

**International Covenant on  
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**Human Rights Committee****Communication No. 2126/2011****Views adopted by the Committee at its 112th session  
(7–31 October 2014)**

<i>Submitted by:</i>	Kesmatulla Khakdar, (represented by counsel, Ms. Tsytlina and Mr. Golubok)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Russian Federation
<i>Date of communication:</i>	7 December 2011 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 22 December 2011 (not issued in document form)
<i>Date of adoption of decision:</i>	17 October 2014
<i>Subject matter:</i>	Potential deportation of the author to Afghanistan after withdrawal of asylum
<i>Procedural issues:</i>	Non-exhaustion; abuse of the right to submission
<i>Substantive issues:</i>	Torture; right to protection from unlawful interference with privacy and family
<i>Articles of the Covenant:</i>	7; 17
<i>Articles of the Optional Protocol:</i>	2; 3; 5, paragraph 2 (b)

\* Reissued for technical reasons on 15 December 2014.



## 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 (112th session)**

concerning

#### **Communication No. 2126/2011\*\***

*Submitted by:* Kesmatulla Khakdar, (represented by counsel, Ms. Tsytlina and Mr. Golubok)

*Alleged victims:* The author

*State party:* Russian Federation

*Date of communication:* 7 December 2011 (initial submission)

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

*Meeting on* 17 October 2014,

*Having concluded* its consideration of communication No. 2126/2011, submitted to the Human Rights Committee by Kesmatulla Khakdar 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 pursuant to article 5, paragraph 4 of the Optional Protocol**

1.1 The author of the communication is Kesmatulla Khakdar, born in 1962, an Afghan national and formerly a refugee in the Russian Federation. In 2009 the Federal Migration Service withdrew his refugee status and at the time of submission he was under threat of expulsion to Afghanistan. He submits that, if the Russian Federation proceeds with his forcible return to Afghanistan, it would constitute a violation of his rights under articles 7

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\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Christine Chanet, Ahmed Amin Fathalla, Yuji Iwasawa, Cornelis Flinterman, Zonke Zanele Majodina, Gerald Neuman, Victor Manuel Rodríguez-Rescia, Margo Waterval, Konstantine Vardzelashvili, Yuval Shany, Fabián Omar Salvioli, Anja Seibert-Fohr, Andrei Paul Zlatescu, Nigel Rodley and Dheerujlall Seetulsingh.  
The text of a joint opinion by Committee members Ms. Chanet, Mr. Shany and Mr. Vardzelashvili (dissenting) is appended to the present Views.  
The text of an individual opinion by Committee member Mr. Iwasawa (dissenting) is appended to the present Views.

and 17 of the International Covenant on Civil and Political Rights.<sup>1</sup> The author is represented by counsel, Ms. Tsytlina and Mr. Golubok.

1.2 On 22 December 2011, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to expel the author to Afghanistan pending consideration of his communication.

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

2.1 The author submits that, from 1981 to 1985, he served in the pro-Soviet Afghan army fighting the mujahideen and was a member of the then ruling People's Democratic Party of Afghanistan, which was supported by the Soviet Union. He subsequently left Afghanistan, on an unspecified date, to start university studies in the Soviet Union. In 1990 he married a Russian national, Valentina Smolyar, and on 12 December 1993 she gave birth to their daughter Leyla, also a Russian national. From 1991 to 1997 the author studied journalism at Saint Petersburg State University and from 1997 to 2002 he was enrolled in post-graduate studies in international relations at the same university. During that period he resided in the country on a student visa.

2.2 On 28 January 2003, the Vasilyevskiy Island District Court of St. Petersburg found the author guilty of violating the registration rules for foreigners, sentenced him to a fine and ordered him to leave the country within one month. The author lodged an appeal with the City Court, which on 19 February 2003 partially rejected his appeal, but removed from the first instance decision the requirement to leave the country within a month. The author paid the fine and remained in the country.

2.3 On an unspecified date, the author requested asylum in the Russian Federation. The St. Petersburg Directorate of the Federal Migration Service rejected his request and he appealed to the Kuybushevskiy District Court, which on 25 May 2006 ruled in his favour. Subsequent appeals by the Federal Migration Service failed and in 2006 he was granted temporary asylum.

2.4 Despite the court judgement being still in force, in October 2009 the Federal Migration Service withdrew his temporary asylum status. The author appealed to the Dzerzhinskiy District Court, claiming that he would be at risk of persecution owing to his army and political background and citing his established family ties in the country. His appeal was rejected on 1 April 2010. His subsequent cassation appeal to the City Court and an application for a supervisory review to the Supreme Court were also rejected, on 9 December 2010 and on 14 March 2011 respectively. The author continued to reside with his family in St. Petersburg, but he has no valid residence permit and is liable to deportation at any time.

