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Human Rights Committee

Communication No. 1833/2008

Views adopted by the Committee at its 103rd session, 17 October to 4 November 2011

Submitted by: X. (represented by counsel, Anna Lindblad)

Alleged victim: The author

State Party: Sweden

Date of communication: 26 November 2008 (initial submission)

Document references: Special Rapporteur's rule 97 decision, transmitted to the State party on 5 December 2008 (not issued in document form)

Date of adoption of Views: 1 November 2011

Subject matter: Deportation of an alleged bisexual person to Afghanistan

Substantive issues: Risk of torture and death upon return to country of origin

Procedural issues: Exhaustion of domestic remedies

Articles of the Covenant: 6; 7

Articles of the Optional Protocol: 5, paragraph 2 (b)

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (103rd session)

concerning

Communication No. 1833/2008*

Submitted by: X. (represented by counsel, Anna Lindblad)
Alleged victim: The author
State party: Sweden
Date of communication: 26 November 2008 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2011,

Having concluded its consideration of communication No. 1833/2008, submitted to the Human Rights Committee on behalf of Mr. X under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, dated 26 November 2008, is Mr. X., a national of Afghanistan. The author claims to be a victim of a violation by Sweden of his rights under articles 6 and 7 of the Covenant. He is represented by counsel, Anna Lindblad.

Factual background

2.1 The author arrived in Sweden on 2 October 2002 and applied for asylum the day after, on 3 October 2002. In his asylum application, he indicated that he was an active member of the Communist party in Afghanistan since 1989-1990. He was working for the

* The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Mr. Fabian Omar Salvioli and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Krister Thelin did not participate in the adoption of the present decision.

An individual opinion signed by Committee member Rafael Rivas Posada is appended to the present Views.

party by way of producing documentary films and writing theatre scripts, literature and reports criticizing the Mujahedin; he also acted in his plays. This work made him famous in Afghanistan, as his films and plays became known to the public. After the fall of the Najibullah regime, he was arrested in 1993 by the Mujahedin, who were then in power in Mazar-e-Sherif. He was taken to a security prison, where there were only political prisoners. He was detained incommunicado and subjected daily to torture, including electric shocks, kicks, beatings, sexual abuses, including rape. He was imprisoned for about six months, without trial or access to legal aid. Finally, his father managed to bribe a person and obtain his release. During the following years, he was constantly living in hiding, going from one town to another, until he managed to leave the country in 2002. He claims that his father was killed by the Mujahedin. On 16 August 2005, his application for asylum was rejected by the Migration Board of Sweden. The author appealed the decision to the Aliens Appeals Board, which rejected his claim on 20 January 2006. This decision was the final rejection. On 7 April 2006, a temporary residence permit, valid until 7 April 2007, was granted to the author (as well as to other rejected Afghan asylum-seekers) due to the moratorium declared by the Migration Board regarding deportations to Afghanistan due to the situation in the country.

2.2 On 20 December 2006, the author filed a new application under chapter 12 of the Aliens Act, stating that there were new circumstances, referring to the same fear of persecution, including torture, and providing a medical certificate from the Centre for Crisis and Trauma of the Danderyd Hospital in Stockholm citing the consequences of past torture. His application was rejected by the Migration Board of Sweden on 20 June 2007; it stated that the author did not present any new circumstances. His appeal was rejected by the Migration Court on 16 July 2007.

2.3 Another application for asylum was filed by the author at the beginning of 2008. He reiterated his claim that he would be at risk of being killed because he was a former political prisoner who had left the country and was still regarded as an opponent to the Mujahedin because of his previous work. He claimed that the Mujahedin were still holding very powerful positions in Afghanistan. On that occasion, the author submitted documents, *inter alia*, a letter from Afghan officials confirming that he would still be at risk if he were to return to Afghanistan. On 13 March 2008, the Migration Board of Sweden rejected his claim, arguing that the author presented no new circumstances, therefore there were no grounds to reopen his case.

2.4 In September/October 2008, the author filed another application with the Migration Board of Sweden, in which he revealed, for the first time, his bisexuality as a reason for requesting asylum. He explained that he had his first homosexual relationship at the age of 15-16 with a boy and that they were together for about four to five years. The author said that he had never revealed his sexual orientation, not even to friends or family, as he was afraid of severe punishment by non-State actors or State authorities. He maintained his previous asylum claim, but added that the main reason for his arrest in 1993 was a play about bisexuality that he had written and in which he had acted himself and he appeared kissing a man. After he had received threats, the performances were discontinued. He claimed that he was arrested as a result of this and accused of acting against Islam and being a political opponent. He was tortured, and claimed that rape was part of the torture to which he was subjected. After his release, he continued to have sexual relations with both men and women, including during his marriage. He lived in constant fear that this would be revealed and he would be reported to the authorities and severely beaten or killed by the State or by individuals, as the State does not offer protection.

