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Agenda item 10

Consideration of communications under the
first Optional Protocol to the Covenant

Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2593/2015* **

<i>Submitted by:</i>	M.Z.B.M. (represented by counsel, Mr. Gunnar Homann)
<i>Alleged victim:</i>	The author
<i>State Party:</i>	Denmark
<i>Date of communication:</i>	31 March 2015
<i>Document references:</i>	Special Rapporteur's rules 92 & 97 decision, transmitted to the State party on 1 April 2015 (not issued in document form)
<i>Date of adoption of Views:</i>	20 March 2017
<i>Subject matter:</i>	Deportation of transgender woman to Malaysia
<i>Procedural issues:</i>	non-substantiation of claims, inadmissibility ratione loci and ratione materiae
<i>Substantive issues:</i>	risk of torture or ill treatment; arbitrary or unlawful interference with privacy; freedom of thought, conscience and religion; equality before the law and prohibition of discrimination

* Adopted by the Committee at its 119th session (6 March-29 March 2017).

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

Articles of the Covenant: 7, 17, 18 and 26

Articles of the Optional Protocol: 2, 3

1.1 The author of the communication is M.Z.B.M., a Malaysian national born in 1977. She claims that her forcible return to Malaysia would violate her rights under article 7, in conjunction with articles 17(1), 18(1) and 26 of the Covenant. She is represented by counsel. The Optional Protocol entered into force for the State party on 23 March 1976.

1.2 On 1 April 2015, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from deporting the author to Malaysia while her case was under consideration by the Committee.

Factual background

2.1 The author was born as a man and grew up in Seramban district, north of Kuala Lumpur. She is ethnically Malay and a registered Muslim but she considers herself Hindu. At age 16, the author left her family and moved to Kuala Lumpur. She also started wearing women's clothing and receiving female hormone treatment. She worked at a restaurant and volunteered for a local NGO. Her voluntary work consisted in walking around the streets and assisting persons affected by HIV or transgender persons. Around 1998-1999, the author was raped by several unknown individuals.

2.2 In 2007, the author underwent gender reassignment surgery in Thailand¹. However, she continued to appear as a male on her Malaysian ID-card since it is not possible to change the gender on that card. She also appeared as a Muslim in her ID card.

2.3 From around 2001 to 2010, on several occasions after being stopped on the street and having her ID-card checked, the author was taken into custody by Malaysian police for up to 24 hours and physically and sexually abused.² On one occasion the author went to the police office in Kuala Lumpur to report the rape, but the police refused to register her complaint, after which she did not dare report any further abuse.

2.4 According to the author, in April 2012,³ the police in Melaka took her to an office of the Islamic Organization "Jabatan Agama Islam", where she was detained until the following day. Prior to her release, photographs were taken of the tattoo on her hand, as it is not permitted for a Muslim in Malaysia to have tattoos or to change religion. They also took her women's shoes, since it is forbidden for men to wear women's clothing. Upon her release, representatives from "Jabatan Agama Islam" informed her that "her case would be sent for adjudication".

2.5 The author arrived in Denmark on 25 January 2014⁴ and applied for asylum on 4 February 2014. Following three interviews with the Danish Immigration Service (DIS) held on 24 February, 3 March and 16 April 2014 respectively, her asylum application was rejected on 28 August 2014. The DIS found the author's account of her detention and sexual abuse by the police in Malaysia to be inconsistent and implausible, in particular in light of the fact that the author had left Malaysia to travel to Thailand, Singapore and India

¹ According to her statements to Danish authorities, the author had lost contact with her family out of fear that they would be ashamed of her, but became closer to her family after her surgery in 2007.

² In her interviews with the DIS, the author stated that she had been stopped in the streets 20 to 30 times by the Malaysian police for identification check-ups between 2001 and 2010/2012.

³ In her communication to the Committee, the author stated that her detention in an office belonging to the Jabatan Agama Islam had taken place in April 2012. However, in the proceedings before Danish authorities, she had stated that such detention had taken place on 13 December 2012.

⁴ According to her statement to Danish authorities, the author travelled to Amsterdam, the Netherlands, on 24 January 2014, and from there to Denmark.

for short periods of time over 20 times. The DIS also considered implausible that the author had to wait until January 2014 to leave Malaysia due to lack of financial means as argued by her, taking into consideration her frequent travels overseas, including holidays in India in October 2013. The DIS also noted that the author had not been charged with a criminal offense and that she had not been detained between her last arrest in April 2012⁵ and her departure in January 2014.

2.6 On 19 December 2014, the Refugee Appeals Board (RAB) upheld the decision by the DIS. The RAB noted that, despite the Jabata Agama Islam's threat allegedly made in April 2012, there had been no follow up on any criminal proceedings against the author, and that until her departure in January 2014, the author had been travelling legally on several occasions in and out of Malaysia. The RAB concluded that the author would not be exposed to a real risk of persecution if returned to Malaysia.

