



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2471/2014\*, \*\*

<i>Communication submitted by:</i>	Merhdad Mohammad Jamshidian, represented by Elena Jamshidian, his wife (represented by counsel, Mr. Raman Kisliak)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Belarus
<i>Date of communication:</i>	23 October 2014 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 28 October 2014 (not issued in document form)
<i>Date of adoption of Views:</i>	8 November 2017
<i>Subject matters:</i>	Deportation to the Islamic Republic of Iran; death penalty; torture; right to family life; conversion to Christianity
<i>Procedural issues:</i>	Substantiation of claims; exhaustion of domestic remedies
<i>Substantive issues:</i>	Administrative arrest and detention; admissibility — exhaustion of domestic remedies; aliens' rights — expulsion; death penalty; extradition; freedom of religion; family rights; non-refoulement; right to life; torture prevention.
<i>Articles of the Covenant:</i>	6, 7, 9, 14 (1) and (2), 17 (1), 18 and 23
<i>Articles of the Optional Protocol:</i>	1, 2, 3 and 5

1.1 The author of the communication is Merhdad Mohammad Jamshidian, a national of the Islamic Republic of Iran. The communication is submitted by his wife Elena Jamshidian, a national of Belarus. The author claims that Belarus will violate his rights under articles 6,

\* Adopted by the Committee at its 121st session (16 October–10 November 2017).

\*\* The following members of the Committee participated in the examination of the communication: Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Olivier de Frouville, Christof Heyns, Yuji Iwasawa, Ivana Jelić, Marcia V.J. Kran, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Anja Seibert-Fohr, Yuval Shany and Margo Waterval.



7, 9, 17 and 18, read in conjunction with articles 6, 7, 14 (1) and (2) and article 23 of the Covenant, if he is expelled to the Islamic Republic of Iran. The Optional Protocol entered into force for the State party on 30 September 1992. The author is represented by counsel.

1.2 On 27 October 2014, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to grant the author's request for interim measures and requested the State party not to deport him to the Islamic Republic of Iran pending consideration of the communication by the Committee.

1.3 On 9 January 2015, the State party requested the Committee to consider the admissibility of the communication separately from the merits. On 29 July 2016, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, denied the State party's request.

### **Factual background**

2.1 The author arrived in Belarus in 1993 and shortly after that met his future wife, Elena Jamshidian, with whom he had three children (born in 1994, 1997 and 1999). The author resided in Belarus without proper registration until 2005 and was subjected to administrative sanctions in that regard in 1999 and 2002. Between 2005 and 2009, he served a prison sentence in Belarus for fraud. On 21 September 2009, he was expelled to the Islamic Republic of Iran. On 11 February 2011, the author and Elena Jamshidian were married. The author's five-year re-entry ban was reduced following a request by his wife and he returned to Belarus on 6 November 2011. In April 2012, the author went to the Islamic Republic of Iran to visit his sick mother and returned to Belarus in August 2012. In October 2012 his uncle informed him that his mother and brother had gone missing. They were later found killed in the Islamic Republic of Iran.

2.2 On 9 December 2012, the Iranian authorities issued an international arrest warrant against the author for the murder of his mother and brother. On 28 December 2012, he was arrested on the basis of an order issued by the Minsk Prosecutor's Office and placed in pretrial detention facility No. 1 until 9 February 2013. As a result of the Iranian authorities' failure to request his extradition within 40 days, the author was released.

2.3 On 12 February 2013, the citizenship and registration unit of Zavodskoy District, Minsk, issued a deportation order against the author, with a one-year re-entry ban, on the grounds that he posed a threat to public order, morals and health and the rights and freedoms of the citizens of Belarus. He was placed in a temporary detention facility in Minsk pending deportation.

2.4 On 18 February 2013, a request for extradition was submitted by the Iranian authorities and on 5 March 2013 the author was transferred to pretrial detention facility No. 1 in Minsk pending extradition. On 3 May 2013, he was released due to the failure of the Iranian authorities to provide the documents and guarantees requested by Belarus under the extradition procedure.

2.5 On the same day, 3 May 2013, the author was detained by the citizenship and registration unit of the Ministry of Internal Affairs for the purpose of deportation and placed in a temporary detention facility in Minsk. On 10 June 2013, he attempted to commit suicide. He was treated at a psychiatric clinic from 10 to 17 June 2013, before being discharged.

