal counsel for the author.



the author to Iraq while his case is under consideration by the Committee. On 7 May, the Board suspended the time limit for the author's departure from Denmark until further notice, in accordance with the Committee's request. On 29 October, the State party requested the lifting of interim measures as the author had failed to substantiate that it was probable that he would be at risk of suffering irreparable harm if returned to Iraq. On 24 June 2016, the Committee, acting through its Special Rapporteur on new communications and interim measures, denied the request for the lifting of interim measures, recalling that the interim measures remained in force.

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

2.1 The author was born in Baghdad to a Sunni Muslim family. He served three and a half years' military service under the Saddam Hussein regime. In 1978, he started his own carpentry business in New Baghdad, but was called up again to perform military service, which he did for five and a half years during the war between Iraq and the Islamic Republic of Iran, from 1980 to 1985.<sup>2</sup> Having seen many atrocities during his nine years of military service, the author avoided a third call-up in 2000 to serve in Saddam Hussein's "Jerusalem Army". He sold his business for less than it was worth, went into hiding and barely escaped with his life. He claims to come from a prominent Sunni family, a fact he chose to hide from the asylum authorities in Denmark for over 10 years to protect his relatives who still live in Iraq.

2.2 On 4 March 2002, the author arrived in Denmark, without valid travel documents, and applied for asylum on the same day. He was placed in a centre for asylum seekers. The Danish Immigration Service rejected his asylum application on 29 January 2003. The Service based its refusal on the assumption that the author would not suffer disproportionate punishment for escaping the third call-up for military service because he managed to stay in hiding in Baghdad for 12 months without being caught.

2.3 On 1 March 2004, the Board upheld this decision. Additionally, the Board argued that the refusal to join the army implied no danger after the fall of the former regime in Iraq in 2003, and that the author is a Sunni Muslim with a total of nine years of compulsory military service on record, which was not in itself a sufficient reason for granting asylum. The author has no family ties in Denmark.

2.4 A few days after receiving the negative decision of the Board, the author was contacted by the Danish National Police to prepare for his removal, which he refused to do. Consequently, the author could no longer receive the monetary subsidy and the two food parcels per day he had been receiving as an asylum seeker every second week. In September 2004, he was transferred to a different centre for asylum seekers and was provided with three meals a day. He also had to present himself and sign in at the police station twice a week.

2.5 On an unspecified date, the author submitted a request to reopen his asylum case on the grounds that he and his family would be subject to persecution, which had further increased during the civil war in Iraq from 2006 to 2008. On 10 March 2008, the Board rejected his application. The author still feared returning to Iraq, including because he comes from an allegedly prominent Sunni family, that his family is affiliated with the Dulaimy tribe and the Baath Party,<sup>3</sup> and his fear of Shia militias. The author did not disclose some of these elements to the Danish asylum authorities because of his anxiety about his family's safety.

2.6 By letter of 28 August 2012, the author's counsel applied again to the Board to request the reopening of the author's asylum case. In the application, the author claimed that he could not return to Iraq because he comes from a prominent Sunni family and the area of his home was dominated by Shias inspired by the Islamic Republic of Iran. Between 2004 and 2006, the property of the author's family was repeatedly attacked by military vehicles and their house was searched. In 2006, the author's siblings escaped to the Syrian Arab Republic, where they were granted asylum by the Office of the United Nations High

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<sup>2</sup> The war lasted from 1980 to 1988.

<sup>3</sup> The author's sister B. was the head of the secretariat of the health minister until 2003.

Commissioner for Refugees (UNHCR). They returned to Iraq in 2010. The author's sister, B., reportedly died under suspicious circumstances. She was probably murdered, only a week after her return to Baghdad.<sup>4</sup> The remaining close relatives reportedly escaped to Turkey in 2014, where UNHCR had been providing protection. The author feared in particular Hakim Al-Zameli, a member of parliament who was a lieutenant in Saddam Hussein's army and then became one of the top leaders of the Shia El Mehdi militia. Mr. Al-Zameli was allegedly in charge of reprisals and torture by Shias, which took place from 2006 to 2008 in a mosque which is only 100 metres from the author's home. Shia militias led by Mr. Al-Zameli reportedly completely dominated the author's home town.<sup>5</sup> On 4 April 2014, the Board again rejected the author's request for asylum and informed him that if he did not leave Denmark voluntarily, he "might be forcibly deported". Notwithstanding the Board's decision, the author did not leave the country.

2.7 The author claims that since April 2014, the situation in Iraq has further deteriorated due to the uprising and atrocities committed by the Islamic State in Iraq and the Levant (ISIL). The conquest by this group of several larger cities in northern Iraq has brought about even more dangerous tensions between Sunni and Shia Muslims. These tensions are the central ground for the author's refusal to go back to Iraq.