### **The complaint**

3.1 The author submits that, if he were returned to Afghanistan, he would be exposed to treatment prohibited under article 7 of the Covenant. He maintains that, if returned to Afghanistan, being a former combatant of the pro-Soviet regime who fought against the mujahideen, he would be at serious risk of a vigilante attack by the Taliban fighters, who hate everyone connected to the former regime. The fact that he has spent more than 20 years in the Russian Federation, seen as being inhabited by infidels and supporting the NATO operation in Afghanistan, would increase the risk to his life. The author refers to the Committee's jurisprudence to the effect that the right enshrined in article 7 of the Covenant

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<sup>1</sup> The Optional Protocol entered into force for the Russian Federation on 1 October 1991.

requires the States parties to “take steps of due diligence to avoid a threat” of torture emanating from third parties such as illegal armed groups and other non-State actors.<sup>2</sup> He maintains that he faces a real risk of ill-treatment by such actors if returned to Afghanistan because of the overall climate of violence and destitution in Afghanistan and owing to his individual circumstances. The author makes reference to recent reports of the United Nations Secretary-General<sup>3</sup> and the United Nations Assistance Mission in Afghanistan (UNAMA),<sup>4</sup> which cite high numbers of security incidents and numerous targeted killings as one of the tools in a widespread and systematic campaign of intimidation against civilians by the anti-government elements.

3.2 He also submits that, having spent 20 years outside the country, he has no relatives or any other connections left in Afghanistan, with a total absence of a support network, and will be exposed to attacks. He maintains that the area from which he originated, Paktya province in the eastern part of Afghanistan near the Pakistani border, has been reported as being increasingly outside of the reach of the central government and in the hands of the Taliban.<sup>5</sup> The author further refers to the jurisprudence of the European Court of Human Rights, which in similar cases had ruled that the situation of general violence in the country of destination led it to the conclusion that any returnee to that country would be at risk of ill-treatment.<sup>6</sup> He also refers to the Court’s jurisprudence to the effect that the situation when an asylum seeker is forced to live in the street with no resources or access to sanitary facilities and without any means of providing for his essential needs is incompatible with article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>7</sup> The author notes that the Russian courts based their decisions on the conclusion that the author had left Afghanistan for the Soviet Union not because of fear of persecution, but to study. While that might have been true in 1987, with the violent fall of the Najibullah regime in 1992 and the rise of fundamentalist Islamists to power, he maintains that he has become a refugee *sur place* as it is no longer possible for him to return to his homeland.

3.3 The author further submits that, if he were returned to Afghanistan, his family life would be destroyed and annihilated, since his daughter and spouse would not be able to go with him, as the situation of general violence there amounts to a violation of article 7 of the Covenant. Moreover, they would be specifically targeted as non-Muslim women who do not speak the language and do not know the local customs, including religious customs. The author therefore submits that if he were deported to Afghanistan his rights under article 17 of the Covenant would be violated.

#### **The State party’s observations on admissibility**

4.1 On 16 April 2012, the State party submits that the author had arrived in the territory of the Union of Soviet Socialist Republics (Soviet Union) in 1987 under an international agreement to study in a medical academy. Between 1989 and 1997 he studied in the

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<sup>2</sup> The author refers to communication No. 1051/2002, *Ahani v. Canada*, Views of 29 March 2004, para. 10.7.

<sup>3</sup> The author refers to the report of the Secretary-General on the situation in Afghanistan and its implications for international peace and security (A/66/369–S/2011/590), para. 51.

<sup>4</sup> The author refers to the UNAMA Afghanistan Midyear report on Protection of Civilians in Armed Conflict (Kabul, July 2011) p. 19.

<sup>5</sup> The author refers to the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (2007), p. 62.

<sup>6</sup> The author refers to the judgment of the European Court of Human Rights in *Sufi and Elmi v. the United Kingdom*, Applications No. 8319/07 and 11449/07, judgment of 28 June 2011, para. 293.

<sup>7</sup> The author refers to the judgment of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, judgment of 21 January 2011, para. 263.

journalism faculty of the state university of Saint Petersburg. In 1991 he visited relatives in Afghanistan for two weeks. Between September 1998 and March 2001 he was enrolled in post-graduate studies at the Saint Petersburg state university and had a temporary residence registration in Saint Petersburg. After he finished his studies his residence permit was extended until 10 January 2002. However he remained on the territory of the Russian Federation after his permit expired and on 28 January 2003 the Vasilyevskiy Island District Court of St. Petersburg convicted him of an administrative offence under article 18.8 of the Code of Administrative Violations and sentenced him to a fine and administrative expulsion by 23 February 2003. On 30 January 2003, he was issued with an exit visa for Afghanistan, but did not leave the territory of the Russian Federation.