2.6 On 16 August 2013, the author lodged an application for asylum with the Department of Citizenship and Migration in Minsk. His deportation was suspended pending consideration of his application. The author indicated the following reasons for seeking asylum: his conversion to Christianity in 2002, a capital offence in the Islamic Republic of Iran; his family life in Belarus since arriving to the country in 1993; his brother's membership of a political opposition movement in the Islamic Republic of Iran; the fact that he is accused of murdering his mother and brother, a crime which he did not commit and which is punishable by death. He claimed to have been arrested at the airport of Teheran in 2010 and interrogated regarding the whereabouts of his brother and his own activities abroad. He was released because he had served in a missile unit from 1988 to

1990, he had influential connections and he paid a bribe. The author referred to international reports about the widespread use of torture in Iranian prisons, in particular in order to obtain confessions, and the absence of a legal defence institute, which would deprive him of a fair trial.<sup>1</sup>

2.7 On 30 May 2014, the Department of Citizenship and Migration rejected the author's asylum application. It noted that the author had failed to provide sufficient evidence of his conversion to Christianity, that the mere fact that he attended church and lived in a Christian country was not enough to grant protection, that there was no information to suggest that the authorities in the Islamic Republic of Iran knew about his conversion and that he had not reported encountering any problems in that regard when he had returned to the Islamic Republic of Iran in 2010 and 2012. The Department also refused the author subsidiary protection, despite acknowledging that he might face the death penalty upon return to the Islamic Republic of Iran on the basis of the charges against him. Based on the information available to it, the Department concluded that torture was used in Iranian prisons, but only in relation to offences relating to national security and that there was no information about torture applied to suspects in criminal cases. It found, therefore, that prosecution for murder in accordance with Iranian domestic law could not be considered to constitute torture. The Department indicated that asylum and subsidiary protection could not be granted to persons who, on the basis of objective reasons, are suspected of committing a serious criminal offence of a non-political nature prior to entering Belarus. The author was informed about the decision on 10 June 2014 and was placed in detention on the same day pending deportation.

2.8 On 23 June 2014, the author lodged an appeal against the decision of the Department of Citizenship and Migration with the Central District Court in Minsk, which rejected it on 4 August 2014. On 14 August 2014, the author filed a cassation appeal with Minsk City Court. At the moment of submission of the present communication, the case was pending before the Court.

### **The complaint**

3.1 The author claims that the State party would be acting in violation of his rights under articles 6 and 7 of the Covenant if he is expelled to the Islamic Republic of Iran. He claims that, as a murder suspect, he will be detained, tortured in prison and, most probably, sentenced to death without a fair trial.

3.2 The author alleges violation by the State party of his rights under article 9 of the Covenant by reason of the five arrests between 2012 and 2014 for the purposes of extradition and deportation. He claims that the arrests were arbitrary since he was not brought promptly before a judge.

3.3 He also alleges that, if deported to the Islamic Republic of Iran, he will be separated from his family for a long period of time, in violation of articles 17 and 23 of the Covenant.

3.4 In his subsequent submission, the author also claims that his deportation to the Islamic Republic of Iran will be in violation of article 18, read in conjunction with articles 6, 7 and 14 (1) and (2) of the Covenant.

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

4.1 In a note verbale dated 9 January 2015, the State party challenged the admissibility of the communication under articles 1, 2 and 5 of the Optional Protocol. It claims that, although the author was detained, he had the right to correspondence and could have submitted the communication himself, rather than through his wife. The State party also asserts that authorization for the counsel should be signed by the author, not by his wife. The State party considers that his wife, the counsel and Ms. A.K. at the Helsinki

<sup>1</sup> The author referred, among others, to: the United States of America, Department of State, Country reports on human rights practices for 2013: Iran, available at <https://www.state.gov/documents/organization/220564.pdf>; General Assembly resolution 67/182; and Amnesty International, "Annual Report: Iran 2013", available at <https://www.amnestyusa.org/reports/annual-report-iran-2013/>.

Foundation for Human Rights in Poland, as the contact person in Poland indicated in the correspondence address, are acting on behalf of the author without his consent. The State party declares that the Committee breached its own rules concerning confidentiality by addressing the correspondence between the State party and the Committee to the Helsinki Foundation for Human Rights in Poland without the State party's consent.