2.8 The author, who was 70 years old at the time of his initial complaint, has been living in Denmark for 13 years, with the constant stress of possibly being returned to Iraq. He lives in an asylum centre and does not have any income. He received meals only while he had to report to the police twice a week, until 2014.

2.9 The author claims to have exhausted all available and effective domestic remedies, as the decision of the Refugee Appeals Board of 4 April 2014 cannot be appealed. The author has not submitted his communication to any other procedure of international investigation or settlement.

### **The complaint**

3.1 The author claims that by denying his request for asylum and his potential deportation to Iraq, the State party would violate its obligations under articles 6, 7 and 14 of the Covenant.

3.2 He claims that he would face a risk to his life and torture or cruel or degrading treatment in Iraq because he is a former deserter from the military and a member of a prominent Sunni family. Many members of his family had first fled to the Syrian Arab Republic in 2006 and remained there until 2010. They then fled to Turkey in 2014, after receiving threats from Shia militants. The author submits that the repeated threats, searches, torture and executions of other Sunnis in the author's home area provide sufficient grounds to believe that his sister had not died naturally, but was killed after her return from the Syrian Arab Republic. The area of his family's home is allegedly under the control of the Shia El Mehdi militia, led by the parliamentarian Hakim Al-Zameli, who formerly served as a lieutenant in Saddam Hussein's army. The author therefore fears that he will not be able to leave the Baghdad airport alive,<sup>6</sup> let alone return to his family's home. He submits that the Refugee Appeals Board disregarded the serious tensions between Sunni and Shia Muslims in Iraq in its decisions not to grant him asylum in 2004, 2008, 2009 and 2014.<sup>7</sup>

3.3 The author also submits that the tensions between Sunni and Shia Muslims increased with the ISIL uprising. Consequently, the author claims that he has a well-founded fear of

<sup>4</sup> The information on file, however, indicates that, according to the Danish authorities, the author's sister died in hospital from stomach-related complications.

<sup>5</sup> At the time of submission of the initial communication.

<sup>6</sup> The author fears the risk on account of his real name, M.H.H.A.D., which indicates his membership in the Dulaimy tribe. Since this tribe is allegedly perceived as dangerous, it attracts a risk of reprisals by Shia Muslims.

<sup>7</sup> The author refers to the following reports: Amnesty International, *Absolute Impunity: Militia Rule in Iraq* (London, 2014), index No. MDE 14/015/2014, p. 17; and the section on Iraq in *Amnesty International Report 2014/15: The State of the World's Human Rights* (London, 2015). The cleansing of Sunni areas is also documented in Human Rights Watch, *After Liberation came Destruction: Iraqi Militias and the Aftermath of Amerli* (18 March 2015).

losing his life or becoming a victim of torture or cruel or degrading treatment if returned to Iraq. He submits that the Danish authorities did not adequately assess the risk that he would be subjected to harm if he were forcibly removed to Iraq.

3.4 In addition, the author claims that his asylum application has been considered only by the administrative authorities, without a possibility of appeal to a court. Moreover, he contends that the Board, with the exception of its decision of 2004, did not provide for an oral statement from him to clarify the new documentation produced on his and his siblings' prominence as Sunni Muslims, and that his right to legal aid was limited since the fee granted to assigned counsel in connection with hearings before the Board covers only six hours of preparation. He claims that this amounts to a violation of the fair trial guarantees, in violation of article 14 of the Covenant.

3.5 The author further argues that another fair trial issue derives from the absence of translation or language education requirements for the interpreters used by the Immigration Service and the Refugee Appeals Board, and from the lack of audio recording of the asylum interviews. The author also claims that since the translator used during his interview in 2004 was a Shia Muslim from the Islamic Republic Iran, he was reluctant to reveal his situation and he considered that he could not safely make reference to the fact that he belonged to a well-known Sunni family.

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

4.1 On 29 October 2015, the State party submitted its observations on admissibility and the merits, elaborating first on the author's asylum proceedings and the decisions of the Board of 1 March 2004, 10 March 2008, 4 April 2014 and 23 October 2015.

4.2 The State party describes the structure, composition and functioning of the Board, which it considers to be an independent, quasi-judicial body.<sup>8</sup> The State party submits that the author stated on his arrival in Denmark that he did not want to be a soldier in Saddam Hussein's Jerusalem Army. The State party recalls that, since the Saddam Hussein regime had fallen, the Board decided, on 1 March 2004, that those grounds could not justify asylum. Additionally, it found that the general conditions in Iraq were not sufficient to justify asylum, as the author did not establish a specific and individual risk of persecution. The Board also found that neither selling his business to raise money to allow his escape nor the inability of his siblings to help him could justify granting him asylum.

4.3 The State party notes that the author submitted new information to the Board on the situation in Iraq but the Board decided, on 10 March 2008, that the information was not of such a nature as to justify the reopening of his case. The Board reiterated that, generally, poor conditions in a country cannot justify granting asylum.