2.7 On 25 February 2015, the author requested the reopening of her case based on the fact that she had a pending case before the Sharia court in Melaka, where she was being charged with "posing as a woman and wearing women's clothing", which could entail a fine or imprisonment for up to six months.⁶ The author had obtained a copy of the undated court documents through her family. On 10 March 2015, the RAB assessed the new evidence but rejected the author's request for the reopening of her case, arguing that there was no new "information of significance". According to the DIS translation of the Sharia court documents, the case against the author appeared to be under investigation and pending to be sent to the prosecutor's office. In the heading of the letter sent by the Sharia court to the author's sister appeared the word "closed". The RAB noted that it was not certain whether the author would be found guilty as no proceedings had taken place. On 25 March 2015, the author renewed her request for the reopening of her case based on an alleged mistake by the RAB in translating the word "closed", which should have been "confidential". On 30 March 2015, the RAB rejected the author's request, arguing that the revised translation did not alter the fact that neither Jabatan Agama Islam nor anyone else had followed up on the charges against the author since April 2012, and that, since that date, the author had been able to travel legally in and out of the country without facing any difficulties until her departure in January 2014, and that she had not faced any further detention or abuse.

The complaint

3.1 The author claims that her forced return to Malaysia would violate article 7 of the Covenant as she would risk being submitted to sexual violence by Malaysian police. The author alleges that, as a transgender woman, she is part of an extremely vulnerable minority group. The seriousness of the risk that she faces is based on her gender identity and appearance, which are not in accordance with Sharia law and for which she was subjected to sexual violence and discrimination from the Malaysian authorities in the past.

3.2 The author also claims a violation of article 7 in conjunction with article 18(1) of the Covenant, because her conversion from Islam to Hinduism, which is not permitted by Sharia law in Malaysia, puts her at risk of imprisonment upon her return to Malaysia.

3.3 The author also claims a violation of article 7 in conjunction with articles 17(1) and 26 because, in the context of the pending case against her before the Sharia Court, her gender identity and appearance are being made public, thereby violating her right to

⁵ See footnote 3 above.

⁶ The author has attached a list of Islamic laws that criminalize gender identity in Malaysia. According to this list, cross-dressing in the state of Melaka may entail a sanction of up to six months-imprisonment.

privacy. Additionally, if sentenced to imprisonment, she would be held together with men, in light of her national ID documents, thereby exposing her to further abuse.

State party's observations on admissibility and merits

4.1 In its observations dated 1 October 2015, the State party argues that the communication is inadmissible or, alternatively, without merit. The State party also describes the nature and legal basis of proceedings before the Danish Refugee Appeals Board (RAB).⁷

4.2 Regarding the facts of the case, the State party provides an account of the author's statements before Danish authorities. The author stated that she had not officially converted to Hinduism because it was not permitted by Islam and she would have faced problems with Islamic authorities. In one of the interviews, she stated that the last time that she had been detained by police officers and forced to perform oral sex had been in December 2012, whereas in a later interview, she stated that her last detention and sexual abuse had occurred in 2010. Regarding her travels, the author stated that she had travelled to Thailand over 20 times and to Singapore about 15 times.

4.3 The State party argues that the author has failed to provide sufficient grounds for believing that her return to Malaysia would violate article 7 of the Covenant.

4.4 With regard to the author's claims under articles 17, 18 and 26 of the Covenant, the State party notes that the author is seeking to apply State obligations under these articles in an extraterritorial manner. Her allegations of violations under these provisions are not based on treatment that the author has suffered in Denmark or a territory under its effective control and therefore the State party cannot be held responsible for these alleged violations.⁸ The Committee has never considered a complaint on its merits regarding the removal of a person who feared violation of provisions other than articles 6 and 7 of the Covenant in the receiving State. Therefore, these claims should be declared inadmissible *ratione materiae* and *ratione loci*.

4.5 On the merits, the State party argues that the author's removal to Malaysia would not expose her to a real risk of being subjected to a treatment falling within article 7 of the Covenant. To grant a residence permit under section 7(1) of the Aliens Act, the RAB requires the existence of a well-founded fear of being subjected to specific, individual persecution of a certain severity if returned to the country of origin, which should be supported by objective facts. When assessing whether this fear is well-founded, the RAB takes into account, *inter alia*, the information on persecution available prior to the asylum seeker's departure from their country of origin.