2.5 While in Sweden, he had short and long homosexual relationships and became a member of the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (hereinafter RFSL). RFSL has sent letters to both the Migration Board and the Migration

Court protesting against the decision to deport him to Afghanistan. During his stay in Sweden, although open about his sexuality, he never told any Afghan about his sexual orientation for fear of reprisal. However, it is possible that some Afghans know and could communicate that information to persons in Afghanistan.

2.6 On 17 November 2008, the Migration Board of Sweden rejected the author's new application, stating that he had not given a valid excuse as to why he had not revealed his sexual orientation to the asylum authorities initially. The author replied that this was due to the stigma associated with bisexuality and homosexuality in his culture, feelings of shame, fear of what his previous lawyer, migration authorities and interpreters would think of him, and fear of reprisal if other Afghans learned about it. Furthermore, he did not know that fear of persecution based on sexual orientation was a valid claim for refugee status and asylum in Sweden; he was unaware of the importance that this kind of argument could have.

2.7 On 24 November 2008, the author appealed the latest decision of the Migration Board of Sweden to the Migration Court. In addition to arguing that, due on his personal circumstances and the situation in Afghanistan, he would be at risk of torture and persecution if he returned to Afghanistan, the author also argued that the Migration Board had not applied the correct standard of proof. He stated that the Board had applied the "probable test" instead of the lower standard of proof which should be applied when new circumstances justify the reopening of a case. RFSL made submissions on his behalf, explaining the particular problems that homosexual and bisexual persons may encounter during the asylum process, including difficulties speaking about their sexuality. It supported the argument that the author would be at risk of persecution and torture if he returned to Afghanistan. On 25 November 2008, in a submission to the Migration Court, the Migration Board argued that the author had not given any valid excuse for not referring to his sexuality before. It also found it contradictory that although he had been open about his sexual orientation in Sweden, and had had homosexual relations and visited gay clubs, he did not see fit to confide in the migration authorities on that issue. On 26 November 2008, the Migration Court upheld the decision of the Migration Board of Sweden. The Court considered that there were no grounds, under chapter 12, section 19, of the 2005 Aliens Act, to examine the new asylum application based on new facts. Consequently, the author was deported to Afghanistan.

2.8 As regards the exhaustion of domestic remedies, the author stated that there was the possibility of formally appealing the decision to the Migration Court of Appeal of Sweden. However, this could not have been considered an effective remedy for two reasons: first, due to time constraints, since the risk of deportation was imminent; and second, there were reasons to believe that the Migration Court of Appeal would not have stopped the deportation, as in its previous decisions, it had clearly indicated that the Migration Court interpreted the criteria of "valid excuse" very strictly. For these reasons, the author considered that domestic remedies had been exhausted.

The complaint

3.1 The author claims that his forcible return to Afghanistan amounts to a violation by Sweden of his rights under articles 6 and 7 of the Covenant, since there is a real risk of torture and other cruel, inhuman or degrading treatment or punishment, as well as threats to his life in Afghanistan by Afghan authorities, individuals as well as armed groups. The Afghan authorities would not act with due diligence in order to offer him effective protection against non-State actors.

3.2 The author refers to information from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Ministry of Foreign Affairs of Sweden, which indicates that LGBT people could not live openly in Afghanistan without the risk of

human rights violations. UNHCR's Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers (December 2007) states that "open homosexual relations are not possible in Afghanistan given conservative social mores. In addition to gays and lesbians risking violence from family or community members, most interpretations of the applicable criminal law indicate that homosexual acts would lead to severe punishment were they to come to the attention of authorities" (p. 9). The same document further states that "overt homosexual relations are [...] not possible to entertain. Homosexual persons would have to hide their sexual orientation. Homosexuality is outlawed under Islam, and punishable by death as a *Hudood* crime" (p. 72). According to the report of the Swedish Ministry of Foreign Affairs on the human rights situation in Afghanistan in 2007 (March 2008), "overt homosexuality does not exist and homosexual intercourse is prohibited according to Sharia law. There is no legal protection against discrimination for reasons of sexual orientation or gender identity." The author further claims that chapter 12, section 19, of the Swedish Aliens Act is contrary to articles 6 and 7 of the Covenant, as the issue of a "valid excuse" is irrelevant if there is a risk of *refoulement*. He claims that it is also contrary to Sweden's international obligation not to return anyone to a country where he or she would be at risk of torture or other serious human rights violations.

Additional submission by the author

4. In a letter dated 31 March 2010, counsel indicated that she had been in contact with the author in Afghanistan and he had stated that he was living a very difficult life, hiding and moving from city to city, between Afghanistan and Pakistan. He was afraid to go out and only managed to continue his daily life because he was financially supported by his brother who lived abroad.