4.4 The State party submits that, in an application for reopening the author's asylum case in 2012, the author provided new information about his family's prominence and the resulting conflicts, including the suspicious death of his sister and his fear of Hakim Al-Zameli. On 4 April 2014, the Board decided that this new information was insufficient to give rise to a different assessment of the matter. The Board noted that the information regarding his sister was based solely on an assumption held by the author and was not supported by facts or evidence, as was the claim of his problems with Mr. Al-Zameli.

4.5 The State party submits that, after the decision of the Board of 4 April 2014, the author submitted updated information regarding the rise of ISIL. Since the author comes from Baghdad, which, according to available information, has been controlled by the security forces of the Government of Iraq, the Board found that the author failed to render it probable that he would be at real risk of persecution or abuse.

4.6 As regards the admissibility of an alleged violation of articles 6 and 7 of the Covenant, the State party submits that the author has failed to establish a *prima facie* case for the purpose of admissibility of his communication. He has not established that there are

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<sup>8</sup> See, e.g., communication No. 2379/2014, *Obah Hussein Ahmed v. Denmark*, Views adopted on 7 July 2016, paras. 4.1-4.3.

substantial grounds for believing that his life would be at risk or that he would be in danger of torture or other cruel, inhuman or degrading treatment if returned to Iraq.

4.7 As regards the admissibility of an alleged violation of article 14 of the Covenant, the State party submits that proceedings relating to the expulsion of aliens do not fall within the ambit of a determination of “rights and obligations in a suit at law” within the meaning of article 14 (1).<sup>9</sup>

4.8 On the merits of the alleged violations of articles 6 and 7 of the Covenant, the State party submits that the author has not sufficiently established that the Covenant would be breached if he were returned to Iraq. The State party submits that the author’s situation prior to his departure in 2002 cannot justify asylum, since Saddam Hussein’s regime fell in 2003 and any fear of being recruited is no longer justifiable. The State party notes that general conditions in Iraq cannot justify asylum, especially since the author is from Baghdad, which is not under the control of ISIL.

4.9 As regards the author’s fear of ethnic cleansing and reprisals, particularly by Hakim Al-Zameli, the State party submits that the author has not demonstrated any direct confrontation with Mr. Al-Zameli. The State party also notes that the author has not shown that he would be such a high-profile individual as to be in a directly adversarial position to Mr. Al-Zameli or other Shia Muslim group. Additionally, while noting the tense relations between Sunni and Shia Muslims, the State party considers that the fact that the author is a Sunni Muslim is not sufficient to conclude that he would be at risk in case of return to Iraq.

4.10 In relation to the author’s family connections, the State party points out that the author did not raise this argument until the 2012 proceedings, 10 years after he first entered Denmark. The State party notes that the alleged searches of the author’s home were unsubstantiated and that, even if true, they did not have any consequences.

4.11 On the merits of the alleged violations of article 14 of the Covenant, the State party submits that proceedings relating to the expulsion of aliens do not fall within the ambit of a determination of “rights and obligations in a suit at law” within the meaning of article 14 (1). The State party further observes that the Board assesses whether new information may result in a different decision. It therefore considers that the procedure complies with the two-instance principle.

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

5.1 On 26 February 2016, the author submitted that his forcible removal to Iraq would constitute a violation of his rights under articles 6, 7 and 14 or, alternatively, 13 of the Covenant,<sup>10</sup> as he would be exposed to a real, personal and foreseeable risk of being killed or exposed to torture or ill-treatment, linked to a combination of personal threats and the general situation in Iraq. Although there have allegedly been several factual errors in the State party’s observations of 29 October 2015, such as regarding the dates of his family’s flight to the Syrian Arab Republic, the author expressed satisfaction that the State party did not question the veracity of his statements.

5.2 The author’s application for asylum had already been refused in January 2003, only 10 months after his arrival in Denmark, while the Saddam Hussein regime was still in power. He claims that, at that time, he had a legitimate expectation of being granted asylum as he had deserted from the army. His return to Iraq would then have led to his death. Although the State party considered individual aspects of his situation, it did not properly assess the risk of death or torture resulting from the combination of risk factors that he was facing.

5.3 He adds that as his name points to an affiliation with the Dulaimy tribe, he only disclosed it after 10 years in Denmark mainly to protect his sisters and other family members in Baghdad. The Dulaimy tribe is not only “a known Sunni tribe”, as the State

<sup>9</sup> See, e.g., communication No. 2186/2012, *Mr. X and Ms. X v. Denmark*, Views adopted on 22 October 2014, para. 6.3.