4.2 On 5 February 2003 and 16 June 2003, the author filed requests for temporary protection with the Migration Departments of the St. Petersburg and Leningrad Region Internal Affairs Departments. Under section 7.1.3 of Federal Law No. 115-FZ on the Legal Position of Foreign Citizens in the Russian Federation,<sup>8</sup> the fact that he had been convicted of an administrative offence was an obstacle to granting him a temporary residence permit for a period of five years. However, the Kuybushevskiy District Court, on 23 October 2006, declared that the decision of the Migration Service was illegal and granted the author temporary asylum, which was extended by one year on two occasions, on 29 October 2007 and on 23 October 2008 respectively.

4.3 The Kuybushevskiy District Court issued its decision on humanitarian grounds, in accordance with article 8, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 9 of the Convention on the Rights of the Child. The Court granted the author entitlement to enjoy his rights, including the right to family life. After being granted temporary asylum, the author had the opportunity, in accordance with article 6, paragraphs 3.4 and 3.62, of Federal Law No. 115, to apply for a temporary residence permit, outside of the Government-approved quota, as he was married to a citizen of the Russian Federation, who had living premises in the Kirovsky Region, and they had a minor child to support. According to article 7, paragraph 1.3, of Federal Law No. 115, a temporary residence permit may not be issued to a foreigner subject to administrative expulsion for a period of five years. That period expired for the author on 28 January 2008 and therefore as of 29 January 2008 he was entitled to file an application for a temporary residence permit to the Migration Department of the Kirovsky Region. However he failed to do so. He had explained to the Court that he did not intend to live in the Kirovsky Region for economic reasons and that he would like to live and work in St. Petersburg.

4.4 On 28 September 2009, the author filed an application for extension of his temporary asylum, but his application was rejected. He appealed the decision of the Federal Migration Service before the Dzerzhinsky District Court of St. Petersburg. Article 2.2 of the Law on refugees stipulates that the Law does not protect individuals who left their countries of origin for economic reasons. On the basis of that provision the Dzerzhinsky District Court rejected the author's appeal on 1 October 2010. Currently the author has the option to use his "personal, family rights", after a short voluntary exit from the Russian Federation and preparing "primary migration paperwork". After obtaining a temporary residence permit he will also be entitled to apply for citizenship through a simplified procedure.

4.5 The State party maintains that at the time of its submission there is no risk for the author of being forcibly expelled. According to article 31.9 of the Code of Administrative

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<sup>8</sup> Federal Law No. 115-FZ, on the Legal Position of Foreign Citizens in the Russian Federation, 25 July 2002, available from [www.legislationline.org/documents/action/popup/id/4355](http://www.legislationline.org/documents/action/popup/id/4355).

Violations, an order for the imposition of an administrative punishment may not be implemented if it has not been implemented for two years after its entry into force. There is no decision regarding the deportation of the author to Afghanistan. The State party thus maintains that there has been no violation of the rights of the author on the territory of the Russian Federation.

4.6 The State party submits that the allegations of the author that there is a decision of the authorities of the Russian Federation to deport him and that he has exhausted all available domestic remedies as required under articles 2 and 5, paragraph 2 (b), of the Optional Protocol are unfounded and unreliable. The State party maintains that the communication should be declared inadmissible, inter alia for abuse of the right of submission.

#### **Author's comments on admissibility**

5.1 On 10 June 2012, the author submitted that the State party does not suggest any effective domestic remedies that should have been exhausted by the author and does not refer to any other valid inadmissibility grounds under articles 2 and 5 of the Optional Protocol.

5.2 Regarding the facts of the case, the author notes that the decision of the Kuybushevskiy District Court quashing the Migration Service's decision not to grant him temporary asylum, which referred to international human rights treaties, later became "inoperative" because of the subsequent refusal of the Migration Service to extend the author's temporary asylum.

5.3 The author agrees that he could not be expelled on the basis of the 28 January 2003 decision of the Vasilyevskiy Island District Court. However, the gist of his complaint is that, as he has no formal right to stay in the Russian Federation, he could be deported at any time pursuant to section 31 of Federal Law No. 115<sup>9</sup> in conjunction with section 13 of the

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<sup>9</sup> The article reads: "Article 31. Consequences of Non-Observation by a Foreign Citizen of the Term of Stay or of Residence in the Russian Federation.

1. If the term of the residence or of a temporary stay of a foreign citizen in the Russian Federation is reduced, this foreign citizen is obliged to leave the Russian Federation within three days.