State party's observations on admissibility and merits

5.1 On 25 February 2011, the State party provided its observations on the admissibility and merits of the communication. It presented detailed information on the pertinent Swedish asylum legislation. Referring to the notion of "valid excuse" in chapter 12, section 19, of the 2005 Aliens Act, it stated that the Migration Court of Appeal interprets this notion restrictively, essentially in the view of the following. The Swedish asylum procedure is designed to guarantee that the examination of an asylum claim by the Migration Board of Sweden and the migration courts maintains as high a level of legal certainty as possible within the framework of ordinary proceedings. Such proceedings will ultimately result in a decision that gains legal force and becomes enforceable. Accordingly, it is only exceptionally that an asylum-seeker can be considered to have a valid excuse for not having invoked all relevant circumstances prior to such decision.

5.2 The State party further submits the following information concerning the facts of the author's case, based primarily on the case files of the Migration Board of Sweden and the migration courts. The author applied for asylum on 3 October 2002, at which time the Migration Board held the initial interview with the author. During the interview, the author stated that, while at school, he was engaged in the youth section of the People's Democratic Party of Afghanistan (PDPA). He started to work in the security service and did so for three years. He stopped when the former president, Mohammad Najibullah, was about to be removed from power. He claimed that those who worked for Najibullah cannot live in Afghanistan today, and if he was forced to return, he would be arrested and sentenced, and therefore he feared for his life.

5.3 On 3 December 2003, a counsel was appointed as his legal representative. The author filed two submissions with the Migration Board, dated 14 March 2005 and 18 March 2005, in which he stated, *inter alia*, that he was arrested by the mujahideen in 1993 and

taken to a local prison where he was imprisoned for six months. He was accused of being a communist and an enemy of the mujahideen. They were aware of the author's past activities. He was repeatedly subjected to torture by beating and kicking, electric shocks and sexual harassment. He still suffers from the injuries he sustained from the torture. One evening, his father came to the prison and managed to bribe a person and obtain his release. After his escape, he had to hide from the mujahideen. He hid in and around Kabul. His father was murdered by the mujahideen who were searching for him. For the past year, he had been unable to contact his wife and son. The author also stated that he suffered from pain throughout his body, severe headaches and sleeping problems, which he believed were the result of the torture he was subjected to; he submitted copies of notes from his medical record.

5.4 On 16 August 2005, the Migration Board of Sweden rejected his application for a residence permit, a work permit, a declaration of refugee status and a travel document, and ordered his deportation to Afghanistan. Based on information from UNHCR, the International Crisis Group (ICG) and the Cooperation Centre for Afghanistan (CCA), the Board considered that an individual who had been a member of the PDPA in a low position was not at risk in Afghanistan. There was no information that former members of the PDPA were at risk of being persecuted by the Government or the authorities of Afghanistan. Further, many former members of the PDPA had been able to return from abroad and find employment in the public sector. The events that the author had invoked as a basis for his need for protection occurred a long time ago and nothing further had happened to him during the years he stayed in Afghanistan. Therefore, the Board concluded that the author had not shown that it was likely that he was at risk of being subjected to State-sanctioned persecution on account of his political involvement or his religion. Furthermore, an overall assessment of the humanitarian circumstances of the case, including his health status, did not reveal any exceptionally distressing circumstances to make the Swedish authorities consider granting a residence permit under chapter 2, section 4, of the Aliens Act.

5.5 The author appealed the decision to the Aliens Appeals Board, stating essentially the following. He was active and outspoken when he was involved in the Communist party. He was arrested and tortured as a direct result of this work. He claimed that within every security area in Afghanistan there are special groups taking care of returnees and he fears that these groups will arrest, torture and kill him. On 20 January 2006, the Aliens Appeals Board rejected the appeal and upheld the decision of the Migration Board. The decision was not subject to further appeal.

5.6 On 7 April 2006, the Migration Board granted the author a residence permit for one year (until 7 April 2007), on grounds that the author had spent a considerable time in Sweden and the situation in Afghanistan was such that it was not possible to enforce decisions to deport an individual there by force. The order to deport the author to his country of origin was not suspended. The decision to grant a residence permit was made for humanitarian reasons, but the permit was limited to one year.

5.7 On 27 April 2007, the author filed a new application for a residence permit to the Migration Board. He claimed that he suffered from severe headaches and was being treated at the Crisis and Trauma Centre for individuals suffering from torture. He also stated that he had found permanent employment. A formal report from the Crisis and Trauma Centre, issued on 13 June 2007, was subsequently submitted to the Board. The report stated that the author suffered from headaches, memory lapses, concentration problems and lack of energy, and that he was under examination by a neurologist. On 20 June 2007, the Board rejected his application for a re-examination under chapter 12, section 19, of the 2005 Aliens Act, and found no impediments to the enforcement of the expulsion order. It added that the security situation in the part of Afghanistan where the author originates was not such that would constitute an armed conflict.