4.6 In her communication to the Committee, the author has failed to provide any new and specific information on her situation other than what was already provided and assessed by the RAB on 19 December 2014, and 10 March and 30 March 2015. In those decisions, the RAB considered the grounds for asylum and the supporting documents and background information provided by her, including the Sharia court document. The RAB considered it a fact that the author had gender change surgery and could not dismiss that she had been detained for brief periods of time, including in April 2012. However, the RAB could not

⁷ See, in this regard, the Committee's communication No. 2379/2014, *Obah Hussein Ahmed v. Denmark*, Views adopted on 7 July 2016, para. 4.1 - 4.4.

⁸ The State party cites jurisprudence by the European Court of Human Rights in cases *Soering v. UK* (application No. 14038/88), decision of 7 July 1989, para. 88; *F v. UK* (application No. 17341/03), decision of 22 June 2004, p. 12; and *Z and T v. UK* (application No. 17034/05), decision of 28 February 2006, p. 6.

consider it a fact that the author had been sexually abused. Her statements concerning the rapes raised a significant amount of uncertainty concerning the circumstances, number of perpetrators and incidents and the towns or cities where these had occurred. On the whole, the Board did not find it probable that the author had been the victim of this kind of assaults. With regard to the alleged threat made by the Islamic organization Jabatan Agama Islam to institute legal proceedings against the author in April 2012, the RAB emphasized that no steps had been taken to follow up on that threat since April 2012, and that the author had travelled in and out of the country since that date and until her departure in January 2014 on numerous occasions. The RAB also noted that most of the incidents referred to by the author had taken place several years ago and that the author, to a great extent, was able to live a tolerable life in her country of origin, including with her family in Serambam where her mother was a great support. The RAB had concluded that the author had failed to render it probable that she would face a risk of persecution in case of return.

4.7 The State party notes that the RAB did not presume that the author would have to conceal her gender or religious identity on her return to avoid abuse. The author had informed local police about her gender and religious identity, despite which she was able to live a normal life without being subjected to abuse. In its assessment, the RAB took into account the author's particular vulnerability.

Authors' comments on the State party's observations

5.1 In her observations dated 5 February 2015, the author submits that she has sufficiently shown that substantial grounds exist for believing that her return to Malaysia would violate article 7 of the Covenant.

5.2 With regard to the State party's statement that she is seeking to apply articles 17, 18 and 26 in an extraterritorial manner, the author clarifies that she is arguing that her previous experience combined with available background information on the situation of transgender women in Malaysia confirm that, being a gender woman, her rights to private life and to freedom of religion would be violated in Malaysia. These conditions cumulatively raise the author's risk of being subjected to cruel, inhuman or degrading treatment or punishment if returned.

5.3 The author notes that having undergone a gender operation and taken female hormones, and being 170 cm tall, 105 kilos and having a 44 shoe size, she appears as an unusually big woman and that this external appearance gives rise to suspicion of whether she is a man dressed in woman clothing. It is most likely for this reason that the author has been subjected to frequent ID checks by Malaysian police and that she would be again at risk of those checks. Also, in the context of these checks, the tattoos on her chest, left hand and her back would also be uncovered. Based on this, she would be transferred to the sharia court for the pending case against her.

5.4 The author cites several reports by governmental and non-governmental organisations on the situation of transgender people in Malaysia. In particular, a report by Human Rights Watch⁹ notes that discrimination against transgender people is pervasive and that the Federal Court decided in October 2016 to overrule a lower court decision that had declared unconstitutional a provision in the Islamic law of the Negeri Sembilan state criminalising cross-dressing. According to a US Department of State report,¹⁰ transgender individuals were often charged under the Minor Offences Act for "indecent behaviour" and

⁹ Human Rights Watch : World Report 2016 – Malaysia.

¹⁰ US Department of State « Country Report on Human Rights Practices 2014 – Malaysia », 25 June 2015.

may be fined or, in case of repeated conviction, sentenced to up to three months imprisonment.

Issues and proceedings before the Committee

Consideration of admissibility

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

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

6.3 The Committee notes the author's claim that she has exhausted all effective domestic remedies available to her. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5(2)(b) of the Optional Protocol have been met.

6.4 The Committee takes note of the author's claim that her return to Malaysia puts her at risk of imprisonment due to her alleged conversion to Hinduism, in violation of article 7 in conjunction with article 18(1) of the Covenant, as conversion is not permitted by Sharia law in Malaysia. The Committee notes, however, the State party's submission that the author informed the Danish authorities that she had not formally converted to Hinduism. Nor has the author provided the Committee with any detail regarding her alleged conversion, or of the consequences that that conversion implicates. She has not claimed that her alleged case before the Sharia court in Melaka is related to her joining Hinduism, or that she has otherwise been subjected to persecution as a result of her conversion, nor has she provided any detail regarding the likely risk and nature of such persecution if she were returned. Accordingly, the Committee concludes that this claim is insufficiently substantiated and therefore inadmissible pursuant to article 2 of the Optional Protocol.