2. If a permit for a temporary residence or a residence permit issued to a foreign citizen is cancelled, this foreign citizen is obliged to leave the Russian Federation within 15 days.

3. A foreign citizen who has failed to discharge the duty stipulated in Items 1 and 2 of the present Article is subject to deportation.

4. The deportation of foreign citizens in the cases envisaged in the present Article, shall be carried out by the federal executive power body, controlling the matters of internal affairs, or by its territorial subdivision.

5. The deportation shall be effected at the expense of the funds of the deported foreign citizen, and if such funds are absent or if the foreign worker was taken on for a job with a violation of the procedure for the invitation and the use of foreign workers established in this Federal Law – at the expense of the funds of the body which has invited him, or of the diplomatic representation or of the consular institution of the foreign State of which the deported foreign citizen is a national, or of the international organization or of its representation or of the natural person or the legal entity mentioned in Article 16 of the present Federal Law. *Federal Law No. 122-FZ of August 22, 2004 reworded Item 6 of Article 31 of this Federal Law. The new wording shall enter into force as of January 1, 2005.*

6. If it is impossible to identify the inviting party, the outlays on the deportation arrangements shall be expense commitments of the Russian Federation. The procedure for spending the funds allocated for the said purpose shall be determined by the Government of the Russian Federation.

Law on refugees”.<sup>10</sup> Such a decision may be taken by Migration Service officials at any time and the only reason that that had not been done was the Committee’s request for interim measures . The author further maintains that there is no procedure for the judicial review of a deportation decision that would automatically suspend the deportation. If deported he would be prevented from visiting the Russian Federation and seeing his family for at least five years. Additionally, since he has no status in the Russian Federation, he cannot work legally, nor is he entitled to medical or social insurance or support or to move around. The author’s status has remained unchanged since his submission to the Committee.

5.4 The author is concerned at the State party’s suggestion that he leave the country and re-enter in order to regularize his stay. There is no guarantee that if he leaves he would be allowed to re-enter the country. He has no documents with which to leave the country

7. The federal executive power body controlling the matters of internal affairs or its territorial subdivision shall forward information on the deportation of a foreign citizen to the federal executive power body controlling the matters of foreign affairs.

8. The federal executive power body controlling the matters of foreign affairs shall inform the diplomatic representation or the consular institution of the foreign State in the Russian Federation, whose national the deported foreign citizen is, on the deportation of the foreign citizen.

9. Foreign citizens subject to deportation shall be kept by court decision in the specially allocated premises of the internal affairs bodies, or in the special institutions established in accordance with the procedure laid down by the law of the subject of the Russian Federation, until the execution of the decision on the deportation.” Available from [www.legislationline.org/documents/action/popup/id/4355](http://www.legislationline.org/documents/action/popup/id/4355).

<sup>10</sup> The article reads:

“Article 13. Expulsion (deportation) of persons from the territory of the Russian Federation

1. A person receiving a notice dismissing their application on its merits or refusal of refugee status or notice of loss of refugee status or deprivation of refugee status who does not exercise their right to appeal the decision and refuses to leave voluntarily, shall be expelled (deported), together with their accompanying family members from the territory of the Russian Federation in accordance with the present Federal Law, other federal laws and other normative legal acts of the Russian Federation and the international treaties to which the Russian Federation is a party.

2. The person who appeals a decision dismissing their application on its merits or the refusal of refugee status or a decision on the loss of refugee status or deprivation of refugee status and receives notice that their appeal has been rejected, and has no other legal grounds to stay in the territory of the Russian Federation and refuses to voluntarily depart, shall be expelled (deported), together with their accompanying family members, from the territory of the Russian Federation in accordance with the present Federal Law, other federal laws and other normative legal acts of the Russian Federation and the international treaties to which the Russian Federation is a party.

3. A person deprived of the status of refugee or asylum in connection with their conviction for a crime committed in the territory of the Russian Federation shall be subject to expulsion (deportation) from the territory of the Russian Federation after serving their sentence, unless other rules are provided by international treaties to which the Russian Federation is a party.

4. A person who has lost temporary asylum or has been deprived of temporary asylum due to the circumstances provided for in paragraph 5 and paragraph 6, subparagraph 2 of Article 12 of this Federal Law, has no other legal grounds to stay in the territory of the Russian Federation and refuses to leave voluntarily, shall be expelled (deported) from the territory the Russian Federation in accordance with the present Federal Law, other federal laws and other normative legal acts of the Russian Federation and the international treaties to which the Russian Federation is a party.