5.8 The author then submitted a letter claiming that he could not return because the mujahideen forces who had imprisoned him were still in power throughout the district he was from; the letter was handled by the Migration Court as a complaint. On 16 July 2007, the Migration Court rejected the complaint, on grounds that the new circumstances invoked by the author were modifications of and amendments to his originally invoked circumstances. The author submitted another letter to the Migration Court, claiming that the people who forced him to flee were still in power in half of the country, not least in the province from which he originated. On 17 September 2007, the Migration Court of Appeal decided not to grant leave to appeal against the 16 July 2007 judgment of the Migration Court.

5.9 On 21 September 2007, the author submitted a letter to the Migration Board, in which he maintained that he could not return to Afghanistan; he provided a certificate stating that he had been injured and treated in hospital for ten days in 1993. The certificate also stated that his life was in danger. On 2 October 2007, the Migration Board refused to re-examine the case as the submitted document was considered to have little value as evidence.

5.10 The author appealed the Migration Board's decision not to grant a re-examination of his case, claiming that, by virtue of his work, he is easily recognized in Afghanistan, including by the people in power and the Government. He claimed that after his arrest in 1993, he had escaped to another town, but also had to flee from there. He had received a letter from the police and his life was again in danger. He did not know whether his family was still in the country. If forced to return, he would be accused of heresy, hostility toward Islam and being a Christian, and would therefore be killed. On 9 November 2007, the Migration Court rejected the author's request for an oral hearing, but gave him the possibility to finalize his argumentation in writing. On 20 November 2007, the Migration Court rejected the appeal, stating that no new circumstances were adduced. On 21 February 2008, the Migration Court of Appeal decided not to grant leave to appeal the decision of the Migration Board.

5.11 On 3 March 2008, a letter was registered with the Migration Board, reiterating the author's previous claims. On 13 March 2008, the Migration Board decided to reject the author's third application for re-examination.

5.12 On 3 October 2008, another letter from the author, declared as an appeal, was registered with the Migration Board. In that letter, the author claimed for the first time that he was bisexual. On 9 October 2008, the appeal was dismissed as being filed beyond the relevant time limit. However, the letter was registered as an application for re-examination of the case. The author thereafter filed an additional application, based on his alleged bisexuality.

5.13 On 17 November 2008, the Migration Board decided to reject the author's fourth application for re-examination. The information that the author was bisexual was considered to be a new circumstance that had not been previously examined by the authorities. The Board stated that the situation in Afghanistan for homosexual or bisexual people was not such that this in itself warranted international protection, and that the examination had to be made on an individual basis. The Board considered that the author had not established that he risked being subjected to persecution if he were to return to Afghanistan.

5.14 The author submitted an appeal to the Migration Court. The Migration Board was given an opportunity to submit observations on the appeal and it stated the following. A prerequisite for granting a re-examination under chapter 12, section 19 of the Aliens Act is that the new circumstances had not been invoked previously or that the alien showed that he or she had a valid reason for not having done so. The longer the time elapses before new

circumstances are invoked, the higher the demand on the explanation as to why those circumstances are invoked at a late stage in the process. When an asylum-seeker has withheld information of importance for the examination of his asylum application, this has an impact on the credibility of the new circumstances invoked. The author had on numerous occasions, and in different contexts, been given the possibility to present information regarding his sexual orientation during the six years he spent in Sweden. In the information submitted by him, no specific time was stated, other than "eventually" as to when he started to live more openly as a bisexual person, when he became involved in RFSL and when he started to meet other men. Nor did the author state why he had not been able to present these circumstances to the authorities, despite receiving several negative decisions regarding his application for protection. In the absence of any further explanation, it appeared contradictory that, on the one hand, the author had started to live openly as a bisexual person, but on the other hand, he had not felt confident enough about the Swedish authorities to invoke this. In view of the late disclosure, the credibility of the claim was so low that he could not be considered as having made probable that there were lasting impediments to the enforcement of the expulsion order. Consequently, the Board decided not to grant a re-examination of the author's application.

5.15 On 26 November 2008, the Migration Court upheld the decision of the Migration Board. The author did not appeal the Migration Court's decision to the Migration Court of Appeal.

5.16 As to the exhaustion of all domestic remedies, the State party submits that the expulsion order against the author became final on 20 January 2006, when the last instance at the material time, namely the Aliens Appeals Board, decided to reject the author's appeal of the 16 May 2005 decision of the Migration Board. However, at a later stage of the proceedings, the author failed to appeal to the Migration Court of Appeal against the 26 November 2008 decision of the Migration Court rejecting his application for re-examination under chapter 12, section 19, of the Aliens Act, on the basis of his claim about being bisexual. As reasons for his failure to appeal, the author submitted that the day before he was to be expelled from Sweden, the Migration Court decided not to stay the enforcement of his expulsion, and that he had good reasons to believe that the Migration Court of Appeal would also reject his request for a stay of enforcement, in view of the fact that the Court of Appeal would probably not grant him leave to appeal.