6.5 The Committee notes the State party's argument that the author is seeking to apply articles 17 and 26 of the Covenant in an extraterritorial manner. It notes, however, that the author has clarified that her claims before the Committee are based primarily on article 7 and that the risk to her rights under articles 17 and 26 underscore the increased risk that she would be subjected to cruel, inhuman or degrading treatment or punishment if she were returned to Malaysia. The Committee therefore considers that the author's allegations under articles 17 and 26 cannot be dissociated from the allegations under article 7, which must be determined on the merits.

6.6 The Committee notes the State party's argument that the author's claims under article 7 of the Covenant are insufficiently substantiated. The Committee notes, however, that as a transgender individual the author is part of a particularly vulnerable group in Malaysia, that she claims to have been repeatedly detained and subjected to sexual abuse as a result of her appearance and gender identity, which do not correspond with her identity document and are contrary to the Sharia law, and that she has argued that her return to Malaysia would expose her to a risk of further police harassment and abuse. The Committee therefore considers that the author has sufficiently substantiated, for the purposes of admissibility, her claims under article 7 of the Covenant, in conjunction with articles 17(1) and 26 of the Covenant, based on her gender identity.

6.7 In light of the above, the Committee declares the communication admissible insofar as it appears to raise issues under article 7 of the Covenant, in conjunction with articles 17(1) and 26 of the Covenant, and proceeds to its examination on the merits.

Consideration of the merits

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

7.2 The Committee takes note of the author's claim that, if returned to Malaysia, she would face a risk of being submitted to sexual violence by Malaysian police based on her gender identity. The author states that her appearance following her gender reassignment surgery, hormonal treatment and dressing does not correspond with her ID documents, for which she has been detained on several occasions, submitted to sexual abuse by Malaysian police, and charged with a criminal offense under the Sharia law of the state of Melaka, which could entail a fine or imprisonment for up to six months. She alleges that her appearance makes it likely that she will be subjected to continued checks if she is returned to Malaysia given her past experience and the general context of criminalization and persecution of transgender women, as confirmed by international reports submitted by the author, and that her tattoos increase the risk that she will be transferred to the Sharia court. She states that, in the context of the pending case against her before the Sharia Court in Melaka, her gender identity is being made public, in violation of her right to privacy. She further states that, if imprisoned, she would be held together with men based on her national identification documents, thereby exposing her to further abuse.

7.3 The Committee recalls its General Comment No. 31¹¹, 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 article 7 of the Covenant, which prohibits cruel, inhuman or degrading treatment. The Committee has also indicated that the risk must be personal and that the threshold for providing substantial grounds to establish that a real risk of irreparable harm exists is high.¹² The Committee further recalls its jurisprudence that considerable weight should be given to the assessment conducted by the State party, and that it is generally for the organs of the States parties to the Covenant to review and evaluate facts and evidence in order to determine whether such risk exists,¹³ unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.¹⁴

7.4 In the present case, the Committee notes that the State party has acknowledged the author's gender change and the fact that she may have been detained in the past. However, both the DIS and the RAB thoroughly examined the author's claims and evidence presented, but found the allegations of detention and in particular sexual abuse to be poorly substantiated and inconsistent on several grounds, including the number, time and location of the alleged incidents and the number of perpetrators. In this regard, the Committee notes that the author described these incidents in a generic manner in her communication. Regarding the alleged criminal proceedings against the author under the Sharia law and the threats of imprisonment made in 2012 as a result, the RAB also reviewed the Sharia court documents presented by the author but noted that the charges against her had not been pursued since April 2012 and that, between that date and her final departure in January 2014, the author had frequently travelled abroad without ever experiencing any difficulties,

¹¹ 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.

¹² See, *inter alia*, communications No. 2007/2010, *X v. Denmark*, Views adopted on 26 March 2014, para. 9.2; No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6; and No. 1833/2008, *X v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

¹³ See communication No. 1957/2010, *Lin v. Australia*, Views adopted on 21 March 2013, para. 9.3.

¹⁴ *Ibid.*

and that she had not been detained or otherwise harassed during that time. The RAB also questioned the author's claim that the reason for delaying her departure until January 2014 was the lack of financial means, in light of the mentioned international travels.

7.5 The Committee notes that the author has failed to identify any irregularity in the decision-making process or any risk factor that the State party's authorities failed to properly take into account. While the author has challenged the factual conclusion reached by Danish migration authorities, she has not explained how the proceedings before these authorities were arbitrary or otherwise amounted to a denial of justice.

7.6 In light of the foregoing the Committee cannot conclude that the removal of the author to Malaysia would constitute a violation of her rights under article 7 read in conjunction with articles 17(1) and 26 of the Covenant.

8 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 the author's removal to Malaysia would not violate her rights under article 7, read in conjunction with articles 17(1) and 26 of the Covenant.