4.2 The State party submits that, in the case in question, domestic remedies have not been exhausted, without specifying further details.

4.3 The State party refers to rule 92 of the Committee's rules of procedure, according to which the Committee may, prior to forwarding its Views on the communication to the State party concerned, inform that State of its Views as to whether interim measures may be desirable to avoid irreparable damage to the victim of the alleged violation. The State party claimed that it had not received such Views. In the light of the above, the State party decided to cease correspondence on the present communication with the Committee.

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

5.1 On 17 June 2016, the author submitted comments on the State party's observations. The author states that he is free to choose whether to submit his complaint to the Committee himself or through a family member, i.e. his wife. He is also free to choose the address of correspondence. The author attaches an authorization for his wife, dated 21 October 2014, requesting her to present his case before the Committee.

5.2 As to the correspondence address in Poland, the author submits that he can choose where to send correspondence addressed to his counsel. In the present case, Helsinki Foundation for Human Rights in Poland agreed to receive correspondence and transmit it to the counsel to prevent interference by the State party.

5.3 The author points out that the State party does not provide arguments to support its statement that the author failed to exhaust domestic remedies.

5.4 The author further argues that the claim by the State party that it did not receive the Committee's Views on the granting of interim measures constitutes disagreement with the Committee's decision to register the communication. The State party's decision to cease further correspondence in the case in question is in violation of its obligation to cooperate with the Committee in good faith under article 5 of the Optional Protocol. The author concludes his submission by stating that the communication meets all the necessary criteria for admissibility.

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

6.1 In a note verbale dated 19 December 2016, the State party submitted its observations on the merits of the communication. The State party describes the steps taken by the author relating to his asylum proceedings in 2014 and the reasons given for rejecting his application for protection.

6.2 According to the information presented by the State party, the author submitted a second application for asylum to the Department of Citizenship and Migration on 9 July 2015. That application was rejected on 17 May 2016. A subsequent appeal to the Central District Court in Minsk was rejected on 4 July 2016. The author submitted cassation appeals to the Minsk City Court against the two decisions refusing him asylum dated 4 August 2014 and 4 July 2016. His cassation appeals were rejected by Minsk City Court on 27 November 2014 and 15 December 2016, respectively.

6.3 The State party submits that the author has not exercised his right to file a request for supervisory review with the President of Minsk City Court and, should it be rejected, with the President of the Supreme Court and his or her deputies and the Prosecutor General and his or her deputies. The State party informs the Committee that the Supreme Court considered 187 requests for supervisory review filed in 2015 and a further 116 filed in the first six months of 2016.

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

7.1 On 27 January 2017, the author submitted his comments on the State party's observations. He informed the Committee that, on 20 October 2014, he submitted an asylum application to the President of Belarus based on the possibility of persecution on religious grounds following his conversion to Christianity. In November 2014, the author's 17-year-old son was diagnosed with an oncological disease. Because of this, the author was released from detention on humanitarian grounds on 16 January 2015, pending consideration of his asylum application. On 27 February 2015, the presidential commission on citizenship rejected his application.

7.2 On 5 January 2015, the author filed an appeal against the expulsion decision with the Zavodskoy District Court in Minsk. The Court rejected his appeal on 22 April 2015. The author filed a cassation appeal with the Minsk City Court on 22 May 2015. The Court rejected the cassation appeal on an unspecified date.

7.3 On 22 July 2015, the author filed a second asylum application with the Department of Citizenship and Migration, indicating conversion to Christianity as the main ground for seeking international protection.<sup>2</sup> On 17 May 2016, the Department rejected his request. The author appealed to the Central District Court in Minsk. The Court rejected his appeal on 4 June 2016. The author submitted a cassation appeal to the Minsk City Court on 6 July 2016, which was rejected on 15 September 2016.

7.4 On 23 September 2016, the author received notification of the renewal of the expulsion order issued in his regard. He is currently living under the threat of detention and expulsion to the Islamic Republic of Iran.

7.5 The author claims that his son's medical condition entails a high level of parental care and substantial financial costs. Expulsion in these circumstances would violate the right to family life of the author and his wife and son.