5.17 The State party submits that, by the time the author had decided to inform the migration authorities about his bisexuality (October 2008), the expulsion order against him had been final for more than two and a half years. Both the Migration Board and the Migration Court were of the opinion that the author's claim concerning his sexual orientation was a "new circumstance," and therefore could have been examined under chapter 12, section 19, of the Aliens Act. However, the Migration Court was also of the view that the author had failed to meet the requirement of "valid excuse" under the same provision. The author could have appealed the 26 November 2008 decision of the Migration Court to the Migration Court of Appeal. He could have asked the Migration Court of Appeal to stay the enforcement of the expulsion order pending examination of the appeal. The respective court has the power both to decide on relevant interim measures and to grant a re-examination of the author's case. Accordingly, the remedy was effective in that regard. Apparently, the author chose instead to file a complaint with the Committee. The author failed to show that an appeal to the Migration Court of Appeal was objectively futile. In November 2008, the Migration Court of Appeal had only issued one judgment concerning the notion of "valid excuse", which did not concern sexual orientation, and it had stated that a case-by-case assessment had to be made. Accordingly, it was far from certain how the Migration Court of Appeal would have dealt with an appeal from the author. In light of the above, the Committee should declare the present communication inadmissible for failure to exhaust domestic remedies. The State party also maintains that

the author's assertion that he is at risk of being treated in a manner that would amount to a breach of the Covenant fails to attain the basic level of substantiation required for purposes of admissibility; therefore the communication is manifestly unfounded and inadmissible under articles 2 and 3 of the Optional Protocol.

5.18 Should the Committee conclude that the communication is admissible, the issue before it is whether the author's forced return to Afghanistan violated the obligations of Sweden under articles 6 and 7 of the Covenant. It follows from the Committee's jurisprudence that for a violation of articles 6 or 7 to be found, it must be established that the individual concerned faced a real risk of being subjected to acts under articles 6 and 7 in the country to which he or she is returned. That the risk must be real means that it must be the necessary and foreseeable consequence of the forced return.¹ The Committee has also indicated that the risk must be personal.² The jurisprudence of the Committee indicates 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. Important weight should be given to the assessment conducted by the State party. The Committee has also held that it is generally up to the courts of the States parties to the Covenant to evaluate the facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.³

5.19 With regard to the human rights situation in Afghanistan, a number of reports⁴ state that serious human rights violations, such as extrajudicial killings, torture, unlawful detention, rape, illegal expropriation of private property, trafficking, discrimination and harassments are still occurring in Afghanistan; the lack of respect for human rights is directly linked to the security situation in the country; crime is extensive and brutal and public administration is weak and under construction; torture is frequently used by police and prison authorities. The death penalty is prescribed in the new Constitution and the Penal Code and Islamic *Hudood* Law stipulates the death penalty for acts such as murder and apostasy. There is an obvious sensitivity against anything that could be considered as spreading immorality or non-Islamic messages.

5.20 As to the situation of homosexual or bisexual individuals in Afghanistan, according to Sharia law, homosexual activities are punishable as a *Hudood* crime by a maximum sentence of death. The US Department of State 2009 report states that the authorities only sporadically enforce the prohibition, and no death sentences have been handed out since the end of Taliban rule, although it is still technically possible. Organizations devoted to the protection or exercise of freedom of sexual orientation have remained underground. UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (December 2010) stated, *inter alia*, that "In light of the strong societal taboos, as well as the criminalization of „homosexual conduct“, UNHCR considers that LGBTI individuals may be at risk on account of their membership of a particular social group, i.e. their sexual orientation and/or gender identity, since they do not, or are perceived

¹ See communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 11 August 1997, paras. 6.8 and 6.14.

² *Ibid.*, para. 6.6.

³ See communication No. 1549/2007, *Nakrash and Others v. Sweden*, Views adopted on 30 October 2008, para. 7.3 to 7.4.

⁴ See Sweden, Ministry of Foreign Affairs, 2007 Report on human rights in Afghanistan (March 2008); United States of America, Department of State, 2009 Human Rights Report: Afghanistan (March 2010); United Kingdom: Home Office, *Country of Origin Information Report - Afghanistan* (November 2010); Amnesty International, Report 2010 - Afghanistan; and Human Rights Watch, World Report 2009 - Afghanistan.

not to conform to prevailing legal, religious and social norms" (p. 29). The US Department of State 2009 report noted, however, that there were no reported instances of discrimination or violence based on sexual orientation, but social taboos remained strong. Open homosexuality does not occur.

5.21 The Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act, as the Committee applies when examining a complaint under the Covenant. The national authority conducting the asylum interview is in a very good position to assess the information submitted by an asylum-seeker and to evaluate the credibility of his or her claims. Thus, the Swedish migration authorities had sufficient information, including the facts and documentation available on file, to ensure that they had a solid basis for their assessment of the author's need for protection. Great weight must therefore be attached to the assessment made by the Swedish migration authorities. Regarding the merits of the communication, the State party relies on the decisions of the Migration Board and the Migration Court and on the reasoning set out therein.