5. Expulsion (deportation) of persons from the territory of the Russian Federation is carried out by the federal executive body authorized to exercise the functions of control and supervision in the field of migration and its regional authorities, in cooperation with the federal executive body for internal affairs and its territorial bodies.” Available from <http://refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=527246344&skip=0&coi=RUS&querysi=Law &refugees&searchin=title&sort=date>.

legally. The author finds it surprising that the authorities are suggesting a way to circumvent their own migration regulations, without any explanation as to why, if the State party accepts that he has genuine family ties in the country, relevant documents cannot be issued to him while in the Russian Federation.<sup>11</sup>

5.5 The author maintains that he has done nothing to abuse his right to submit an individual communication and notes that the State party does not make any reference to the Committee's case law to support that contention. According to the prevailing Russian legal doctrine, which is based on article 10 of the Russian Civil Code, abuse of right is an exercise of a right with the sole intent to damage the "lawful interests" of the other party. The author maintains that, even under that doctrine, a complaint to an adjudicative body cannot be considered an abuse of right when it is not made with the intent to damage the "lawful interests" of other parties. He maintains that he submitted his communication to the Committee in order to seek international protection of his human rights.

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

6.1 On 17 August 2012, the State party reiterated its previous submission on the admissibility of the communication (see paras. 4.1–4.6).

6.2 The State party further submits that the author has not filed any further appeals, such as an appeal to the Supreme Court of the Russian Federation. According to article 126 of the Constitution of the Russian Federation, article 19 of the Federal Constitutional Law on the Judicial System and article 9 of the Federal Constitutional Law on the Courts of General Jurisdiction, the Supreme Court is the highest judicial authority on administrative cases. The State party further maintains that the author repeatedly failed to use the opportunity to legalize his stay in the territory of the Russian Federation. The State party submits that the allegations of the author that there is a decision of the authorities of the Russian Federation to deport him and that he has exhausted all available domestic remedies in accordance with articles 2 and 5, paragraph 2 (b), of the Optional Protocol are unfounded and unreliable. The State party maintains that the communication should be declared inadmissible, *inter alia* for abuse of the right of submission.

#### **Author's further comments on admissibility**

7.1 On 19 October 2012, the author notes that the State party's observations are essentially identical to its observations submitted on 16 April 2012 and refers to his own submission of 10 June 2012.

7.2 The author further submits that a request for a supervisory review, as proposed by the State party, does not constitute an effective domestic remedy to be pursued by the author.<sup>12</sup> He further submits that, meanwhile, after the Committee's interim measures request, the author had once again been refused temporary asylum in the Russian Federation.<sup>13</sup> He therefore maintains that he is at imminent and real risk of deportation. If deported the author will not be able to re-enter the Russian Federation (section 26 of the "Exit from Russian and Entry into Russia Act") and will be separated from his family for many years.

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<sup>11</sup> The author refers to the judgment of the European Court of Human Rights in *Kiyutin v. Russia*, judgment of 10 March 2011, Application no. 2700/10, para. 69.

<sup>12</sup> The author refers in particular to the Committee's Views in communication No. 1866/2009, *Chebotareva v. Russian Federation*, Views adopted on 26 March 2012.

<sup>13</sup> The author submits a copy of a letter from the Russian Federal Migration Service for St. Petersburg and Leningrad Region, dated 11 October 2012.

**Further submission by the author**

8. On 13 July 2013, the author submits that he still has no papers and “has no valid legal grounds” for remaining in the Russian Federation and therefore, under the domestic legislation on the status of foreigners, may be deported at any time on the basis of an administrative decision of the Federal Migration Service. He reiterates that his latest request for temporary asylum, submitted after his communication to the Committee, has been rejected. He further submits that his appeals of that decision have also failed and provides copies of the relevant court decisions.<sup>14</sup>

**Further submission by the State party**

9. On 18 October 2013, the State party confirms that the author’s appeal against the decision to refuse his application for temporary asylum had been reviewed and rejected by the Dzerzhinskiy District Court in a judgment of 23 January 2013 and that the St. Petersburg City Court rejected the appeal against that judgement on 15 May 2013. It further submits that the Supreme Court has not reviewed a cassation appeal against the Dzerzhinskiy District Court judgment. The State party submits that, on the basis of the court decisions, it appears that in his application and appeals the author had put forward the same arguments as in 2009, namely that the first instance court had agreed with the decision of the Federal Migration Service and had not found any grounds to declare it illegal. Accordingly at the time of the State party’s submission there were no grounds to grant temporary asylum to the author on the territory of the Russian Federation.

**Issues and proceedings before the Committee***Consideration of admissibility*

10.1 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.