7.6 In his submission, the author raises a new claim under article 18 of the Covenant, read alone and in conjunction with articles 6, 7, and 14 (1) and (2). He claims that he converted to Christianity in 2002. He attends church with his family and celebrates Christian festivities. At a hearing before the Central District Court in Minsk on 1 July 2016, a pastor, S.K., testified that, in 2002, he had accepted the author into the Christian faith and now considers him a profound believer in the Christian religion. The author alleges that the Iranian authorities are aware of his conversion, a fact confirmed by statements and letters from the Iranian embassy and by the mass media. Conversion to Christianity is a capital offence in the Islamic Republic of Iran. In case of expulsion, he will face the threat of torture and death without a fair trial.

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

#### *Consideration of admissibility*

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

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

8.3 With regard to the author's claim of a violation of article 9 of the Covenant, the Committee notes that the author has not brought the issue of arbitrary detention before the domestic courts. Accordingly, the Committee declares this part of the communication inadmissible under article 5 (2) (b) of the Optional Protocol.

<sup>2</sup> The State party's submission and that of the author give different dates of submission for the second asylum application. Since neither party submitted a copy of the application, it is impossible to clarify the date.

8.4 The Committee notes the State party's observation that the present communication was registered in violation of the provisions of the Optional Protocol, in particular because it seems that the author did not authorize his wife to submit a complaint on his behalf and because the identity of the contact person indicated for correspondence purposes is unclear. In this regard, the Committee recalls its practice, as reflected in rule 96 (b) of its rules of procedure, that individuals may be represented by a duly authorized person of their choice. A communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally. Implicit in a State's adherence to the Optional Protocol is the undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination thereof, to forward its Views to the State party and the individual (art. 5 (1) and (4)).<sup>3</sup> It is incompatible with those obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication, and in the expression of its Views.<sup>4</sup> It is for the Committee to determine whether a communication should be registered. The Committee observes that, by refusing the right of an individual to be represented, by failing to accept the competence of the Committee to determine whether a communication should be registered and by declaring beforehand that it will not accept the Committee's determination on the admissibility or on the merits of the communication, the State party would be violating its obligations under article 1 of the Optional Protocol.

8.5 The Committee takes note of the author's claim under article 18, read in conjunction with articles 6, 7, and 14 (1) and (2) of the Covenant, that, if expelled to the Islamic Republic of Iran, he would be at risk of torture and execution due to his conversion to Christianity in 2002. In this regard, the Committee notes that the author has not provided supporting documents demonstrating that the Iranian authorities are aware of his conversion. Noting also that, with regard to his previous trips to and extended stay in the Islamic Republic of Iran in 2009 to 2011 and 2012, the author has not reported encountering any problems related to his conversion, the Committee finds this claim to be insufficiently substantiated for the purposes of admissibility under article 2 of the Optional Protocol.

8.6 The Committee notes the author's claim that his family life would be affected were he to be expelled to the Islamic Republic of Iran. From the information before it, the Committee notes that, while he had raised this issue in his initial asylum application to the Department of Citizenship and Migration on 16 August 2013, he did not raise it before the appeal and cassation courts. The Committee considers that the author has not exhausted all available domestic remedies concerning his claim under articles 17 and 23 of the Covenant and finds it inadmissible under article 5 (2) (b) of the Optional Protocol.

8.7 As to the remainder of the communication, the Committee takes note of the State party's argument that the author has not exhausted all the effective domestic remedies, since he has not filed request for supervisory review with the President of Minsk City Court, the President of the Supreme Court and his or her deputies, or the Prosecutor General and his or her deputies. The Committee considers that filing a request for supervisory review with the President of a court with regard to a court decision that has entered into force constitutes an extraordinary remedy, which would depend on the discretionary powers of a judge, and the State party would have to show that there is a reasonable prospect that such a request would result in an effective remedy in the circumstances of the case.<sup>5</sup> The Committee takes note of the statistics provided by the State party on a number of requests filed for supervisory review upheld by the Supreme Court (para 6.3 above). It notes, however, that these statistics do not specify whether and in how many cases the requests for supervisory review filed with the President of the Supreme Court were successful in cases similar to the present one. In such circumstances, the Committee finds that article 5 (2) (b)

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<sup>3</sup> See, mutatis mutandis, communication No. 1929/2010, *Lozenko v. Belarus*, Views adopted on 24 October 2014, para. 5.2.

<sup>4</sup> See, inter alia, communications No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1; and No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 5.2.