5.22 As concerns the author's claim that he faces a real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment in Afghanistan by the mujahideen due to his activities in the PDPA, the State party recalls that this claim was examined by the Migration Board on three occasions and by the Migration Court on two occasions. In all those examinations, the claim was rejected, as indicated above. The evaluation of the authorities can hardly be considered clearly arbitrary or as amounting to a denial of justice. Moreover, according to the author's own statements, he was not subjected to threats, harassment, torture or other inhuman or degrading treatment or punishment after he was released from prison in 1993 and up to the time he left Afghanistan, that is, a period of almost ten years (1993-2002). According to the author, no such acts have been targeted against him since he was returned to Afghanistan as at the date of the present submission by the State party, that is, another two years. In light of the foregoing, the view expressed by the Migration Board of Sweden in its decision of 16 August 2005 is further strengthened. Consequently, the author has not substantiated that he faces a real risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment by the mujahideen or other actors in Afghanistan because of his previous involvement in the communist regime.

5.23 With regard to the author's claim relating to his alleged bisexuality, the State party recalls that the author claimed for the first time that he was bisexual only in his fourth submission to the Migration Board, dated 3 October 2008, that is, after a stay of six years in Sweden. Although acknowledging the difficulties that a person may have in informing others, including the migration authorities, that he or she is bisexual, it is reasonable that, in some instances, the fact that a protracted period of time has elapsed between an asylum-seeker's arrival in the country where protection is sought and his or her claim for protection based on sexual orientation would be allowed to influence the assessment of his or her claims. It is a basic principle under international and domestic refugee law that an alien who applies for protection in another country should state all his or her reasons for seeking protection as early as possible in the proceedings. In the present case, the author claimed his bisexuality six years later, despite the fact that during those years he had been in contact with the migration authorities and courts repeatedly.

5.24 The author submitted to the Committee that he did not disclose his sexual orientation at an earlier stage of the asylum proceedings because of the stigma associated with bisexuality and homosexuality; feelings of shame; fear of what his previous lawyer, migration authorities and interpreters would think of him and how they would react; fear of reprisal if other Afghans learned about his sexual orientation. Another reason invoked by the author was that he had not been informed that fear of persecution based on sexual orientation would be a valid claim for refugee status and asylum in Sweden. The State party

considers the above reasons insufficient. It is understandable that an individual from Afghanistan claiming to be bisexual would be affected by social taboos. However, the author had sexual relationships with men, and eventually women, since the age of 15 up until he left Afghanistan in 2002; he was responsible for the production of and performed in a play allegedly on the theme of bisexuality; he started to have relationships with men in Sweden only one year after his arrival; he started visiting gay clubs and taking part in their social activities as of 2004. The State party therefore concludes that on a personal level, the author was not in a state of denial about his bisexuality, either in Afghanistan or in Sweden. Accordingly, the author's reasons for not informing the migration authorities about his bisexuality at an earlier point in the process because of stigma, feelings of shame or fear of reprisal from other Afghans in Sweden are called into question. The State party further adds that Sweden is a country where there is generally an awareness and tolerance for individuals' rights related to their sexual orientation. The fact that the author started to live openly as a bisexual in Sweden as early as 2004 and to socialize with like-minded people indicates that he was well aware of this situation. For this reason, it is difficult to understand why he waited nearly six years before invoking his sexual orientation as a ground for seeking asylum, and even more so, when taking into account the fact that he came to Sweden with the specific aim of seeking protection. The author was represented by legal counsel throughout the domestic proceedings, which calls into question his claim that he had not been informed that sexual orientation could be a valid claim for refugee status in Sweden. Although a certain delay could be accepted with regard to matters of sexual orientation, the State party finds the six-year period to be unreasonably protracted.

5.25 The State party also points to inconsistencies in the author's statements regarding his bisexuality. A document submitted by the RFSL stated that it was difficult for the author to keep his contacts with men secret and that those around him eventually started to become aware of his bisexuality and harassed him, whereas in all the other submissions by the author regarding his alleged bisexuality he stated that he did not tell anyone about his sexual orientation and people were unaware of this. Moreover, the author stated that he was active in the communist party and that he worked for its security services for three years. He stated that it was during this period that he wrote and produced plays that ridiculed the mujahideen. When he submitted his claim concerning his bisexuality, he maintained but modified his previous claims to bring them in line with his previous statements. Thus, he stated that representatives of the mujahideen were present when the play about bisexuality was performed and that they threatened and abused him because of its content. The State party finds it unlikely that representatives of the mujahideen would have been allowed access to a play, regardless of its theme, which was a production within the secret service of the communist party and while it was still in power in Afghanistan. Consequently, the credibility of this claim is challenged. In view of the above, there are reasons to question the author's statements and claims relating to the alleged risk that he would be killed and/or subjected to torture or other ill-treatment upon return to Afghanistan because of his sexual orientation.