<sup>10</sup> The author’s initial claim of a violation of article 14 of the Covenant was changed to a claim of a violation of article 13.

party submits, but it is the leading group in opposition to the Shia Government. He adds that some members of the tribe have joined ISIL. Therefore, any Shia Muslim and the Shia Government would perceive any member of the Dulaimy tribe as a dangerous enemy.

5.4 Moreover, ISIL has largely conquered large Anbar Province west of Baghdad, and people named Dulaimy from Anbar who are displaced and have sought refuge are prevented from crossing the bridge that connects Anbar with Baghdad. The author adds that there are currently about 85 Shia militias in Iraq, of which 23 are criminal and lawless. Those militias often operate with impunity against Sunnis as they are outside any government control.<sup>11</sup>

5.5 The author reiterates that, in addition to being a member of the Dulaimy tribe,<sup>12</sup> his prominent position derives from the fact that he was well known in his neighbourhood, New Baghdad, where he lived and had his carpentry workshop for 23 years before fleeing in 2002.

5.6 When in Denmark, he was also a familiar figure among the Iraqis. In 2009, when about 100 Iraqis sought protection in Brorson's Church in Copenhagen for three months, some 25,000 postcards were distributed with his picture and the text "Would you send M. back to Iraq?", to support the plight of Iraqi asylum seekers. He was then the subject of several interviews in leading newspapers and his story was reproduced in two books, *Kirkeasyl (Church Asylum)* and *De Afviste (The Rejected)*, written by the leading newspaper journalist, Anton Geist. The author further notes that he was the main character in a satirical video production to support the Iraqi case which was posted on YouTube and which has been watched some 20,000 times ("Harry: you must not think of Baghdad").

5.7 Regarding the State party's claim that he only provided new information on his family situation in 2012, 10 years after he first entered into Denmark, the author submits that, after the brutal clearing of Brorson's Church by the Danish police on the night of 13 to 14 August 2009, the author, an old and prudent man, felt the need to stay away from the Danish authorities for some time.

5.8 While the family lived in Sadr City (eastern Baghdad), the author's sister B. was probably the best-known member of the family. She was a respected and active member of the Baath Party and a long-time career government official. She served as the head of the secretariat of the health minister for several years prior to 2003 and was in contact with a number of prominent politicians under the Saddam Hussein regime. In the family house, she was an adviser to a large number of neighbours, making the house known as a Sunni bastion and a place of contact with those in power before 2003. B. was dismissed in 2003, after the fall of the regime. She and the family fled to the Syrian Arab Republic. Despite being in generally good health, B. fell ill upon return to Iraq in 2010, probably because of a small ulcer, and she was hospitalized in Baghdad. The day after, she was declared dead "for medical reasons", as stated officially. A closer examination of the cause of death was not requested, as it might have been too dangerous. The author claims that when the Shias were in power in Iraq in 2010, someone in the health-care system or from a Shia militia decided to kill his sister. He admits that "nothing of course can be proved, but it is wrong for the Board not to attribute any significance to those events". The author concludes that it would be dangerous for him to go back to Baghdad when "an unexpected death can hit his immediate family under highly suspicious circumstances".

5.9 The author also submits that further to the expropriation of his two plots of land in a Shia-dominated area by the Shia-dominated Government after 2003, he had to turn to the Iraqi Embassy in Denmark to request compensation for the lands seized. As a result, he is well known to the Embassy. He claims that it is likely that he would disappear or die for "medical reasons" so that his compensation request would cease without settlement. He also submits that the headquarters of the Shia militia leader Hakim Al-Zameli is based only 100 metres from his family home and that the militia's headquarters is reputed to be a place where torture, imprisonment, murder and disappearance take place. Moreover, Mr. Al-

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<sup>11</sup> Amnesty International, *Absolute Impunity*.

<sup>12</sup> In this regard, the author claims that being a member of the Dulaimy tribe did not represent a risk until 2002.

Zameli, who reportedly knows the author, continues to be influential owing to his position as a parliamentarian. An additional risk factor for the author rests in the fact that he deserted in 2002 to avoid a call-up for military service (at the age of 55). He alleges that a few old soldiers may still remember him as a “traitor” and desire revenge.

5.10 The author submits that he has never made a secret of his preference for secular, democratic rule in Iraq; he has expressed this many times, including in newspaper interviews and books. He could not live in an area dominated by ISIL. He maintains that if he were to be forcibly removed to Iraq, he would be subject to persecution and irreparable harm and persecution because he is a “well-known, dangerous and prominent person”.

5.11 The author also reiterates that his case has never been heard by a court and that a request to reopen his asylum case in Denmark can only be addressed by the same Board, which is contrary to the principle of a fair trial. In that context, the author submits that, instead of referring to article 14 of the Covenant, he considers it more appropriate to refer to article 13, which deals with the expulsion of aliens. Finally, the author requests the Committee not to lift interim measures.