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

10.3 The Committee notes the State party’s submission that there was no decision regarding the deportation of the author to Afghanistan and that therefore the communication should be declared inadmissible under article 2 of the Optional Protocol. That submission raises the issue of whether the author of the communication can be regarded as a “victim” for the purposes of articles 1 and 2 of the Optional Protocol. In that regard the Committee takes note of the author’s explanation that, on the basis of Federal Law No. 115 in conjunction with section 13 of the Law on refugees the officials of the Migration Service could at any time take a decision to deport him and that the only reason that that had not been done was the Committee’s request for interim measures. The author also submits that there is no procedure for the judicial review of such a deportation decision that would suspend the deportation. The Committee notes that the State party has not refuted those submissions. The Committee further notes that the author has alleged that if deported to Afghanistan he would be facing a real and personal risk of torture. The Committee observes that the facts as presented raise issues under article 7 of the Covenant

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<sup>14</sup> The author provides a copy of a judgement of the Dzerzhinskiy District Court, dated 23 January 2013; a copy of his appeal of that judgement, from February 2013; and a copy of the appellate ruling of the St. Petersburg City Court rejecting his appeal, dated 15 May 2013.

and finds that it is not precluded from examining the communication by the requirements of article 2 of the Optional Protocol.

10.4 The Committee notes the State party's submission that the author had failed to exhaust the available domestic remedies in that he had failed to request a residence permit on the basis of his marriage to a Russian Federation citizen. The Committee notes that the author has not provided an explanation as to why applying for a residence permit on the ground of being married to a Russian Federation citizen and having a child, who is also a Russian Federation citizen, would not have constituted an effective remedy for the protection of his rights under article 17 of the Covenant. The Committee therefore declares the author's claim under article 17 to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

10.5 The Committee takes note of the State party's argument that the communication should be considered inadmissible on the grounds of abuse of the right to submit communications, owing to the fact that, both during and after the period for which he had been granted temporary asylum, the author had failed to apply for a residence permit on the basis of his marriage to a Russian Federation citizen and of having a child of that marriage to support. The Committee however observes that the essence of the author's communication concerns issues under article 7 of the Covenant if the author were to be deported to Afghanistan, and finds that it is not precluded from examining the communication by the requirements of article 3 of the Optional Protocol.

10.6 The Committee further takes note of the State party's argument that the author had failed to exhaust the available domestic remedies since he had failed to apply for a residence permit on the basis of his marriage to a Russian citizen and that the above legal avenue was still available to him if he left the country voluntarily and submitted "primary migration paperwork" (see para. 4.4 above). The Committee however takes note of the author's explanations that he has no valid documents with which to leave the Russian Federation legally and that there is no guarantee that, if he leaves, he will be allowed to re-enter the country. The Committee observes that, as an undocumented immigrant, if the author leaves the Russian Federation the only possible destination for him would be his home country, Afghanistan. The Committee also observes that the risk of his being subjected to torture would not be assessed by the State party's authorities in the course of application proceedings for a residence permit on the basis of family ties. The Committee therefore concludes that it is not precluded from examining the author's claim under article 7 of the Covenant by the requirements of article 5, paragraph 2(b), of the Optional Protocol.

10.7 The Committee notes the State party's further submission that the author had failed to exhaust the available domestic remedies in that he had not filed any appeals to the Supreme Court of the Russian Federation, which is the highest judicial authority for administrative issues. The Committee however observes that the decision of the Dzerzhinskiy District Court of 1 October 2010, which upheld the refusal to extend the author's temporary asylum, was based on the consideration that the Law on Refugees does not protect individuals such as the author, who in the opinion of the Court had originally left their country for economic reasons. The Committee further observes that the author has raised issues under article 7 of the Covenant and that the State party has not provided an explanation as to whether the suggested appeal to the Supreme Court would result in an assessment of whether the author would be at risk of being subjected to torture were he to be forcibly deported to Afghanistan. The Committee observes that, in the context of article 7 of the Covenant, the principle of exhaustion of domestic remedies requires the author to use remedies that are directly related to assessing the risk of torture in the country to which he would be sent, not those that might allow him to remain where he is. The Committee therefore concludes that it is not precluded from examining the author's claim

under article 7 of the Covenant by the requirements of article 5, paragraph 2 (b), of the Optional Protocol, declares that claim admissible and proceeds to its examination on the merits.

*Consideration of the merits*

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

11.2 The Committee has taken note of the author's submission that, if returned to Afghanistan, being a former combatant of the pro-Soviet regime who fought against the mujahideen, he would be at serious risk of a vigilante attack by the Taliban fighters; that having spent 20 years outside the country he had no connections left there, and would be in a situation of total absence of a support network and exposed to attacks; and that the area from which he originated has been reported to be increasingly outside of the reach of the central government and in the hands of the Taliban.