5.26 The State party also recalls that, according to the author, the incident of arrest and torture occurred in 1993, but he stayed in Afghanistan until 2002 without being arrested and tortured again. The State party also draws the Committee's attention to the fact that there is nothing in the author's counsel submission of 31 March 2010 indicating that the author has been subjected to any threats, harassment or treatment prohibited under articles 6 and 7 of the Covenant since his return to Afghanistan. According to that submission, the author travels between Afghanistan and Pakistan.

5.27 In conclusion, the State party submits that the communication should be declared inadmissible under article 5, paragraph 2 (b), of the Optional Protocol for failure to exhaust all domestic remedies; and under article 2 of the Optional Protocol for failure to substantiate, for purposes of admissibility, his claims since the documentation and the

circumstances invoked by the author do not suffice to show that there were substantial grounds for believing that he ran a real and personal risk of being subjected to treatment contrary to articles 6 and 7 when returned to Afghanistan. Concerning the merits, the State party contends that the present communication reveals no violation of the Covenant.

Author's comments on the State party's observations

6.1 On 4 May 2011, the author's counsel acknowledged the fact that the author did not appeal the Migration Court's decision of 26 November 2008 to the Migration Court of Appeal. She explained that the Migration Court of Appeal was the last instance in asylum cases and a leave to appeal was required for the Court to rule on a case. She further claimed that leave to appeal was granted in about 1 to 2 per cent of cases, and therefore the domestic remedies were practically exhausted once the Migration Court had rendered its decision on 16 May 2005. The author's counsel also submitted that a request for re-examination under chapter 12, section 19, of the 2005 Aliens Act could be submitted without a time limit and as many times as wanted following a final rejection in an asylum case and before the expulsion of the asylum-seeker to his or her country of origin. The legal remedy under the respective chapter could therefore never be totally exhausted, since the possibility of recourse to this remedy always existed for an asylum-seeker at risk of expulsion.

6.2 The counsel stated that due consideration should be given to the position of UNCHR that LGBT individuals may be at risk on account of their membership of a particular social group, and maintained that the country information presented supported the author's claims. The counsel also informed that there had been no contact with the author in Afghanistan since 31 March 2010.

State party's further observations

7. By letter of 5 July 2011, the State party emphasized that it fully maintains its position regarding the admissibility and merits of the present communication, as expressed in its observations of 25 February 2011.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

8.3 Regarding the State party's contention under article 5, paragraph 2 (b), of the Optional Protocol with regard to exhausting domestic remedies, the Committee notes its argument that the author did not file an appeal to the Migration Court of Appeal against the Migration Court's decision of 26 November 2008, by which his application for a re-examination of his case based on his sexual orientation claim was rejected. The Committee also takes note of the author's arguments that the respective remedy was not considered effective in light of the imminent deportation he faced and the fact that the Migration Court of Appeal would have probably rejected his request for a stay of enforcement and not granted him leave to appeal in view of its strict interpretation of the "valid excuse" requirement. The State party has refuted these arguments, stating that the Migration Court of Appeal had the power to decide both on the relevant interim measures request and on granting a re-examination of the author's case, and therefore the author failed to

demonstrate that the available remedy, in the form of an appeal to the respective court, was not effective or was objectively futile. Furthermore, since the only decision of the Migration Court of Appeal on the notion of “valid excuse” did not concern the author’s sexual orientation, he could not have been certain about the manner in which the Court of Appeal would have dealt with his appeal, especially noting the position of the Court that a case-by-case assessment is required for the interpretation of the concept of “valid excuse”.

8.4 The Committee recalls, in this context, its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies may be effective in the given case and are de facto available to the author.⁵ Although the Committee is satisfied that the remedy, in the form of an appeal to the Migration Court of Appeal would have been an effective remedy within the meaning of article 5, paragraph 2 (b), of the Optional Protocol, it observes that the author’s deportation to Afghanistan was enforced shortly after the 26 November 2008 decision of the Migration Court was notified to the author, thus de facto depriving him of the right to file the respective appeal to the Migration Court of Appeal within three weeks of the date on which the decision of the Migration Court was issued, as provided under chapter 16, section 10, of the 2005 Aliens Act. The Committee considers that, when further domestic remedies are available to asylum-seekers who risk deportation to a third country, they must be allowed a reasonable length of time to pursue the remaining remedies before the deportation measure is enforced; otherwise, such remedies become materially unavailable, ineffective and futile. Under such circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

8.5 In the Committee’s view, the author has sufficiently substantiated, for purposes of admissibility, the claims under articles 6 and 7 of the Covenant. The other admissibility requirements having been met, the Committee considers the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author’s claim that his forcible return to Afghanistan would expose him to a risk of torture and other cruel, inhuman or degrading treatment or punishment, as well as threats to his life due to his sexual orientation. It recalls that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by virtue of their extradition, expulsion or *refoulement*.⁶ The Committee further notes the State party’s argument that the author’s asylum application was duly considered by the migration authorities which did not find that the situation of homosexual or bisexual persons in Afghanistan was such that in itself warranted international protection, and that the author had not established that he risked being subjected to persecution if he were to return to Afghanistan (see para. 5.13

⁵ See, for example, communications No. 1959/2010, *Wasame v. Canada*, Views adopted on 21 July 2011, para. 7.4; No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5.