<sup>5</sup> See, for example, communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.3.

of the Optional Protocol does not preclude it from considering the remaining claims on the merits.

8.8 The Committee finds that the remaining allegations made by the author, concerning torture in prison and the observance of fair trial guarantees in capital cases, raise substantive issues under articles 6 and 7 of the Covenant and proceeds with its consideration of the merits.

#### *Consideration of the merits*

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

9.2 The Committee notes the author's claim that, as a murder suspect, he risks torture and execution if expelled to the Islamic Republic of Iran. The Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant (para. 12). The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.

9.3 The Committee notes that the State party acknowledged that the Iranian authorities presented sufficient information to support the charges of murder against the author and that they rejected his applications for asylum and for subsidiary protection, partly because he was accused of having committed a grave crime of a non-political nature prior to arriving to Belarus, meaning that international protection cannot be granted under the provisions of domestic law. The Committee notes, however, that, when considering the author's initial asylum application in 2014, the domestic authorities acknowledged that murder was one of a number of offences punishable by the death penalty in the Islamic Republic of Iran, that the defence mechanism is practically non-existent and that torture is used in Iranian prisons only in cases involving national security-related crimes. The domestic authorities did not consider, however, the possibility that the author's case would be regarded in the Islamic Republic of Iran as national security-related, given the interest shown by the authorities in the revolutionary activities of the author's brother, and that the author may, as a result, face the risk of torture.

9.4 The Committee further notes the 2017 report of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, in which the Special Rapporteur mentions the lack of independence of lawyers, in particular in capital cases.<sup>6</sup> In the light of the information casting serious doubts on the independence and quality of legal defence available to criminal defendants and relating to the possible use of torture in capital cases in the Islamic Republic of Iran, the Committee considers that the State party has not taken adequate steps to ensure that the author would not face a real risk of arbitrary execution in the Islamic Republic of Iran. In this light, the Committee concludes that, by expelling the author to the Islamic Republic of Iran, the State party would be in violation of article 6 of the Covenant.

9.5 The Committee notes that article 7 of the Covenant and the principle of non-refoulement arising therefrom are absolute in nature and that no one should be excluded from its protection, even if that person poses a risk to national security. In view of the information before it, in particular the reports referred to by the author, and the recent reports by the United Nations bodies,<sup>7</sup> the Committee finds that there seems to be continued

<sup>6</sup> See A/HRC/34/65, para. 45, in which the Special Rapporteur states that she is concerned that individuals accused of national security, capital, political or press crimes and those accused of offences that incur life sentences are required to select their counsel from an official pool of lawyers chosen by the head of the judiciary during the investigative phase of the trial.

<sup>7</sup> See A/HRC/34/65, para. 26, in which the Special Rapporteur states that, since her appointment, she has received numerous reports about the use of torture and other cruel, inhuman or degrading treatment or punishment. These include amputations, blinding and flogging as forms of punishment,

use of different forms of torture and ill-treatment in detention in the Islamic Republic of Iran, with the principal aim of extracting confessions. The Committee considers that the State party has not taken adequate measures to ensure that the author would not face a real risk of torture in prison if expelled to the Islamic Republic of Iran and subsequently arrested on charges of murder, especially if those charges have a national security dimension. The Committee thus finds that the State party would be in violation of article 7 of the Covenant if it were to expel the author to the Islamic Republic of Iran.

10. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the State party would be in violation of articles 6 and 7 of the Covenant if it were to expel the author to the Islamic Republic of Iran.

11. In accordance with article 2 (1) of the Covenant, which establishes that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, the State party is under an obligation to proceed to a review of the author's claim, taking into account the State party's obligations under the Covenant and the Committee's present Views. The State party is also requested to refrain from expelling the author to the Islamic Republic of Iran while his request for asylum is being reconsidered.<sup>8</sup>

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them translated in the official language of the State party and widely distributed.

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physical and mental torture or ill-treatment to coerce confessions (mostly during pretrial detention), prolonged periods of solitary confinement and denial of access to proper and necessary medical treatment for detainees.

<sup>8</sup> See for example, communication No. 2409/2014, *Abdilaqfir Abubakar Ali et al v. Denmark*, Views adopted on 29 March 2016, para. 9, and communication No. 2379/2014, *Obah Hussein Ahmed v. Denmark*, Views adopted on 7 July 2016, para. 15.