### **Additional observations by the State party**

6.1 On 18 November 2016, the State party submitted that the author’s comments of 26 February 2016 did not provide new or specific information on the conflicts in his country of origin to support his claim. The State party therefore reiterates its observations of 29 October 2015.

6.2 The State party notes that the author, in comments of 26 February 2016, replaced the allegations of a violation of article 14 of the Covenant with an alleged violation of article 13. The State party observes, however, that article 13 of the Covenant does not confer the right to appeal,<sup>13</sup> or the right to a court hearing.<sup>14</sup>

6.3 It observes that the author’s case has been examined at two instances: the Danish Immigration Service and the Refugee Appeals Board. It further submits that the author could have requested the Board to reopen the asylum proceedings on the basis of the essentially new information. The State party observes that the author requested the reopening of his asylum case on two occasions, but the Board dismissed these requests on 10 March 2008 and 23 October 2015 respectively.

6.4 As regards the author’s submission that the decisions of the Board cannot be appealed to the courts, the State party observes that decisions of the Board are final, hence not subject to judicial review. While this practice has been established by the Danish Supreme Court, aliens may nevertheless bring an appeal before the ordinary courts, which have the authority to adjudicate any matter concerning the limits to the competence of a public authority. The Supreme Court also established that the ordinary courts’ review of the Board’s decisions is limited to a review on points of law, including any inadequacy in the basis for the relevant decision and the unlawful exercise of discretion; the Board’s assessment of evidence is not subject to review.

6.5 As regards the author’s allegations that the Board is not a court of justice, since its hearings are not open to the public, and that it is not independent, as one of its members is part of the Ministry of Justice, the State party claims that the Board is an independent and quasi-judicial body, which is considered to be a court or tribunal (see para. 4.2 above),<sup>15</sup> and that the Board was transferred to the responsibility of the Ministry of Immigration, Integration and Housing on 28 June 2015. Nonetheless, pursuant to section 53 (1) of the Aliens Act, members of the Board act independently of the appointing or nominating

<sup>13</sup> See, e.g., *Mr. X and Ms. X v. Denmark*, para. 6.3.

<sup>14</sup> The State party refers to communication No. 58/1979, *Maroufidou v. Sweden*, Views adopted on 9 April 1981, para. 10.1, arguing that the Committee did not dispute that a mere administrative “review” of the decision to expel the author from Sweden was not in violation of article 13 of the Covenant.

<sup>15</sup> Article 46 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 deals with the right of asylum seekers to have a decision taken in their case reviewed by a court or tribunal.

authority or organization. In addition, Board members are not entitled to discuss specific cases with the appointing or nominating authority or organization prior to the Board's examination of an appeal, and the decisions to suspend or dismiss members of the Board — similar to decisions to suspend or dismiss judges in the Danish courts — are made by the Special Court of Indictment and Revision. As regards the author's submission that Board hearings are not open to the public, the State party points out that the author did not request that others be allowed to attend the Board's hearing of his asylum case. For this reason, the State party is of the opinion that the author's submission does not relate to the proceedings in his case.

6.6 As regards the author's argument that the fee granted to assigned counsel in connection with hearings before the Board is only for six hours of preparation, the State party submits that, in practice, the Board pays for all relevant legal work performed after a decision has been made by the Danish Immigration Service. The assignment of counsel covers the work performed in connection with the proceedings before the Board and ceases when the Board has decided the appeal. The usual guideline is that the Board will pay for up to six hours of case preparation prior to the oral Board hearing. The individual panel of the Board may, however, decide, on the basis of a specific assessment, to pay counsel for more or less than six hours of preparation, taking into account the scope and nature of the case, including the number of asylum seekers, the volume of the exhibits, the complexity of the case and the volume of relevant background material. The State party observes that the counsels are professional representatives who often have thorough experience in immigration law and in the procedures of the Danish asylum authorities.

6.7 Concerning the author's claim that there are no educational requirements for interpreters used by the Danish asylum authorities, which allegedly affects the right to a fair trial, the State party observes that the author has not pointed out any errors or omissions in translations done in connection with the proceedings before the Danish Immigration Service or the Board, nor does he appear to have objected to the interpreters used. The State party also observes that the Board is very attentive to the quality of the interpretation provided at its hearings and will suspend a hearing and adjourn the proceedings in case of problems. The State party further notes the author's submission that he was reluctant to provide information on his situation in the presence of the interpreter summoned for the Board hearing in 2004, due to the nationality and religious background of the interpreter. In this regard, the State party observes that the interpreter's only task in connection with the proceedings is to translate. An interpreter's background, including his or her ethnicity, nationality, gender and religion, is irrelevant to his or her task, which was clearly pointed out to the author during the interviews conducted by the Danish Immigration Service. The State party also observes that the author could have mentioned that he felt uncomfortable with the interpreter during the asylum proceedings.