11.3 The Committee recalls its general comment No. 31, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm.<sup>15</sup> The Committee recalls that it is generally for the judicial authorities of the States parties to the Covenant to assess the facts in such cases, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.<sup>16</sup>

11.4 The Committee notes the author's allegations that, if returned to Afghanistan, being a former combatant of the pro-Soviet regime who fought against the mujahideen, he would be at serious risk of a vigilante attack by the Taliban fighters and that the fact that he has spent more than 20 years in the Russian Federation would increase the risk to his life. The Committee considers that the author's allegations suggest that he is at real and personal risk of being subjected to treatment contrary to article 7 of the Covenant. The Committee observes that the material before it shows that, when the author's claims were considered by the State party's authorities, much weight was given to the fact that the domestic legislation regulating refugee status did not apply to him and that it appears that in the proceedings related to his application for temporary asylum inadequate consideration was given to the specific rights of the author under the Covenant.<sup>17</sup> The Committee observes that the State party in its submissions merely states that he had left his home country for economic reasons and does not assess the current risk of torture for the author should he be returned to Afghanistan. Notwithstanding the deference given to the immigration authorities to assess the evidence before them, the Committee considers that further analysis should be carried out in the present case. In the absence of a submission from the State party demonstrating that a thorough assessment would be conducted of his claims that he might be subjected to torture if forcibly returned to Afghanistan, the Committee considers that a deportation order issued and enforced against the author would constitute a violation of article 7 of the Covenant.

<sup>15</sup> See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States Parties to the Covenant, para. 12.

<sup>16</sup> See general comments No. 6 (1982) on article 6: the right to life; and No. 20 (1992) on article 7: prohibition of torture, or other cruel, inhuman or degrading treatment or punishment; and, for example, communications No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.2; No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010, para. 8.2.

<sup>17</sup> See for example communication No. 1544/2007, *Hamida v. Canada* (see footnote 18), paras. 8.3–8.4 and 8.6.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that a deportation order issued and enforced against the author would violate his rights under article 7 of the Covenant.

13. 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 a full reconsideration of his allegations of the risk of torture, taking into account the State party's obligations under the Covenant. The State party is also under an obligation to avoid exposing others to similar risks of a violation.

14. 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 or not 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 or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy where a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

## Appendices

### Appendix I

[Original: English]

#### **Joint opinion of Committee members Christine Chanet, Yuval Shany and Konstantine Vardzelashvili (dissenting)**

1. We are unable to join the majority on the Committee in finding a violation of article 7 of the Covenant in the circumstances of the case.

2. As it appears from the case file, the courts of the State Party addressed on multiple occasions (on 25 May 2005, 6 September 2010, 9 December 2010, 14 March 2011, 23 January 2013) the author's claim that his life would be at risk if he were deported to Afghanistan and found those claims to be unsubstantiated. As a result, the State party refused to grant the author permanent asylum and in 2009 revoked his temporary asylum status, thus rendering him eligible for future deportation. The State party did not challenge the author's claim that the courts that had reviewed his case failed to consider his refugee sur place argument (i.e., the argument that even though he left Afghanistan for economic reasons, he would nonetheless be placed at risk should he be compelled to return there now). We therefore agree with the substantive holding of the majority that, if the State party were to deport the author now without considering his refugee sur place argument, it would violate the State party's non-refoulement obligations under the Covenant.

3. Still, we question the ripeness of the communication, and believe it should have been declared inadmissible for the following reasons.

4. The State party has maintained in its submissions to the Committee that no decision has actually been made to deport the author. Furthermore, it has acknowledged that, on account of his family relations with Russian citizens, the author is eligible to regularize his legal status in the Russian Federation, and has offered the author the opportunity to apply for a temporary residence permit, which would lead, through a simplified procedure, to his obtaining permanent residence status in the State party. That right was recognized by three different courts – the Supreme Court of the Russian Federation (in its decision of 14 March 2011 following a supervisory appeal), the City Court of St. Petersburg (in its decision of 6 September 2010) and the District Court of St. Petersburg (in its decision of 25 May 2006). It should also be noted that the District Court of St Petersburg specifically held that the Constitution of the Russian Federation, the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) and the Convention on the Rights of the Child all preclude the author's imminent deportation. The District Court therefore granted the author temporary asylum and instructed him to apply for permanent residence in the Russian Federation. To date, the author has not applied for permanent residence, citing the fact that that would entail his relocation from St. Petersburg to Kirovsk (where his wife is registered as a resident).