⁶ See the Committee’s general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 9, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A; and communications No. 1494/2006, *A.C. v. the Netherlands*, decision of inadmissibility adopted on 22 July 2008, para. 8.2; No. 1234/2003, *P.K. v. Canada*, decision of inadmissibility adopted on 20 March 2007, para. 7.2.

above). In this context, the Committee recalls that it is generally for the instances of States parties to the Covenant to review or evaluate facts and evidence in order to determine the existence of such danger.

9.3 However, in the present communication, the Committee observes that the material before it shows that the State party's migration authorities rejected the author's application, not on the ground of the author's unchallenged sexual orientation and its impact on the author in the particular circumstances in Afghanistan, but rather on the ground that the sexual orientation claim had been invoked at a late stage in the asylum process which, in the view of the State party, substantially undermined his credibility, notwithstanding the reasons given by the author for the late disclosure of his claim – namely stigma associated with bisexuality and homosexuality, feelings of shame, fear of reprisal, as well as lack of knowledge that sexual orientation would be a valid claim for refugee status and asylum – and considered that he failed to meet the standard of "valid excuse" within the meaning of chapter 12, section 19, of the 2005 Aliens Act.

9.4 The State party found that the author would not face any risk of torture if returned to his country of origin, even though the State party itself referred to international reports according to which homosexual activities in Afghanistan are punishable as *Hudood* crimes by a maximum sentence of death. The Committee observes that in the assessment of the author's risk of being subjected to treatment contrary to articles 6 and 7 of the Covenant upon return to Afghanistan the State party's authorities focused mainly on inconsistencies in the author's account of specific supporting facts and the low credibility derived from the late submission of the sexual orientation claim. The Committee is of the view that insufficient weight was given to the author's allegations on the real risk he might face in Afghanistan in view of his sexual orientation. Accordingly, the Committee considers that, in the circumstances, the author's deportation to Afghanistan constitutes a violation of articles 6 and 7 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the State party has violated the author's rights under articles 6 and 7 of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including taking all appropriate measures to facilitate the author's return to Sweden, if he so wishes. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a State 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 or not 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, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the Committee's Views and to have them translated in the official language of the State party and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Appendix

Individual opinion by Committee member, Mr. Rafael Rivas Posada

The Human Rights Committee, in paragraph 10 of its decision on the case *X. v. Sweden*, concluded “that the State party has violated the author’s rights under articles 6 and 7 of the International Covenant on Civil and Political Rights”. In paragraph 9.4, the Committee justifies its conclusion on the grounds of “the real risk he might face in Afghanistan in view of his sexual orientation”. In other words, the mere risk or possibility that the author might lose his life in the country to which he is to be deported is sufficient reason to consider that there has been a direct violation of article 6 of the Covenant.

I believe that in this, as in other similar cases, the Committee is erroneously applying article 6 of the Covenant which, while it enshrines the right to life, quite clearly states that “No one shall be arbitrarily deprived of his life”. By taking the view that in this case the author runs the risk of losing his life in Afghanistan in view of his sexual orientation – a risk which the State party did not consider and in respect of which it did not request the usual diplomatic assurances–, and that the risk is sufficient to decide that there has been a violation of article 6, the Committee seems to have altered the wording of article 6 to interpret it as if it stated that “No one shall be *subjected to the risk of being* arbitrarily deprived of his life”. However, this is not what article 6 says. Its meaning is unequivocal and not tainted by ambiguity. Only the “deprivation of life” gives grounds for its application, and the mere *risk* of being deprived of one’s life, however strong the likelihood, may not justify the conclusion that there has been a direct violation of the article.

Because in this case there is no doubt that there has been a violation of article 7, which, in accordance with the Committee’s jurisprudence, occurs not only when the cruel, inhuman or degrading treatment or punishment is of a physical nature, but also when it is psychological, the correct wording of the views should have been that “in this case, there has been a violation of article 7, taken in conjunction with article 6.” The reference to article 6 is justified because the risk to which the author might be subjected includes the possibility of being sentenced to death.

I agree with all the other elements of the Committee’s Views.

(Signed) Rafael Rivas Posada

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee’s annual report to the General Assembly.]