6.8 The State party further notes the author's submission that asylum interviews ought to be audio recorded. The State party observes that a written report is made by a case officer of each asylum seeker's oral statement to the Danish Immigration Service. After the asylum interview, the report of the interview is read to the asylum seeker, who can comment on the report, correct any misunderstandings and elaborate on the report if necessary. As regards the issue of the author's statement to the Board, the State party observes that a clerk makes a summary record of the asylum seeker's oral statement at the Board hearing, and any issues related to the report or the understanding of the statement are clarified at the Board hearing. The State party submits that the due process guarantees applied in the case at hand.<sup>16</sup> It therefore finds that it has not been rendered probable that the interpretation gave rise to any errors or misunderstandings affecting the decision made by the Board.

6.9 Furthermore, the State party recalls that the errors claimed by the author<sup>17</sup> to have occurred in the reporting of specific elements of his statement as reproduced in the Board's decision of 4 April 2014 did not affect the Board's assessment of his application for asylum.

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<sup>16</sup> See, e.g., communication No. 2393/2014, *K. v. Denmark*, Views adopted on 16 July 2015, para. 7.6.

<sup>17</sup> The author points out that the Board incorrectly noted several facts, including the dates of his family's flight to the Syrian Arab Republic.



The State party further reiterates that the author's initial communication and his additional observations seem to provide no new and specific information on the conflicts in his country of origin relied upon by the author, as compared with the information available on 23 October 2015 when the Board most recently made a decision in this case.

6.10 As to the author's claim that the Board failed to make an overall assessment of his circumstances, including his religious, family and ethnic affiliations, the State party underscores that the Board made an overall assessment of the specific circumstances of the author's case compared to the background information on the situation in Iraq. On the basis of its assessment, the Board found that the author is not facing any threat that would justify asylum under section 7 of the Aliens Act and that his return to Iraq would not constitute a breach of articles 6 and 7 of the Covenant. Moreover, the State party considers that the information provided by the author on his clan affiliation cannot cumulatively or independently lead to a different outcome. In particular, the State party observes that the author only found the occasion to provide this information after having stayed in Denmark for 10 years. It considers that this merely reflects that the author disagrees with the Board's assessment of his specific circumstances and the background information, and that the author has failed to identify any irregularity in the decision-making process or any risk factors that the Board failed to take properly into account.

6.11 The State party submits that the author is in fact trying to use the Committee as an appellate body to have the factual circumstances advocated in support of his claim for asylum reassessed by the Committee. In submits that the Committee should give considerable weight to the findings of fact made by the Board, which is better placed to assess the factual circumstances of the author's case. In the State party's view, there is no basis for doubting or setting aside the assessment made by the Board, according to which the author has failed to establish that there are substantial grounds for believing that he would be in danger of being subjected to inhuman or degrading treatment or punishment if returned to Iraq. In that regard, the State party refers to the judgment of the Grand Chamber of the European Court of Human Rights in *J.K. and others v. Sweden*.<sup>18</sup>

6.12 The State party reiterates that the author has failed to establish a prima facie case for the purpose of admissibility of his communication under articles 6, 7 and 13 of the Covenant (rule 96 (b) of the Committee's rules of procedure) and that those parts of the communication should therefore be considered inadmissible as manifestly ill-founded.

6.13 The State party also maintains that asylum proceedings fall outside the scope of article 14 of the Covenant and that this part of the communication should therefore be considered inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

6.14 Should the Committee find the communication admissible, the State party maintains that no substantial grounds have been established to believe that it would constitute a violation of article 6 or 7 of the Covenant to return the author to Iraq, or that article 13 of the Covenant would have been violated during the procedure of the author's asylum case.

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

7.1 On 30 January 2017, the author submitted comments on the State party's additional observations, claiming that he was not aware of the right to have others present when his case was dealt with or of the right to make a complaint about the interpreter, who seemingly disliked the author. He reiterates the claims of his family's position of prominence,

<sup>18</sup> See application No. 59166/12, judgment of 23 August 2016, paras. 108-111, an extract of which reads as follows:

"... Although the security situation in Baghdad City has deteriorated, the intensity of violence has not reached a level which would constitute, as such, a real risk of treatment contrary to Article 3 of the Convention. Nor do any of the recent reports from independent international human rights protection associations referred to in paragraphs 32-34 above contain any information capable of leading to such a conclusion (para. 110).