5. While the specific conditions attached by the State party to applications for temporary or permanent residence – submission of an application in Kirovsk or a short-term exit from the Russian Federation – may inconvenience the author and may even give rise to certain justified concerns on his part, there is nothing in the evidence before us that would suggest that the State party has decided to deport the author in contravention of its non-refoulement obligations under the Covenant. We are therefore unable to agree with the

majority's conclusion that the State party failed to refute the author's claim that he is facing imminent deportation and that "the only reason that that had not been done was the Committee's request for interim measures" (see para. 10.3. of the Views). Rather, we regard the author's claim of a risk of imminent deportation to be unsubstantiated by the information in the case file, which points in its entirety towards the opposite conclusion – namely, that the State party is attempting to find ways to regularize the status of the author in the Russian Federation.

6. Thus, although the author's presence in the Russian Federation is currently precarious, as he has been unwilling or unable to follow the procedures for regularizing his legal status, we are unable to conclude that there is at present a "real risk"<sup>18</sup> that he would be deported to Afghanistan (and be exposed there to irreparable harm). As a result, we are of the view that he does not yet qualify as a "victim" of a violation of article 7 of the Covenant, and that the communication should therefore have been declared inadmissible under article 1 of the Optional Protocol.

7. Should the State party reach a new decision to actually deport the author, such a decision would be governed by the provisions of article 7 and 13 of the Covenant, and the State party would then be required to provide the author with the opportunity to challenge the decision before domestic legal mechanisms, as well before international legal mechanisms, including this Committee.

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<sup>18</sup> See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12.

## Appendix II

[Original: English]

### Individual opinion of Committee member Yuji Iwasawa (dissenting)

1. The author submitted the present communication when no deportation order was in place. It thus raises the issue of whether the author is a “victim” under the Optional Protocol. The author claimed that the Migration Service officials could take the decision to deport him at any time. In response, the State party stresses and reiterates that “at the moment of its submission there is no risk for the author to be forcibly expelled. ... There is no decision regarding the deportation of the author to Afghanistan” (paras. 4.5 & 6.1). Because a decision to deport him to Afghanistan has not been taken, I am of the view that he is not a “victim” of a violation of article 7 of the Covenant and that the communication should have been found inadmissible. The author claims that the only reason a decision to deport him has not been taken is the Committee’s request for interim measures, and that claim appears to form the basis for the Committee’s conclusion that he is a “victim” (see para. 10.3). However, the granting of interim measures by the Committee cannot turn an inadmissible communication into an admissible one. I am unable to agree with the Views of the majority which find the communication admissible and find a violation in a hypothetical form that if a deportation order is issued and enforced against the author it would violate his rights under article 7 of the Covenant.

2. Needless to say, in deporting a person, States parties are obliged to respect the provisions of the Covenant. Therefore, should the State party take a decision to deport the author, it must observe the provisions of the Covenant, including article 7. If the decision contravenes the Covenant, the author is not precluded from submitting a new communication to the Committee with a new request for interim measures.

3. The power of the Committee to make a request for interim measures is to be exercised only if it is urgently required in order to prevent “irreparable damage” to the author’s rights under the Covenant before the Committee has had an opportunity to consider the case and adopt its Views.<sup>19</sup> The Committee must make sure that those requirements are met, all the more so because it takes the view that States parties have an obligation under the Optional Protocol to comply with its request for interim measures.<sup>20</sup> In the present case, the Committee, acting through its Special Rapporteur on new

<sup>19</sup> Rule 92, rules of procedure of the Human Rights Committee; general comment No. 33, on the obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, para. 19; Mandate of the Special Rapporteur on new communications and interim measures: report by the Special Rapporteur (CCPR/C/110/3), para. 10. For decisions of the Committee, see, e.g., communications No. 511/1992, *Länsman v. Finland*, Views adopted on 26 October 1994, para. 6.3 (rejecting a request for interim measures, stating that the application of rule 92 in this case would be “premature”); No. 645/1995, *Bordes and Temeharo v. France*, Views adopted on 22 July 1996, para. 2.3 (rejecting a request for interim measures). See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, *I.C.J. Reports 2009*, pp. 152–53, para. 62 (“the power of the Court to indicate provisional measures will be exercised only if there is urgency”); *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Order of 13 July 2006*, *I.C.J. Reports 2006*, p. 129, para. 62 (“the power of the Court to indicate provisional measures ... is to be exercised only if there is an urgent need to prevent irreparable prejudice”).

<sup>20</sup> General comment No. 33 (see footnote a), para. 19.

communications and interim measures, requested the State party not to expel the author pending consideration of his communication when no deportation order was in place nor was one imminent. It is open to question whether the requirement of urgency for the interim measures was met at that time.

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