"As the general security situation in Iraq does not as such prevent the applicant's removal, the Court must therefore assess whether their personal circumstances are such that they would face a real risk of treatment contrary to article 3 if expelled to Iraq" (para. 111).

submitting that several members of his family have received threatening letters from Shia militants.<sup>19</sup> He also refers to the dangerous and critical situation of Sunnis in Iraq, emphasizing reports of UNHCR<sup>20</sup> and Human Rights Watch.<sup>21</sup>

7.2 The author counters the State party's description of the Danish asylum system, stating that the Board consisted of only three members when it dealt with his case: the chair, an attorney and a member appointed by the Ministry of Justice.<sup>22</sup>

7.3 The author notes that final written reports of asylum interviews are prepared by translators and that no system is in place to prevent factual or other mistakes. The author reiterates that audio recordings of the interviews are not available and that there are no education requirements for translators. The author notes that these reports, of questionable quality, are decisive in the final decisions made by the Board. In conclusion, the author recalls that under no circumstances would he return to Baghdad, as his life would be "directly" in danger in Iraq.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 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.

8.3 The Committee notes that the State party has not objected to the admissibility of the communication under article 5 (2) (b) of the Optional Protocol. It also observes that the author filed an application for asylum, which was last rejected by the Refugee Appeals Board on 23 October 2015. Since the decisions of the Board cannot be appealed, no further remedies are available to the author. Accordingly, the Committee considers that domestic remedies have been exhausted.

8.4 The Committee further notes that the author did not provide any substantiation regarding his allegation that the Board's assessment of his application for asylum would have amounted to a denial of justice in his case, in violation of article 13, read in conjunction with articles 6 and 7, of the Covenant. The Committee therefore considers that this part of the communication is inadmissible under article 2 of the Optional Protocol. Since the author has withdrawn his allegations of a violation of article 14 of the Covenant in connection with the hearing of his case by the Danish asylum authorities, the Committee will not examine these claims.

8.5 With regard to the author's claims under articles 6 and 7 of the Covenant, the Committee notes the State party's argument that they should be held inadmissible for lack of substantiation. However, the Committee considers that, for the purpose of admissibility, the author has adequately explained the reasons for which he fears that his forcible return to Iraq would incur the risk of treatment contrary to articles 6 and 7 of the Covenant. In the absence of any other obstacles to admissibility, the Committee declares the communication admissible insofar as it appears to raise issues under articles 6 and 7 of the Covenant, and proceeds to its consideration of the merits.

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<sup>19</sup> In the letters, the family was reportedly told to leave their house immediately or suffer the consequences, and they fled to Turkey soon after. The two older sisters remaining in Baghdad reportedly prepared to escape to Turkey as soon as possible. The author does not elaborate further.

<sup>20</sup> "UNHCR position on returns to Iraq", 14 November 2016.

<sup>21</sup> Human Rights Watch, "Iraq: executions by Government-backed militia", 18 December 2016.

<sup>22</sup> The author submits that since 1 January 2017, asylum cases are heard again by only three members of the Board: the chair or a deputy chair, an attorney and a member appointed by the Ministry of Immigration and Integration.

*Consideration of the merits*

9.1 The Committee notes the author's claims that, if removed to Iraq, he would face the risk of being killed or exposed to torture or ill-treatment, due to a combination of several personal risk factors. Those factors include the author's desertion from the army in 2002 and that some old soldiers may still remember him as a "traitor" and desire revenge; the family's affiliation with the Dulaimy tribe; the prominence of some of the family members under the Saddam Hussein regime; suspicious circumstances surrounding the sudden death of the author's sister B., who was reportedly a respected and active member of the Baath Party and a long-time career government official; and the author's fear of a high-ranking member of the Iraqi parliament and Shia militia leader, Hakim Al-Zameli. The Committee also notes the author's fear of persecution in the context of tensions between Sunni and Shia Muslims, exacerbated by ISIL, which a number of persons from the Dulaimy tribe had joined. The Committee also takes note that, according to the author, he is a familiar figure among Iraqis in Denmark, that he was the subject of several interviews and that his story was reproduced in two books. The Committee further notes the State party's argument that the Board made an overall assessment of the specific circumstances of the author's case compared to the background information on the situation in Iraq and found, on the basis of its assessment of the threat, that the author is not facing any threat that would justify asylum in Denmark and that his removal to Iraq would not constitute a breach of articles 6 and 7 of the Covenant.

9.2 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 refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm such as that contemplated by articles 6 and 7 of the Covenant (para. 12). The Committee has also indicated that the risk must be personal<sup>23</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>24</sup> The Committee recalls that it is generally for the organs of States parties to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a manifest error or denial of justice.<sup>25</sup>

9.3 The Committee observes that the author's claims were thoroughly examined by the State party's authorities. Nonetheless, the Committee observes that the author left Iraq more than 15 years ago and that he has alleged that a combination of several personal factors put him at risk, including his desertion from the army for which he may attract revenge, his family's affiliation with the Dulaimy tribe, the prominence of some of the family members under the Saddam Hussein regime and suspicious circumstances surrounding the sudden death of the author's sister B., who was a long-time career government official. The Committee also notes that the author's credibility regarding his account of the persecution he suffered and the risks that he runs has never been questioned by the authorities of the State party, and that there are substantial grounds to believe that he would be viewed as a Western sympathizer and therefore attract a risk of persecution. The Committee further notes that the situation in the author's home city of Baghdad has deteriorated, as admitted by the State party. Considering the author's age, his political campaigning in Denmark,<sup>26</sup> the surging sectarian violence between Shias and Sunnis in Iraq, often targeting Sunni men, including in Baghdad, and the fact that most of his relatives have fled from Iraq, the Committee finds, in the circumstances of the present case, that the author's deportation to Iraq would amount to a violation of articles 6 (1) and 7 of the Covenant.

<sup>23</sup> See *K. v. Denmark*, para. 7.3; and communications No. 2272/2013, *P.T. v. Denmark*, Views adopted on 1 April 2015, para. 7.2; and No. 2007/2010, *X. v. Denmark*, Views adopted on 26 March 2014, para. 9.2.

<sup>24</sup> See *X. v. Denmark*, para. 9.2; and communication No. 1833/2008, *X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

<sup>25</sup> See, inter alia, *K. v. Denmark*, para. 7.4.

<sup>26</sup> Which included denouncing tensions between Sunni and Shia Muslims.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is therefore of the view that deportation to Iraq would, if implemented, violate the author's rights under articles 6 (1) and 7 of the Covenant.

11. In accordance with article 2 (1) of the Covenant, which establishes 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 author's 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 author while his 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 case 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 Committee's Views.

## Annex

### Individual opinion of Committee members Yuval Shany and Christof Heynes (dissenting)

1. We regret that we are unable to join the majority of the Committee in finding that, in deciding to deport the author to Iraq, Denmark would, if it implemented the decision, violate its obligations under articles 6 (1) and 7 of the Covenant.

2. In paragraph 9.2 of its Views, the Committee recalls that “it is generally for the organs of States parties to the Covenant to examine the facts and evidence of the case in order to determine whether such a risk exists, unless it can be established that the assessment was arbitrary or amounted to a denial of justice”. Despite this, the majority of the Committee rejected the factual conclusion of the Danish Immigration Service and the Refugee Appeals Board that the author failed to establish grounds for asylum because his individual circumstances did not give rise to a risk of serious harm, and held, in paragraph 9.3, that due to a combination of personal risk factors and the general situation in Baghdad, the author’s deportation would amount to a violation of articles 6 (1) and 7.

3. By engaging in what appears to be an independent risk assessment, we are of the view that the majority of the Committee failed to properly apply the review standards it has itself identified in paragraph 9.2 and did not follow the long-held tradition, according to which the Committee does not serve as “a fourth instance competent to re-evaluate findings of fact”<sup>1</sup>.

4. 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 sought to base its position on inadequacies in the domestic decision-making process, such as failure to properly take into account available evidence or the specific rights of the author under 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 the decision.<sup>4</sup> In the present case, however, it has not been shown that any piece of evidence was ignored during the asylum proceedings, no inadequacy in the domestic decision-making process has been identified and detailed and, in our view, persuasive justifications were provided by the Danish authorities for the conclusion that the deportation of the author to Iraq would not place him at a real risk of irreparable harm (see, e.g., paras. 4.2-4.11).

5. It thus appears that the majority of the Committee simply disagreed with the risk assessment of the Danish authorities, notwithstanding that they reached their conclusion after a serious fact-finding process which was procedurally adequate and, in our view, far more robust than that which the Committee was able to conduct. We note in this regard that the statement by the majority in paragraph 9.3, according to which the State has not contested the risks as presented by the author, is contradicted by the record as set out in paragraphs 4.5 and 4.6. We are therefore of the view that the majority erred in rejecting the assessment made by the Danish authorities.

6. Furthermore, we believe that the personal risk factors and general conditions in Iraq identified by the majority in paragraph 9.3 do not establish a real risk of irreparable harm which could give rise to the State party’s non-refoulement obligation under the Covenant.<sup>5</sup>

<sup>1</sup> See, e.g., communication No. 1138/2002, *Arenz and others v. Germany*, Views adopted on 24 March 2004, para. 8.6.

<sup>2</sup> See, e.g., communication No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010, paras. 8.4-8.6.

<sup>3</sup> See, e.g., communication No. 1908/2009, *X. v. Republic of Korea*, Views adopted on 25 March 2014, para. 11.5.

<sup>4</sup> See, e.g., communication No. 1222/2003, *Byahuranga v. Denmark*, Views adopted on 1 November 2004, paras. 11.3-11.4.

<sup>5</sup> General comment 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

Instead, the majority merely repeats the author's improbable and highly speculative allegations about threats from a variety of political elements, such as ISIL or pro-Saddam forces, who do not currently have a strong presence in Baghdad and are not likely to take an interest in an individual with the author's profile. We thus believe that the majority also erred in applying the relevant substantive non-refoulement standards of the Covenant.

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